

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PARTS 530 and 575

RIN 3206-AK81

Recruitment, Relocation, and Retention Incentives

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement a provision of the Federal Workforce Flexibility Act of 2004 to provide agencies with the authority to pay recruitment, relocation, and retention incentives to employees. The new authorities will provide agencies with additional flexibility to help recruit and retain employees and better meet agency strategic human capital needs. The new authorities replace the former recruitment and relocation bonus and retention allowance authorities that applied to General Schedule and other categories of Federal employees.

DATES: Effective Date: The interim regulations will become effective on May 13, 2005.

Applicability Date: The interim regulations apply to recruitment and relocation incentives authorized under 5 U.S.C. 5753 and retention incentives authorized under 5 U.S.C. 5754 on the first day of the first pay period beginning on or after May 13, 2005.

Comment Date: Comments must be received on or before July 12, 2005.

ADDRESSES: Send or deliver written comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Division for Strategic Human Resources Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; by fax at (202) 606-0824, or by e-mail at pay-performance-policy@opm.gov.

FOR FURTHER INFORMATION CONTACT: Jeanne Jacobson by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing interim regulations to implement section 101 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411, October 30, 2004). Section 101 amends 5 U.S.C. 5753 and 5754 by providing a new authority to make recruitment, relocation, and retention payments. The amended law replaces

the former authority provided by 5 U.S.C. 5753 and 5754. These interim regulations replace existing regulations at 5 CFR part 575, subparts A, B, and C, to pay recruitment and relocation bonuses and retention allowances. To differentiate these kinds of payments—which are designed to provide a monetary incentive for an individual or group to accept a new position or to remain employed in the current position(s), as opposed to rewarding an individual or group for quality of performance (the typical context in which the term “bonus” is used)—these interim regulations use the term “incentive” in place of “bonus.” These interim regulations also build on the flexibilities provided by the former authority to provide agencies with additional, enhanced authority to pay recruitment, relocation, and retention incentives to employees to address recruitment and retention problems and better meet agency strategic human capital needs.

Overall Authority

These interim regulations provide agencies with the authority to pay—

- Recruitment incentives under 5 CFR part 575, subpart A, to an employee newly appointed to a position that is likely to be difficult to fill in the absence of an incentive;
- Relocation incentives under 5 CFR part 575, subpart B, to a current employee who must relocate to a new geographic area to accept a position that is likely to be difficult to fill in the absence of an incentive; and
- Retention incentives under 5 CFR part 575, subpart C, to a current employee with unusually high or unique qualifications or when there is a special need of the agency for the employee's services that makes it essential to retain the employee and when the agency determines that the employee would be likely to leave the Federal service in the absence of an incentive.

Payments to Current Employees in Interagency Movements

Section 101 of the Act amended 5 U.S.C. 5753(b) to allow OPM to authorize the head of an agency to pay a recruitment incentive to a current employee (of the same or a different agency) who moves to a position in the same geographic area that is likely to be difficult to fill in the absence of an incentive under circumstances described in OPM's regulations. Similarly, 5 U.S.C. 5754 was amended to allow OPM to authorize the head of an agency to pay a retention incentive to a current employee who would be

likely to leave his or her position for a different position in the Federal service in the absence of a retention incentive under conditions described in OPM's regulations. Congress requested OPM to monitor the use of recruitment and retention incentives under these circumstances to ensure that they are an effective use of the Federal Government's funds and do not adversely affect the ability of those Government agencies that lose employees to other Government agencies to carry out their mission. The law provides that agencies should notify OPM within 60 days after the date a recruitment or retention incentive is authorized under these circumstances.

OPM recognizes that costly and inefficient interagency competition could occur if agencies are permitted to authorize recruitment and retention incentives to encourage employees to move from other agencies or to discourage employees from moving to other agencies. We have discussed this issue with the Chief Human Capital Officers (CHCO) Council and have agreed that, before OPM issues any rules providing agencies with the authority to pay recruitment and retention incentives to current employees in interagency movements, we will invite comments from interested parties on whether an agency should be permitted to authorize a recruitment incentive to recruit an employee from another agency or to authorize a retention incentive to retain an employee likely to leave for another Federal position and, if so, the specific circumstances in which such incentives should be authorized. Therefore, these interim regulations do not provide agencies with the authority to pay recruitment or retention incentives to current employees in interagency movements.

OPM invites comments on whether, in view of the potential for costly and inefficient interagency competition, it would be appropriate to authorize a *recruitment incentive* for a current employee who moves to another Federal position in the same geographic area that is likely to be difficult to fill. Specifically—

- Would it be desirable to allow an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the head of the agency initiating the recruitment action determines that the unique competencies (*i.e.*, knowledge, skills, abilities, behaviors, and other characteristics) possessed by the employee are critical to the successful accomplishment of an important agency mission?

- Would it be desirable to allow an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the offered position is under a pay system that differs from the pay system of the employee's position before the move and the head of that agency determines that the employee's service in the new position is critical to the successful accomplishment of an important agency mission?

- Would it be desirable to allow the head of an agency to offer a recruitment incentive to a current employee (of the same or a different Federal agency) when the employee is changing career fields by moving to a position in an occupational series that is part of an occupational group other than the occupational group of the employee's position immediately before the move (e.g., a program analyst (0343) moving to an information technology specialist (security (2210) position)?

Likewise, we invite comments on whether, in view of the potential for costly and inefficient interagency competition, it would be appropriate to offer a *retention incentive* to a current employee who would be likely to leave his or her position for a different position in the Federal service in the absence of such an incentive. Specifically—

- Would it be desirable to allow an agency to offer a retention incentive to a current employee when the head of that agency determines that the loss of the employee's unique competencies (i.e., knowledge, skills, abilities, behaviors, and other characteristics) required for the position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

- Would it be desirable to allow an agency to offer a retention incentive to a current employee when the offered position is under a pay system that differs from the pay system of the employee's position before the move and the head of that agency determines that the loss of the employee in the current position would adversely affect the successful accomplishment of an important agency mission or the completion of a critical project?

- Would it be desirable to allow an agency to offer a retention allowance when the employee's position requires him or her to work under unusually severe or arduous working conditions (e.g., an extreme climate; unreliable essential services, such as basic utility or telecommunication services; or other harsh conditions) that the agency cannot control and the head of that agency has

determined that these conditions have a significant negative effect on the agency's ability to retain that employee at the worksite?

- Would it be desirable to allow an agency to offer a retention incentive to a current employee in order to retain an employee who is likely to leave his or her position for another Federal position before the closure or relocation of the employee's office or facility and the head of that agency has determined that the employee's services are critical to the successful closure or relocation?

OPM also invites comments on whether we should limit the payment of a recruitment or retention incentive in any of the circumstances listed in this section of the Supplementary Information to only those employees whose rating of record is at the highest level under the applicable performance appraisal or evaluation system.

Requirements Applicable to Recruitment, Relocation, and Retention Incentives

The regulations governing each of the recruitment, relocation, and retention incentive authorities are provided in separate subparts of 5 CFR part 575, as discussed later in this Supplementary Information. In addition to these interim regulations, OPM will issue guidance to implement the new recruitment, relocation, and retention incentive authorities. The following requirements are similar for all of the new recruitment, relocation, and retention authorities:

Covered Employees

Under 5 U.S.C. 5753(a)(1) and 5754(a)(1), the new recruitment, relocation, and retention incentive authorities may be applied to employees covered by the General Schedule (GS) pay system or to employees in a category approved by OPM for coverage at the request of the head of an Executive agency. OPM has decided to extend coverage under the new recruitment, relocation, and retention incentive authorities to those categories of employees that were previously approved for coverage under the former recruitment, relocation, and retention authorities, except when otherwise excluded. (See *Employees not covered* in this Supplementary Information.) As under the former recruitment, relocation, and retention regulations, §§ 575.103, 575.203, and 575.303 of these interim regulations provide that employees in the following categories of positions are eligible for recruitment, relocation, and retention incentives:

- A GS position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

- A senior-level (SL) or scientific or professional (ST) position paid under 5 U.S.C. 5376;

- A Senior Executive Service (SES) position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration (FBI/DEA) SES position paid under 5 U.S.C. 3151;

- A position as a law enforcement officer, as defined in 5 CFR 550.103;

- A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule; and

- A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3).

Sections 575.103, 575.203, and 575.303 of these interim regulations also provide the head of an Executive agency with the discretionary authority to request that OPM approve coverage of other categories of employees.

Employees in a requested category must be in an Executive agency (as defined in 5 U.S.C. 105) and meet the definition of *employee* under 5 U.S.C. 2105

(including an employee paid from nonappropriated funds who is covered by 5 U.S.C. 2105(c)). However, agencies do not need to request coverage of a category of employees under the new recruitment, relocation, and retention incentive authorities if OPM previously approved that category for coverage under the former authorities. Coverage of such employee categories under the new authorities will continue unless otherwise requested by the head of an Executive agency or excluded by the regulations. OPM will separately notify agencies regarding the coverage of such employee categories.

Employees Not Covered

Sections 5753(a)(2) and 5754(a)(2) of title 5, United States Code, prohibit the payment of recruitment, relocation, and retention incentives to employees in—

- A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

- A position in the SES as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7)); or

- A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.

In addition, these interim regulations prohibit recruitment, relocation, and retention incentives for employees in positions to which an individual is

appointed by the President without the advice and consent of the Senate. (See §§ 575.104, 575.204, and 575.304.) For example, certain Executive Schedule Presidential appointees who do not otherwise fall into the other excluded categories are prohibited from receiving new recruitment, relocation, and retention incentives under this additional exclusion. As with the former authorities, the interim regulations also prohibit an employee in a position designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members and an employee appointed to a position in the expectation of receiving an appointment as the head of an agency, from receiving recruitment, relocation, and retention incentives.

Authorization of Recruitment, Relocation, and Retention Incentives

An authorized agency official may (1) determine whether an employee meets the statutory requirements for receiving a recruitment, relocation, or retention incentive; (2) approve an incentive for an employee; (3) establish the criteria for determining the amount of an incentive payment, method of payment, and length of a required service period; and (4) establish the criteria for terminating a service agreement and any obligations of the agency and employee when a service agreement is terminated. (See §§ 575.106, 575.206, and 575.306.)

Recruitment, Relocation, and Retention Incentive Plans and Approval Levels

Under 5 U.S.C. 5753(f) and 5754(g) and §§ 575.107, 575.207, and 575.307, an agency must establish a separate plan for each of the new recruitment, relocation, and retention incentives authorities. However, the agency may establish an overall policy for using recruitment, relocation, and retention incentives that addresses the criteria, options, and requirements that apply to all three incentives, but also includes separate plans that provide detailed information on the unique features of each of the recruitment, relocation, and retention incentive authorities. The agency's policy must include the designation of officials with authority to approve the incentives, the categories of employees who are prohibited from receiving incentives, requirements for determining the amount of an incentive and the payment method, requirements governing service agreements, and documentation and recordkeeping requirements. In the interest of ensuring internal equity and consistency, the interim regulations require that such plans apply uniformly across the agency

(unless the agency head in his or her sole and exclusive discretion determines otherwise, subject only to OPM review and oversight).

An authorized agency official who is at least one level higher than the employee's supervisor is authorized to approve a recruitment, relocation, and retention incentive for eligible employees, unless there is no official at a higher level in the agency. Sections 575.107(b), 575.207(b), and 575.307(b) provide certain additional exceptions to the higher-level review and approval requirement.

Requirements for Approving Incentives

Each of the recruitment, relocation, and retention incentive authorities has separate criteria for authorization of an incentive, but shares a new criterion—namely, that eligible employees must have or maintain a rating of record of at least “Fully Successful” or equivalent to receive a recruitment, relocation, or retention incentive, as applicable. (See §§ 575.111(b), 575.205(c), 575.211(b), 575.305(d), and 575.311(b) and (g)(4).)

In determining whether to authorize an incentive, agencies must consider a number of factors, as applicable to the case at hand. For example, agencies must consider employment trends and labor-market factors, non-Federal salaries paid for similar positions, special or unique competencies required for the position, agency efforts to use non-pay authorities, and the desirability of the duties, work or organizational environment, or location of the position.

For each determination to pay a recruitment, relocation, or retention incentive, an agency must document in writing the basis for the approval of the incentive, the amount and timing of the incentive payment, and the length of the required service period.

Recruitment, Relocation, and Retention Incentive Payments

The interim regulations require agencies to use an employee's special rate or locality rate of pay, as applicable, to compute recruitment, relocation, and retention incentive payments. (Agencies were prohibited from using locality rates for this purpose under the former recruitment, relocation, and retention authorities.) Sections 575.102, 575.202, and 575.302 of the regulations define *rate of basic pay* to include a special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority and a locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority. The definition of *rate of basic pay* excludes additional pay of any other kind,

including night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4) for Federal Wage System employees.

Under 5 U.S.C. 5753(d)(3) and 5754(e)(3) and §§ 575.109(e), 575.209(d), and 575.309(h) of these interim regulations, recruitment, relocation, and retention incentive payments are not considered part of basic pay for any purpose. In addition, §§ 575.109(f), 575.209(e), and 575.309(i) provide that payment of recruitment, relocation, and retention incentives is subject to the aggregate limitation on pay under 5 U.S.C. 5307 and 5 CFR part 530, subpart B. (See also the discussion on the aggregate limitation on pay under the “Retention Incentives” section of this Supplementary Information.)

The law and these interim regulations prescribe the limitations on the maximum amount of recruitment, relocation, and retention incentives payments that may be paid to an employee. (See the maximum incentive payments that agencies may authorize under “Recruitment Incentives” and “Retention Incentives” later in this Supplementary Information.) Under 5 U.S.C. 5753(e) and 5754(f), and §§ 575.109(c), 575.209(c), and 575.309(e), an authorized agency official may request that OPM waive these limitations based on a critical agency need. In addition to determining whether the situation meets the regular approval criteria, the authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (e.g., programs or projects related to a national emergency or implementing a new law or critical management initiative). (**Note:** The term *competencies* is defined in all three subparts of these interim regulations as “the knowledge, skills, abilities, behaviors, and other characteristics an [individual or] employee needs to perform the duties of a position.” See §§ 575.102, 575.202, and 575.302.)

Service Agreements

Under 5 U.S.C. 5753(c) and 5754(d) and §§ 575.110, 575.210, and 575.310, before paying a recruitment, relocation, or retention incentive, an agency must require the employee to sign a written service agreement to complete a specified period of employment with the agency. (A service agreement is not required when an agency pays an employee a retention incentive in biweekly installments of equal amounts. See 5 U.S.C. 5754(d)(3)(A) and § 575.310(f).)

A service agreement for a recruitment, relocation, or retention incentive must specify the length of the service period, the amount of the incentive, the method and timing of incentive payments (e.g., lump-sum payment and/or installments), the conditions under which an agreement may be terminated by the agency, any agency or employee obligations if a service agreement is terminated, and any other terms and conditions for receiving and retaining incentive payments.

The required service period for a recruitment incentive may not be less than 6 months. There is no minimum service period for a relocation or retention incentive. The maximum service period for a recruitment or relocation incentive may not exceed 4 years. There is no maximum service period for a retention incentive.

The service agreement must specify the commencement date and termination date of the required service period. The regulations require that recruitment, relocation, and retention incentive service agreements begin on the first day of a pay period and end on the last day of a pay period. In addition, §§ 575.110(b)(3) and 575.210(b)(3) provide agencies with the discretionary authority to delay the commencement date of a recruitment or relocation incentive service agreement until after the employee completes an initial period of formal training or after a probationary period. (See 5 U.S.C. 5753(c)(2)(C).)

Termination of Service Agreement

An authorized agency official may unilaterally terminate a recruitment, relocation, or retention incentive service agreement based on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement). An agency must terminate a service agreement if an employee is demoted or separated for cause (i.e., for unacceptable performance or conduct), if the employee receives a rating of record lower than "Fully Successful" or equivalent during the service period, or if the employee otherwise fails to fulfill the terms of the service agreement.

If an authorized agency official terminates a service agreement based on the management needs of the agency, the agency must pay any recruitment, relocation, or retention incentive

payments attributable to completed service. If an authorized agency official terminates a service agreement because of the employee's unacceptable performance or conduct, the employee receives a rating of record of lower than "Fully Successful" or equivalent, or the employee fails to fulfill the terms of the service agreement, the employee will retain any recruitment, relocation, or retention incentives that are attributable to completed service; receive unpaid recruitment, relocation, or retention incentives that are attributable to completed service only if approved by the agency under the terms of the service agreement; and must reimburse the Federal Government for any recruitment or relocation incentive payments received that are attributable to uncompleted service. While the head of an agency may waive any debt owed to the Federal Government under 5 U.S.C. 5584, if warranted, waivers should be rare because the employee agreed to the repayment conditions when he or she signed the service agreement. See §§ 575.111, 575.211, and 575.311 for additional information on terminating service agreements.

Recruitment Incentives

Under 5 U.S.C. 5753(b)(2)(A) and (B) and § 575.105 of these interim regulations, an agency may pay a recruitment incentive to an individual who is newly appointed as an employee of the Federal Government to a position the agency has determined is likely to be difficult to fill in the absence of a recruitment incentive. This determination must be made on an individual, case-by-case basis before the employee enters on duty. An agency may target groups of positions and make this determination on a group basis.

Difficult To Fill

Under § 575.106, an agency may determine that a position is likely to be difficult to fill if—

- The agency is likely to have difficulty recruiting qualified candidates with the competencies required for a position (or group of positions) in the absence of a recruitment incentive, considering the factors in § 575.106(b); or

- OPM has approved the use of a direct-hire authority under 5 CFR part 337, subpart B, for the position (or group of positions).

Newly-Appointed Employees

An agency may pay a recruitment incentive to an individual who is newly appointed as an employee of the Federal Government. Under § 575.102 of the

recruitment incentive regulations, *newly appointed* refers to—

- The first appointment, regardless of tenure, as an *employee of the Federal Government* (as that term is defined in § 575.102);
- An appointment as a former employee of the Federal Government following a break in service of at least 90 days; and
- An appointment as an employee of the Federal Government when the employee's Federal service during the 90-day period immediately preceding the appointment was limited to one or more of the categories listed in paragraph (3) of the definition of *newly appointed*. For example, if an individual was employed under a competitive or excepted service temporary or time-limited appointment during the 90 days immediately preceding an appointment to a GS position, the agency may pay the employee a recruitment incentive upon appointment to a GS position.

Payment Options and Caps

The new recruitment incentive authority provides a wide range of options for paying a recruitment incentive and significantly raises the limit on recruitment incentive payments. Under 5 U.S.C. 5753(d)(2) and § 575.109(a) of these interim regulations, an agency may pay a recruitment incentive as an initial lump-sum payment at the commencement of the service period required by the service agreement in equal or variable installment payments throughout the service period required by the service agreement, as a final lump-sum payment upon completion of the full service period required by the service agreement, or in a combination of these payment methods. For example, an agency may decide to pay a portion of a recruitment incentive to an employee upon appointment to the new position, another portion when the employee completes half of the service period required by the service agreement, and a final payment when the employee completes the full service period required by the service agreement. Under 5 U.S.C. 5753(d)(4) and § 575.109(d), agencies also may pay all or part of a recruitment incentive to an individual who has not yet entered on duty once he or she has signed a service agreement under § 575.110.

Under 5 U.S.C. 5753(d)(1) and § 575.109(b), the total amount of recruitment incentive payments received by an employee in a service period may not exceed 25 percent of an employee's annual rate of basic pay in effect at the beginning of the service

period (including any special rate or locality payment) multiplied by the number of years (or fractions of a year) in a service period. This will allow an agency to pay a recruitment incentive of as much as 100 percent of an employee's annual rate of basic pay in effect at the beginning of the service period if the employee signs a 4-year service agreement. Special rules apply for determining the annual rate of basic pay for employees who do not have a scheduled annual rate (e.g., Federal Wage System employees) and for determining the number of years in a service period. (See § 575.109(b)(2) and (b)(3).)

For example, assume an agency decides to pay the maximum recruitment incentive to an employee. The recruitment incentive service agreement covers 39 pay periods (546 days). The employee's annual rate of basic pay (including locality pay) at the beginning of the service period is \$74,782. To determine the maximum recruitment incentive the agency may authorize, the following calculation must be made: $\$74,782 \text{ (annual rate)} \times .25 \text{ (25\%)} \times 1.5 \text{ years (546 days/365 days)} = \$28,043$. Thus, the employee may receive recruitment incentive payments totaling up to \$28,043 for a 39 pay period service agreement. Under § 575.109(a), the agency may pay the \$28,043 recruitment incentive as an initial up-front payment at the beginning of the service period, divide the \$28,043 recruitment incentive into installment payments to be paid throughout the service period, pay the full \$28,043 at the end of the service period, or use a combination of these payment methods.

As previously discussed in this Supplementary Information, under 5 U.S.C. 5753(e) and § 575.109(c), an authorized agency official may request that OPM waive the 25 percent limitation under § 575.109(b) based on a critical agency need. Under such a waiver, the total amount of recruitment incentive payments received by an employee in a service period may not exceed 50 percent of the employee's annual rate of basic pay (including any special rate or locality payment) at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. In no event may a waiver provide total recruitment incentives payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period. Section 575.109(c)(2) provides the documentation that agencies must include when submitting waiver requests to OPM.

Repayment Upon Termination of Service Agreement

As previously discussed in this Supplementary Information, an agency must terminate a recruitment incentive service agreement when an employee is demoted or separated for cause, when the employee receives a rating of record of less than "Fully Successful," or when an employee fails to fulfill the terms of a service agreement (§ 575.111(b)). If an agency terminates a service agreement under these circumstances, the employee is entitled to keep all recruitment incentive payments that the agency paid to the employee that are attributable to completed service. (See *Example A* in the next paragraph.) If the employee received recruitment incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agrees to such payment under the terms of the recruitment incentive service agreement. If the employee received recruitment incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount. (See *Example B* in the next paragraph.)

Example A: Assume that an employee who signed a 364-day (26-pay period) service agreement will receive a total recruitment incentive of \$28,043 in two installment payments—i.e., \$14,021 at the end of 13 pay periods of completed service and \$14,022 at the end of 26 pay periods of completed service. The employee receives the first payment of \$14,021. However, after 20 pay periods (280 days), the employee is demoted for cause and the agency terminates the service agreement. The employee is entitled to keep the \$14,021 recruitment incentive payment already received and to receive a prorated share of the second planned recruitment incentive payment based on the amount of service completed. The employee would receive an additional $\$7,544.07 \text{ (280 days/364 days = 76.9\%; } 76.9\% \times \$28,043 = \$21,565.07; \$21,565.07 - \$14,021 = \$7,544.07)$ only if authorized by the agency under the terms of the service agreement.

Example B: Assume an employee signed a 364-day (26-pay period) service agreement and received the full amount of a \$28,043 recruitment incentive payment as an initial lump-sum payment. If the agency separates the employee for conduct after 20 pay periods (280 days), the employee would incur an obligation equal to 23.1 percent (84 days/364 days) of the payment, or \$6,477.93. The employee may keep 76.9 percent (280 days/364 days) of the payment, or \$21,565.07.

Relocation Incentives

Under 5 U.S.C. 5753(b)(2)(B)(i) and (ii) and § 575.206 of these interim

regulations, an agency may pay a relocation incentive to an employee of the Federal Government who must relocate to a different geographic area without a break in service to accept a position in an agency when the position is likely to be difficult to fill or to an employee of an agency who must relocate to a different geographic area to accept a position when the position is likely to be difficult to fill. The relocation may be permanent or temporary and voluntary or involuntary. The employee must sign a service agreement to fulfill a service period in the new geographic area in return for payment of the relocation incentive.

The new flexibilities and authorities in the relocation incentive regulations regarding approval criteria, documentation requirements, payment options and caps, service agreement options and requirements, and repayment requirements are parallel to the provisions in the recruitment incentive regulations at 5 CFR part 575, subpart A, as previously described in this Supplementary Information. The following provisions are unique to the relocation incentive regulations:

- Under § 575.208(b), an agency may waive the case-by-case approval requirement for relocation incentives under two specific conditions and authorize a relocation incentive for a group or category of employees. These conditions are identical to those found in the former relocation bonus regulations.

- Under § 575.205(b), an agency may pay a relocation incentive if the new position or assignment is in a different geographic area. A position is considered to be in a different geographic area if the worksite of the new position is 50 miles or more from the worksite of the position held immediately before the move. If the worksite of the new position is less than 50 miles from the worksite of the position held immediately before the move, but the employee must relocate (i.e., establish a new residence) to accept the position, the head of the agency may waive the 50-mile requirement and pay the employee a relocation incentive subject to the requirements in subpart B of these interim regulations.

- Under § 575.205(b), an employee must establish a residence (temporary or permanent) in the new geographic area before the agency may pay a relocation incentive.

- An agency may not pay a relocation incentive to an employee before the employee enters on duty in the position to which relocated.

In addition, section 101(b) of Pub. L. 108-411 repealed the \$15,000 relocation

bonus payment limit that applied to law enforcement officers under section 407 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509). All employees are covered by the same relocation incentive limit under the new authority at 5 U.S.C. 5753(d) and § 575.209 of these interim regulations.

Retention Incentives

Under 5 U.S.C. 5754(b) and § 575.305 of these interim regulations, an agency may pay a retention incentive to a current employee when the agency determines that the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee and the employee would be likely to leave in the absence of a retention incentive. Like the former retention allowance authority, § 575.305 provides agencies with the flexibility to authorize a retention incentive for an individual employee or for a group or category of employees. (The group retention incentive authority may not be used for SL/ST employees, members of the SES or FBI/DEA SES, Executive Schedule officials, or employees in similar positions. See § 575.305(c).)

Payment Options and Caps

Under 5 U.S.C. 5754(e)(1) and § 575.309(a), an agency must establish a retention incentive rate for each individual employee or group of employees which must be expressed as a percentage of the employee's rate of basic pay (including any special rate or locality payment). Except as provided in

§ 575.309(e), the retention incentive rate may not exceed 25 percent of an employee's rate of basic pay, if authorized for an individual employee, or 10 percent of an employee's rate of basic pay, if authorized for a group or category of employees.

The new retention incentive authority provides agencies with a number of options for paying a retention incentive. Under 5 U.S.C. 5754(e)(2)(A) and § 575.309(b), an agency may pay a retention incentive in (1) installments after the completion of specified periods of service (biweekly, monthly, quarterly, etc.), or (2) a single lump-sum payment after the completion of the full service period required by a service agreement. Under 5 U.S.C. 5754(e)(2), an agency may not pay a retention incentive as an initial lump-sum payment at the start of a service period or in advance of fulfilling the service period for which the incentive is being paid. If an agency chooses to pay retention incentives in installments, the agency may compute each retention incentive installment payment using the full retention incentive percentage rate established for the employee (or group of employees) under § 575.309(a) or a reduced percentage rate. An agency may decide to use different payment options for different retention incentive authorizations.

Under 5 U.S.C. 5754(e)(2)(B) and § 575.309(c)(1), each installment payment is derived by multiplying the retention incentive percentage rate by the total rate of basic pay the employee earned during the installment period (including any special rate or locality

payment). If an agency chooses to provide an installment payment that reflects a reduced retention incentive percentage rate under § 575.309(a), any portion of the retention incentive that is accrued by the employee during an installment period but not paid must be paid as part of a final installment payment to the employee after completion of the full service period under the terms of the service agreement. A retention incentive paid as a single lump-sum payment upon completion of the full service period is derived by multiplying the retention incentive percentage rate established for the employee (or group of employees) under § 575.309(a) by the total amount of basic pay earned by the employee during the full service period. (See 5 U.S.C. 5754(e)(2)(B) and (C) and § 575.309(c) and (d).)

The following chart compares how a 10 percent retention incentive payment is calculated and paid using a sample of payment options available under the regulations. An employee's biweekly rate (computed under 5 U.S.C. 5504) must be used to compute an installment payment or a lump-sum payment. The installment payment is derived by multiplying the percentage incentive retention rate by the employee's basic pay earned in each biweekly pay period during the installment period. In the examples below, a biweekly rate of \$3,974.80 is used to compute retention incentive installment payments after 13 and 26 pay periods of service and to compute a retention incentive lump-sum payment after 26 pay periods of service.

Retention incentive payment option	Retention incentive rate	Basic pay earned in installment period	Retention incentive installment	Total retention incentive paid after 26 pay periods
Installment payment provided after 13 and 26 pay periods of service.	10% (Each installment computed at full percentage rate.).	\$39,748.80 (\$3,974.80 bi-weekly rate times 13 pay periods).	\$3,974.88 (each) (\$39,748.80 basic pay earned times 10%).	\$7,949.76 (\$3,974.88 incentive times 2 installments).
Installment payment provided after 13 and 26 pay periods of service.	10% First installment computed at a reduced percentage rate of 5%. Second installment computed at 10% percentage rate, plus remaining 5% unpaid accrued incentive from first installment period.	\$39,748.80 (\$3,974.80 bi-weekly rate times 13 pay periods).	First: \$1,987.44 (\$39,748.80 basic pay earned times 5%). Second: 5,962.32 (\$39,748.80 basic pay earned times; 10%, plus \$1,987.44 (remaining 5% unpaid accrued incentive from first installment period)).	\$7,949.76 (Two installments of \$1,987.44 and \$5,962.32).
Final lump-sum payment provided after 26 pay periods of service.	10%	\$79,497.60 (\$3,974.80 bi-weekly rate times 26 pay periods).	\$7,949.76 (\$79,497.60 basic rate earned times 10%).	\$7,949.76 (One lump-sum payment of \$7,949.76).

As previously discussed in this Supplementary Information, under 5 U.S.C. 5754(f) and § 575.309(e), an authorized agency official may request that OPM waive the 25 percent payment limitation for individual employees or

the 10 percent payment limitation for groups of employees under § 575.309(a) based on a critical agency need. Under such a waiver, a retention incentive may not exceed 50 percent of the employee's rate of basic pay (including any special

rate or locality payment). OPM will consider waiver requests only for those employees or groups of employees who will be required to sign a service agreement. Section 575.309(e)(2) establishes the documentation that must

be submitted to OPM for waiver requests. OPM may require that waiver requests for groups or categories of employees be coordinated with other agencies that have similar categories of employees.

Under 5 U.S.C. 5754(d)(4) and § 575.309(g), an agency may not begin a retention incentive service agreement or begin paying a retention incentive during a service period covered by a service agreement for payment of a recruitment or relocation incentive. However, an agency may authorize a relocation incentive after a retention incentive service agreement or retention incentive payments have begun.

Aggregate Limitation on Pay

As previously discussed in this Supplementary Information, retention incentives are subject to the aggregate limitation on pay under 5 U.S.C. 5307 and 5 CFR part 530, subpart B. Unlike the former retention allowance authority, retention incentives under the new authority are treated like other covered payments authorized under title 5, United States Code, when administering the aggregate limitation rules. Excess retention incentive payments that would cause an employee's total compensation to exceed the applicable aggregate limitation may be deferred and paid in a lump-sum payment at the beginning of the following calendar year. This change will simplify payroll processing, be easier for employees to understand, and provide a full retention incentive to key employees.

Continuation, Reduction, and Termination of Retention Incentive Service Agreement

As previously discussed in this Supplementary Information, an agency must terminate a retention incentive service agreement when an employee is demoted or separated for cause, if the employee receives a rating of record of less than "Fully Successful" or equivalent, or when the employee fails to fulfill the terms of the service agreement (§ 575.311(b)). If an agency terminates a retention incentive service agreement under these circumstances, the employee is entitled to retain any retention incentive payments received that are attributable to completed service. If the employee received retention incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agrees to such payment under the terms of the service

agreement. (See *Example C* in the next paragraph.)

Example C: Assume an employee who signed a 364-day (26-pay period) service agreement will receive a total retention incentive of \$7,949.76 in two installment payments—i.e., \$3,974.88 at the end of 13 pay periods of completed service and \$3,974.88 at the end of 26 pay periods of completed service. The employee receives the first payment of \$3,974.88. However, after 20 pay periods (280 days), the employee is demoted for cause and the agency terminates the service agreement. The employee is entitled to keep the \$3,974.88 retention incentive payment already received. If authorized in the service agreement, the employee will receive a prorated share of the second planned retention incentive payment based on the amount of service completed or an additional \$2,138.49 (280 days/364 days = 76.9%; 76.9% x \$7,949.76 = \$6,113.37; \$6,113.37 – \$3,974.88 = \$2,138.49).

Termination of Retention Incentive When No Service Agreement Is Required

Under § 575.310(f) of these interim regulations, a written service agreement is not required if the agency pays a retention incentive in biweekly installments of equal amounts. Section 575.311(g) requires agencies to review at least annually each determination to pay retention incentives when no service agreement is required to determine whether payment is still warranted and to certify this determination in writing. An agency may continue such retention incentive payments as long as conditions giving rise to the original determination to pay the incentive still exist. An agency must reduce or terminate an incentive paid without a service agreement whenever payment at the level originally approved is no longer warranted. An agency must terminate a retention incentive when no service agreement is required if the employee is demoted or separated for cause or receives a rating of record lower than "Fully Successful" or equivalent. If an agency terminates a retention incentive when no service agreement is required, the agency must provide written notice to the employee, and the employee is entitled to receive any scheduled incentive payments through the end of the pay period in which the written notice is provided.

Recruitment, Relocation, and Retention Authority Monitoring Requirements and Revocation or Suspension of Authority

The interim regulations at §§ 575.112, 575.212, and 575.312 require agencies to monitor their use of the new recruitment, relocation, and retention incentive authorities to ensure that their recruitment, relocation, and retention plans and the use of the authorities are

consistent with the requirements and criteria established under law and these interim regulations. These sections also authorize OPM to revoke or suspend an agency's authority to make recruitment, relocation, and retention incentive payments if OPM finds the agency's use of the incentive authorities is not consistent with law, regulations, and the agency's plans.

Records and Reports

These interim regulations at §§ 575.113(a), 575.213(a), and 575.313(a) require agencies to keep a record of each determination to pay a recruitment, relocation, or retention incentive and to make such records available for review upon OPM's request. Section 101(c) of Public Law 108–411 also requires OPM to submit an annual report to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform in the House of Representatives on the operation of the new recruitment, relocation, and retention incentive authorities for each of the first 5 years in which the new authorities are in effect (i.e., 2005 through 2009). Sections 575.113(b), 575.213(b), and 575.313(b) of these interim regulations require agencies to submit specific information and data to OPM for this annual report. OPM will issue additional guidance to agencies on these reporting requirements by memorandum.

Recruitment, Relocation, or Retention Payments Authorized Before May 1, 2005

These interim regulations do not apply to recruitment and relocation bonuses and retention allowances authorized under 5 U.S.C. 5753 and 5754 before May 1, 2005. Under section 101(d)(2) of Public Law 108–411 and §§ 575.114 and 575.214 of these interim regulations, a recruitment or relocation bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subparts A and B, before May 1, 2005, remains in effect until its expiration, subject to the law and regulations applicable to recruitment and relocation bonuses before May 1, 2005. (**Note:** If an individual or employee received a formal offer of a recruitment or relocation bonus before May 1, 2005, the agency may pay the bonus after that date as long as the terms associated with the offer were consistent with the regulations in effect when the offer was made.)

Under section 101(d)(3) of Public Law 108–411 and § 575.314 of these interim regulations, retention allowances that were authorized under 5 U.S.C. 5754 and 5 CFR part 575, subpart C, before

May 1, 2005, must continue to be paid until the retention allowance is reauthorized or terminated, but not later than April 30, 2006, and are subject to the law and regulations applicable to retention allowances before May 1, 2005. For example, retention allowances authorized before May 1, 2005, must continue to be subject to the special rules regarding the aggregate pay limitation under 5 CFR part 530, subpart B, and 5 CFR part 575, subpart C, as in effect before May 1, 2005. (**Note:** If an individual or employee received a formal offer of a retention allowance before May 1, 2005, the agency may pay the allowance after that date as long as the terms associated with the offer were consistent with the regulations in effect when the offer was made.)

Other Conforming Changes

Aggregate Limitation on Pay

These interim regulations amend the definitions of *aggregate compensation* and *discretionary payment* in 5 CFR 530.202 and 5 CFR 530.203 of the aggregate limitation on pay regulations to reflect the new term *retention incentive* and the new rules regarding the application of retention incentives toward the aggregate pay limitation. (See discussion on the aggregate limitation on pay in the "Retention Incentives" section of this **SUPPLEMENTARY INFORMATION.**)

These interim regulations also make conforming changes to implement section 301 of Public Law 108–411. The amended definitions of *aggregate compensation* and *basic pay* in 5 CFR 530.202 delete obsolete references and treat locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of applying the aggregate limitation on pay.

Supervisory Differentials

These interim regulations amend the regulations regarding supervisory differentials at 5 CFR 575.405 to reflect the new term *retention incentive* and to exclude recruitment, relocation, and retention incentives from the continuing pay of a supervisor and the continuing pay of a subordinate for the purpose of comparing their pay and calculating a supervisory differential.

These interim regulations also make conforming changes to implement section 301 of Public Law 108–411 by removing obsolete references and treating locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of calculating supervisory differentials.

Extended Assignment Incentives

These interim regulations amend the extended assignment incentive regulations at 5 CFR 575.506 to provide that an agency may not begin paying an extended assignment incentive to an otherwise eligible employee who is receiving a recruitment, relocation, or retention incentive. These interim regulations also make conforming changes to implement section 301 of Public Law 108–411 by removing obsolete references and treating locality payments under 5 CFR part 531, subpart F, as basic pay for the purpose of calculating extended assignment incentives.

Waiver of Notice of Proposed Rulemaking and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These interim regulations implement a provision of Public Law 108–411 that became effective on May 1, 2005. Waiver of the requirements for proposed rulemaking and making the effective date less than 30 days after publication are necessary to ensure timely implementation of the law as intended by Congress. To delay implementation of these regulations by imposing a general notice of proposed rulemaking or an additional 30 day implementation requirement would be contrary to the public interest in giving Federal agencies flexibility to assist in their recruiting, relocation, and retention efforts. The public will be benefited by the immediate implementation of these regulations with no detriment, financial or otherwise, in taking this action. Comments are being solicited which will assist OPM in issuing final regulations without negatively affecting agency flexibility.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects in 5 CFR 530 and 575

Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Dan G. Blair,

Acting Director.

■ Accordingly, OPM amends 5 CFR parts 530 and 575 as follows:

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 1. Revise the authority citation for part 530 to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338 and sec. 4, Pub. L. 103–89, 107 Stat. 981.

Subpart B—Aggregate Limitation on Pay

■ 2. In § 530.202—

- a. Remove paragraph (2) in the definition of *aggregate compensation*;
- b. Redesignate paragraphs (3) through (15) in the definition of *aggregate compensation* as paragraphs (2) through (14), respectively, and revise newly redesignated paragraphs (5) and (6); and
- c. Revise the definitions of *basic pay* and *discretionary payment*.

The revisions read as follows:

§ 530.202 Definitions.

* * * * *

Aggregate compensation means the total of—* * *

(5) Recruitment and relocation incentives under 5 U.S.C. 5753 and retention incentives under 5 U.S.C. 5754;

(6) Extended assignment incentives under 5 U.S.C. 5757;

* * * * *

Basic pay means the total amount of pay received at a rate fixed by law or administrative action for the position held by an employee, including any special rate under 5 CFR part 530, subpart B, or any locality-based comparability payment under 5 CFR part 531, subpart F, or other similar payment or supplement under other legal authority, before any deductions. *Basic pay* includes night and environmental differentials for prevailing rate employees under 5 U.S.C. 5343(f) and 5 CFR 532.511. *Basic pay* excludes additional pay of any other kind.

* * * * *

Discretionary payment means a payment an agency has discretion to make or not to make to an employee. An extended assignment incentive under 5 U.S.C. 5757 is a *discretionary payment*. However, other payments that are preauthorized to be made to an employee at a regular fixed rate each pay period are not *discretionary payments*.

* * * * *

■ 3. In § 530.203, remove paragraph (g)(3) and revise paragraph (d) to read as follows:

§ 530.203 Administration of aggregate limitation on pay.

* * * * *

(d) When an agency authorizes a discretionary payment for an employee, the agency must defer any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the employee's aggregate compensation during the calendar year to exceed the applicable aggregate limitation. Any portion of a discretionary payment deferred under this paragraph must be available for payment as provided in § 530.204. When a discretionary payment is authorized but not required to be paid in the current calendar year, an agency official's decision to set the payment date in the next calendar year is not considered a deferral under this paragraph.

* * * * *

■ 4. In part 575, revise the title to read as follows:

PART 575—RECRUITMENT, RELOCATION, AND RETENTION INCENTIVES; SUPERVISORY DIFFERENTIALS; AND EXTENDED ASSIGNMENT INCENTIVES

■ 5. Revise the authority citation for part 575 to read as follows:

Authority: 5 U.S.C. 1104(a)(2) and 5307; subparts A, B, and C also issued under sec. 101, Public Law 108–411, 118 Stat. 2305 (5 U.S.C. 5753 and 5754); subpart D also issued under 5 U.S.C. 5755; subpart E also issued under sec. 207 Public Law 107–273, 116 Stat. 1779 (5 U.S.C. 5757).

■ 6. Revise part 575, subpart A, to read as follows:

Subpart A—Recruitment Incentives

- 575.101 Purpose.
- 575.102 Definitions.
- 575.103 Eligible categories of employees.
- 575.104 Ineligible categories of employees.
- 575.105 Applicability to employees.
- 575.106 Authorizing a recruitment incentive.
- 575.107 Agency recruitment incentive plan and approval levels.
- 575.108 Approval criteria and written determination.
- 575.109 Payment of recruitment incentives.
- 575.110 Service agreement requirements.
- 575.111 Termination of a service agreement.
- 575.112 Internal monitoring requirements and revocation or suspension of authority.
- 575.113 Records and reports.
- 575.114 Recruitment bonus service agreements in effect before May 1, 2005.

Subpart A—Recruitment Incentives

§ 575.101 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5753, which authorizes payment of recruitment incentives. An agency may pay a recruitment incentive to a newly appointed employee under the conditions specified in this subpart provided the agency has determined that the employee's position is likely to be difficult to fill in the absence of an incentive.

§ 575.102 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an individual needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c). An *employee* also means an individual not yet employed who has received a written offer to be newly appointed or reappointed and has signed the written service agreement required by § 575.110 before payment of the recruitment incentive.

Employee of the Federal Government means an employee (as that term is defined in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c) and (e)) of any part of the Government of the United States (which includes the United States Postal Service and the Postal Rate Commission).

Executive agency has the meaning given that term in 5 U.S.C. 105.

Newly appointed refers to—

(1) The first appointment, regardless of tenure, as an employee of the Federal Government;

(2) An appointment as a former employee of the Federal Government following a break in service of at least 90 days; or

(3) An appointment as an employee of the Federal Government when the employee's Federal service during the 90-day period immediately preceding the appointment was limited to one or more of the following:

(i) A time-limited or non-permanent appointment in the competitive or excepted service;

(ii) Employment with the government of the District of Columbia (DC) when

the candidate was first appointed by the DC government on or after October 1, 1987;

(iii) An appointment as an expert or consultant under 5 U.S.C. 3109 and 5 CFR part 304;

(iv) Service as an employee of a nonappropriated fund instrumentality (NAFI) of the Department of Defense (when moving from a Department of Defense NAFI position to another Department of Defense position) or the Coast Guard (when moving from a Coast Guard NAFI position to another Coast Guard position) if the individual has a break in service of more than 3 days from the nonappropriated fund instrumentality;

(v) Service as an employee of a nonappropriated fund instrumentality of the Department of Defense when moving to a position outside of the Department of Defense or of the Coast Guard when moving to a position outside the Coast Guard; or

(vi) Employment under a provisional appointment designated under 5 CFR 316.403.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which an employee is or will be appointed before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment of not less than 6 months or more than 4 years with the agency in return for payment of a recruitment incentive.

§ 575.103 Eligible categories of employees.

Except as provided in § 575.104, an agency may pay a recruitment incentive to an employee appointed or placed in the following categories of positions:

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of recruitment incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.104 Ineligible categories of employees.

An agency may not pay a recruitment incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.105 Applicability to employees.

(a) A recruitment incentive may be paid under the conditions prescribed in this subpart to an employee who is newly appointed to a position listed in § 575.103 that is likely to be difficult to fill, as determined under § 575.106.

(b) An agency may target groups of similar positions (excluding positions covered by § 575.103(b), (c), or (e) or those in similar categories approved by OPM under § 575.103(g)) that have been difficult to fill in the past or that may be difficult to fill in the future and make the required determination to offer a recruitment incentive to newly-appointed employees on a group basis.

§ 575.106 Authorizing a recruitment incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when a position is likely to be difficult to fill under paragraph (b) of this section;

(2) Approve a recruitment incentive for an employee under § 575.105;

(3) Establish the criteria for determining the amount of a recruitment incentive and the length of a service period under §§ 575.109(a) and 575.110(a), respectively;

(4) Request a waiver from OPM of the limitation on the maximum amount of a recruitment incentive under § 575.109(c); and

(5) Establish the criteria for terminating a service agreement under § 575.111.

(b) *Factors for determining when a position is likely to be difficult to fill.* An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may determine that a position is likely to be difficult to fill if the agency is likely to have difficulty recruiting candidates with the competencies required for the position (or group of positions) in the absence of a recruitment incentive. An agency must consider the following factors, as applicable to the case at hand, in determining whether a position (or group of positions) is likely to be difficult to fill in the absence of a recruitment incentive and in documenting this determination as required by § 575.108:

(1) The availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for similar positions using indicators such as offer acceptance rates, the proportion of positions filled, and the length of time required to fill similar positions;

(2) The salaries typically paid outside the Federal Government for similar positions;

(3) Recent turnover in similar positions;

(4) Employment trends and labor-market factors that may affect the agency's ability to recruit candidates for similar positions;

(5) Special or unique competencies required for the position;

(6) Agency efforts to use non-pay authorities, such as special training and work scheduling flexibilities, to resolve difficulties alone or in combination with a recruitment incentive;

(7) The desirability of the duties, work or organizational environment, or geographic location of the position; and

(8) Other supporting factors.

(c) An agency may determine that a position (or group of positions) is likely to be difficult to fill if OPM has approved the use of a direct-hire authority applicable to the position (or group of positions) under 5 CFR part 337, subpart B.

§ 575.107 Agency recruitment incentive plan and approval levels.

(a) Before paying recruitment incentives under this subpart, an agency must establish a recruitment incentive plan. The plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of recruitment incentives (subject to paragraph (b) of this section), including the circumstances under which an official has the authority to approve payment without higher level approval under paragraph (b)(2) of this section;

(2) The categories of employees who are prohibited from receiving recruitment incentives;

(3) Required documentation for determining that a position is likely to be difficult to fill;

(4) Any requirements for determining the amount of a recruitment incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements, which, at a minimum, must include—

(i) The criteria for determining the length of a service period;

(ii) The conditions for terminating a service agreement; and

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and to fulfill the requirements of §§ 575.112 and 575.113.

(b)(1) Except as provided in paragraph (b)(2) of this section, an authorized agency official who is at least one level higher than the employee's supervisor must review and approve each determination to pay a recruitment incentive to a newly-appointed employee, unless there is no official at a higher level in the agency.

(2) When necessary to make a timely offer of employment, an authorized agency official may establish criteria in advance for offering recruitment incentives to newly-appointed employees and may authorize an official

who is not lower than a candidate's supervisor to use these criteria to offer a recruitment incentive (in any amount within a pre-established range) to a candidate without further review or approval.

(c) Unless the head of the agency determines otherwise, an agency recruitment incentive plan must apply uniformly across the agency.

§ 575.108 Approval criteria and written determination.

(a) For each determination to pay a recruitment incentive under this subpart, an agency must document in writing—

(1) The basis for determining that a position is likely to be difficult to fill, as determined under § 575.106;

(2) The basis for authorizing a recruitment incentive; and

(3) The basis for the amount and timing of the approved recruitment incentive payment and the length of the required service period.

(b) An agency must make the determination to pay a recruitment incentive before the prospective employee enters on duty in the position for which recruited.

§ 575.109 Payment of recruitment incentives.

(a) An authorized agency official must establish the criteria for determining the amount of a recruitment incentive. An agency may pay a recruitment incentive—

(1) As an initial lump-sum payment at the commencement of the service period required by the service agreement or before the start of the service period, as authorized by paragraph (d) of this section;

(2) In installments throughout the service period required by the service agreement;

(3) As a final lump-sum payment upon the completion of the full service period required by the service agreement; or

(4) In a combination of these payment methods.

(b)(1) Except as provided in paragraph (c) of this section, the total amount of recruitment incentive payments paid to an employee in a service period may not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period (not to exceed 4 years).

(2) For hourly rate employees who do not have a scheduled annual rate of basic pay, compute the annual rate required for paragraph (b)(1) of this section by multiplying the applicable hourly rate in effect at the beginning of the service period by 2,087 hours.

(3) For the purpose of determining the number of years in a service period under paragraph (b)(1) of this section, divide the total number of calendar days in the service period by 365 and round the result to two decimal places. For example, a service period covering 39 biweekly pay periods equals 546 days, and 546 days divided by 365 days equals 1.50 years.

(c)(1) An authorized agency official may request that OPM waive the limitation in paragraph (b)(1) of this section for an employee based on a critical agency need. The authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (e.g., programs or projects related to a national emergency or implementing a new law or critical management initiative). Under such a waiver, the total amount of recruitment incentive payments paid to an employee in a service period may not exceed 50 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. However, in no event may a waiver provide total recruitment incentive payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

(2) Waiver requests must include—

(i) A description of the critical agency need the proposed recruitment incentive would address;

(ii) The documentation required by § 575.108;

(iii) The proposed recruitment incentive payment amount and a justification for that amount;

(iv) The timing and method of making the recruitment incentive payments;

(v) The service period required; and

(vi) Any other information pertinent to the case at hand.

(d) An agency may pay a recruitment incentive to an employee who has not yet entered on duty once the employee has signed a service agreement established under § 575.110.

(e) A recruitment incentive is not part of an employee's rate of basic pay for any purpose.

(f) Payment of a recruitment incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.110 Service agreement requirements.

(a) Before paying a recruitment incentive, an agency must require the employee to sign a written service agreement to complete a specified

period of employment with the agency (or successor agency in the event of a transfer of function). An authorized agency official must establish the criteria for determining the length of a service period. The service period may not be less than 6 months and may not exceed 4 years.

(b)(1) The service agreement must include the commencement and termination dates of the required service period. Except as provided in paragraphs (b)(2) and (b)(3) of this section, the required service period must begin upon the commencement of service with the agency. The service period must terminate on the last day of a pay period.

(2) If service with the agency does not begin on the first day of a pay period, the agency must delay the service period commencement date so that a required service period begins on the first day of the first pay period beginning on or after the commencement of service in the agency.

(3) An agency may delay a service agreement commencement date until after the employee completes an initial period of formal training or required probationary period when continued employment in the position is contingent on successful completion of the formal training or probationary period. The agency must make the determination to pay a recruitment incentive before the employee enters on duty in the position. However, the service agreement must specify that if an employee does not successfully complete the training or probationary period before the service period commences, the agency is not obligated to pay any portion of the recruitment incentive to the employee.

(c) The service agreement must specify the total amount of the incentive, the method of paying the incentive, and the timing and amounts of each incentive payment, as established under § 575.109.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement (i.e., if an employee is demoted or separated for cause, receives a rating of record of less than "Fully Successful" or equivalent, or otherwise fails to fulfill the terms of the service agreement) and the conditions under which the employee must repay a recruitment incentive under § 575.111.

(e) The service agreement must include the conditions under which the agency may terminate the service agreement before the employee completes the agreed-upon service period. The service agreement must specify the effect of a termination under

§ 575.111, including the conditions under which the agency will pay an additional recruitment incentive payment for partially completed service under § 575.111(e) and (f).

(f) The service agreement may include any other terms or conditions that, if violated, will result in termination of the service agreement under § 575.111(b). For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in a paid leave status are creditable towards the completion of the service period.

§ 575.111 Termination of a service agreement.

(a) An authorized agency official may unilaterally terminate a recruitment incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a recruitment incentive service agreement if an employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than "Fully Successful" or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a recruitment incentive service agreement.

(e) If an authorized agency official terminates a service agreement under paragraph (a) of this section, the employee is entitled to all recruitment incentive payments that are attributable to completed service and to retain any portion of a recruitment incentive payment he or she received that is attributable to uncompleted service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain

recruitment incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received recruitment incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the recruitment incentive service agreement. If the employee received recruitment incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount.

(g) If an employee fails to reimburse the paying agency for the full amount owed under paragraph (f) of this section, the amount outstanding must be recovered from the employee under the agency's regulations for collection by offset from an indebted Government employee under 5 U.S.C. 5514 and 5 CFR part 550, subpart K, or through the appropriate provisions governing Federal debt collection if the individual is no longer a Federal employee. However, the head of the agency may waive the debt under 5 U.S.C. 5584.

§ 575.112 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of recruitment incentives to ensure that its recruitment incentive plan and the payment of recruitment incentives are consistent with the requirements and criteria established under 5 U.S.C. 5753 and this subpart.

(b) When OPM finds that an agency is not paying recruitment incentives consistent with the agency's recruitment incentive plan and the criteria established under 5 U.S.C. 5753 and this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component in the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a recruitment incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a recruitment incentive to such employees.

§ 575.113 Records and reports.

(a) Each agency must keep a record of each determination to pay a recruitment incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must submit a written report to OPM on the use of the recruitment incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Public Law 108–411. Each agency report must include—

(1) A description of how the authority to pay recruitment incentives was used by the agency during the previous calendar year;

(2) The number and dollar amount of recruitment incentives paid during the previous calendar year by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.114 Recruitment bonus service agreements in effect before May 1, 2005.

This subpart does not apply to a recruitment bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subpart A, before May 1, 2005. Such service agreements remain in effect until their expiration, subject to regulations applicable to recruitment bonuses before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

■ 7. Revise part 575, subpart B, to read as follows:

Subpart B—Relocation Incentives

- 575.201 Purpose.
- 575.202 Definitions.
- 575.203 Eligible categories of employees.
- 575.204 Ineligible categories of employees.
- 575.205 Applicability to employees.
- 575.206 Authorizing a relocation incentive.
- 575.207 Agency relocation incentive plan and approval levels.
- 575.208 Approval criteria and written determination.
- 575.209 Payment of relocation incentives.
- 575.210 Service agreement requirements.
- 575.211 Termination of a service agreement.
- 575.212 Internal monitoring requirements and revocation or suspension of authority.
- 575.213 Records and reports.
- 575.214 Relocation bonus service agreements in effect before May 1, 2005.

Subpart B—Relocation Incentives

§ 575.201 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5753, which

authorizes payment of relocation incentives. An agency may pay a relocation incentive to a current employee who must relocate to accept a position in a different geographic area under the conditions specified in this subpart provided the agency determines that the position is likely to be difficult to fill in the absence of an incentive.

§ 575.202 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an employee needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c).

Employee of the Federal Government means an employee (as that term is defined in 5 U.S.C. 2105, except that the term also includes an employee described 5 U.S.C. 2105(c) and (e)) of any part of the Government of the United States (which includes the United States Postal Service and the Postal Rate Commission).

Executive agency has the meaning given that term in 5 U.S.C. 105.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which the employee is relocated before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment of not more than 4 years with the agency at the new duty station to which relocated in return for payment of a relocation incentive.

§ 575.203 Eligible categories of employees.

Except as provided in § 575.204 of this part, an agency may pay a

relocation incentive to an employee in the following categories of positions:

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of relocation incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.204 Ineligible categories of employees.

An agency may not pay a relocation incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.205 Applicability to employees.

(a) An agency may pay a relocation incentive under the conditions prescribed in this subpart to—

(1) An employee of the Federal Government who must relocate to a different geographic area without a break in service to accept a position listed in § 575.203 in an agency when the position is likely to be difficult to fill as determined under § 575.206; or

(2) An employee of an agency who must relocate to a different geographic area (permanently or temporarily) to accept a position listed in § 575.203 when the position is likely to be difficult to fill as determined under § 575.206.

(b) An agency may pay a relocation incentive under paragraph (a) of this section when an employee must relocate to accept a position or assignment in a different geographic area. A position is considered to be in a different geographic area if the worksite of the new position is 50 or more miles from the worksite of the position held immediately before the move. If the worksite of the new position is less than 50 miles from the worksite of the position held immediately before the move, but the employee must relocate (*i.e.*, establish a new residence) to accept the position, an authorized agency official may waive the 50-mile requirement and pay the employee a relocation incentive subject to the requirements of this subpart. In all cases, the employee must establish a residence in the new geographic area before the agency may pay a relocation incentive to the employee.

(c) A relocation incentive may be paid only when the employee's rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) for the position held immediately before the move is at least "Fully Successful" or equivalent.

§ 575.206 Authorizing a relocation incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when a position is likely to be difficult to fill under paragraph (b) of this section;

(2) Approve a relocation incentive for an employee under § 575.205;

(3) Establish the criteria for determining the amount of a relocation incentive and the length of a service period under §§ 575.209 and 575.210, respectively;

(4) Request a waiver from OPM of the limitation on the maximum amount of a recruitment incentive under § 575.209(c); and

(5) Establish the criteria for terminating a service agreement under § 575.211.

(b) *Factors for determining when a position is likely to be difficult to fill.* An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may determine that a

position is likely to be difficult to fill if the agency is likely to have difficulty recruiting candidates with the competencies required for the position (or group of positions) in the absence of a relocation incentive. An agency must consider the following factors, as applicable to the case at hand, in determining whether a position (or group of positions) is likely to be difficult to fill in the absence of a relocation incentive and in documenting this determination as required by § 575.208:

(1) The availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for similar positions using indicators such as offer acceptance rates, the proportion of positions filled, and the length of time required to fill similar positions;

(2) The salaries typically paid outside the Federal Government for similar positions;

(3) Recent turnover in similar positions;

(4) Employment trends and labor-market factors that may affect the agency's ability to recruit candidates for similar positions;

(5) Special or unique competencies required for the position;

(6) Agency efforts to use non-pay authorities, such as special training and work scheduling flexibilities, to resolve difficulties alone or in combination with a relocation incentive;

(7) The desirability of the duties, work or organizational environment, or geographic location of the position; and

(8) Other supporting factors.

(c) An agency may determine that a position (or group of positions) is likely to be difficult to fill if OPM has approved the use of a direct-hire authority applicable to the position (or group of positions) under 5 CFR part 337, subpart B.

§ 575.207 Agency relocation incentive plan and approval levels.

(a) Before paying relocation incentives under this subpart, an agency must establish a relocation incentive plan. This plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of relocation incentives, subject to paragraph (b) of this section, including;

(2) The categories of employees who are prohibited from receiving relocation incentives;

(3) Required documentation for determining that a position (or group of positions) is likely to be difficult to fill;

(4) Any requirements for determining the amount of a relocation incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements which, at a minimum, must include—

(i) The criteria for determining the length of a service period under a service agreement;

(ii) The conditions for terminating a service agreement; and

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and fulfill the requirements of §§ 575.212 and 575.213.

(b)(1) Except as provided in paragraph (b)(2) of this section, an agency official who is at least one level higher than the employee's supervisor must review and approve each determination to pay a relocation incentive, unless there is no official at a higher level in the agency.

(2) The higher level approval required by paragraph (b)(1) of this section is not needed when approving coverage of individual employees under a previously approved relocation incentive authorization if the case-by-case approval requirement is waived under § 575.208(b).

(c) Unless the head of the agency determines otherwise, an agency relocation incentive plan must apply uniformly across the agency.

§ 575.208 Approval criteria and written determination.

(a)(1) For each determination to pay a relocation incentive under this subpart, an agency must document in writing—

(i) The basis for determining that a position is likely to be difficult to fill as determined under § 575.206;

(ii) The basis for authorizing a relocation incentive for an employee;

(iii) The basis for the amount and timing of the approved relocation incentive payments and the length of the required service period; and

(iv) That the worksite of the employee's new position is not in the same geographic area as the worksite of the position held immediately before the move (or that a waiver was approved under § 575.205(b)) and that the employee established a residence in the new geographic area, as required by § 575.205(b).

(2) Except as provided in paragraph (b) of this section, the agency must make each determination to pay a relocation incentive on a case-by-case basis for each employee.

(3) The agency must make the determination to pay a relocation incentive before the employee enters on duty in the position to which relocated.

(b)(1) An agency may waive the case-by-case approval requirement under paragraph (a) of this section when—

(i) The employee is a member of a group of employees subject to a mobility agreement and the agency determines that relocation incentives are necessary to retain employees subject to such an agreement to ensure continuation of operations; or

(ii) A major organizational unit of the agency is relocated to a new duty station and the agency determines that relocation incentives are necessary for a group of employees to ensure the continued operation of that unit without undue disruption of an activity or function that is deemed essential to the agency's mission or without undue disruption of service to the public.

(2) The written determination under paragraph (a) of this section must specify the group of employees covered by the case-by-case waiver, the conditions under which the waiver is approved, and the period of time for which the waiver may be applied.

§ 575.209 Payment of relocation incentives.

(a) An authorized agency official must establish the criteria for determining the amount of a relocation incentive. An agency may pay a relocation incentive—

(1) As an initial lump-sum payment at the commencement of the service period required by the service agreement;

(2) In installments throughout the service period required by the service agreement;

(3) As a final lump-sum payment upon the completion of the full service period required by the service agreement; or

(4) In a combination of these payment methods.

(b)(1) Except as provided in paragraph (c) of this section, the total amount of relocation incentive payments paid to an employee in a service period may not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period (including fractions of a year) in the service period (not to exceed 4 years).

(2) For hourly rate employees who do not have a scheduled annual rate of basic pay, compute the annual rate required for paragraph (b)(1) of this section by multiplying the applicable hourly rate in effect at the beginning of the service period by 2,087 hours.

(3) For the purpose of determining the number of years in a service period

under paragraph (b)(1) of this section, divide the total number of calendar days in the service period (as established under § 575.208) by 365 and round the result to two decimal places. For example, a service period covering 39 biweekly pay periods equals 546 days, and 546 days divided by 365 days equals 1.50 years.

(c)(1) An authorized agency official may request that OPM waive the limitation in paragraph (b)(1) of this section for an employee based on a critical agency need. The authorized agency official must determine that the competencies required for the position are critical to the successful accomplishment of an important agency mission, project, or initiative (e.g., programs or projects related to a national emergency or implementing a new law or critical management initiative). Under such a waiver, the total amount of relocation incentive payments paid to an employee in a service period may not exceed 50 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (including fractions of a year) in the service period. However, in no event may a waiver provide total relocation incentive payments exceeding 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

(2) Waiver requests must include—

(i) A description of the critical agency need the proposed relocation incentive would address;

(ii) The documentation required by § 575.208;

(iii) The proposed relocation incentive payment amount and a justification for that amount;

(iv) The timing and method for making the relocation incentive payments;

(v) The period of service required; and

(vi) Any other information pertinent to the case at hand.

(d) A relocation incentive is not part of an employee's rate of basic pay for any purpose.

(e) Payment of a relocation incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.210 Service agreement requirements.

(a) Before paying a relocation incentive, an agency must require the employee to sign a written service agreement to complete a specified period of employment with the agency (or successor agency in the event of a transfer of function) at the new duty station. An authorized agency official must establish the criteria for

determining the length of a service period. The service period may not exceed 4 years.

(b)(1) The service agreement must include the commencement and termination dates of the required service period. Except as provided under paragraphs (b)(2) and (b)(3) of this section, the required service period must begin upon the commencement of service at the new duty station. The service period must terminate on the last day of a pay period.

(2) If service at the new duty station does not begin on the first day of a pay period, the agency must delay the service period commencement date so that a required service period begins on the first day of the first pay period beginning on or after the commencement of service at the new duty station.

(3) An agency may delay a service agreement commencement date until after the employee completes an initial period of formal training when continued employment in the position is contingent on successful completion of the formal training. The agency must make the determination to pay a relocation incentive before the employee enters on duty in the position, as required by § 575.208(a)(3). However, the service agreement must specify that if an employee does not successfully complete the training before the service period commences, the agency is not obligated to pay any portion of the relocation incentive to the employee.

(c) The service agreement must specify the total amount of the incentive, the method of paying the incentive, and the timing and amount of each incentive payment, as established under § 575.209.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement (i.e., if an employee is demoted or separated for cause, receives a rating of record of less than "Fully Successful" or equivalent, or otherwise fails to fulfill the terms of the service agreement) and the conditions under which the employee must repay a relocation incentive under § 575.211.

(e) The service agreement must include the conditions under which the agency may terminate the service agreement before the employee completes the agreed-upon service period. The service agreement must specify the effect of the termination under § 575.211, including the conditions under which the agency will agree to pay an additional relocation incentive payment for partially completed service under § 575.211(e) and (f).

(f) The service agreement may include any other terms or conditions that, if violated, will result in termination of the service agreement. For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in a paid leave status are creditable towards the completion of the service period.

§ 575.211 Termination of a service agreement.

(a) An authorized agency official may unilaterally terminate a relocation incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned incentive payments, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a relocation incentive service agreement if an employee is demoted or separated for cause (i.e., for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than "Fully Successful" or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a relocation incentive service agreement.

(e) If an authorized agency official terminates a service agreement under paragraph (a) of this section, the employee is entitled to all relocation incentive payments attributable to completed service and to retain any portion of a relocation incentive payment he or she received that is attributable to uncompleted service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain relocation incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received relocation incentive payments that are less than the amount that would be attributable to

the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the relocation incentive service agreement. If the employee received relocation incentive payments in excess of the amount that would be attributable to the completed portion of the service period, he or she must repay the excess amount.

(g) If an employee fails to reimburse the paying agency for the full amount owed under paragraph (f) of this section, the amount outstanding must be recovered from the employee under the agency's regulations for collection by offset from an indebted Government employee under 5 U.S.C. 5514 and 5 CFR part 550, subpart K, or through the appropriate provisions governing Federal debt collection if the individual is no longer a Federal employee. However, the head of the agency may waive the debt under 5 U.S.C. 5584.

§ 575.212 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of relocation incentives to ensure that the agency's relocation incentive plan and the payment of relocation incentives are consistent with the requirements and criteria established under 5 U.S.C. 5753 and this subpart.

(b) When OPM finds that an agency is not paying relocation incentives consistent with the agency's relocation incentive plan and the criteria established under this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component in the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a relocation incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a relocation incentive to such employees.

§ 575.213 Records and reports.

(a) Each agency must keep a record of each determination to pay a relocation incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must submit a written report to OPM on the use of the relocation incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Pubic Law 108–411. Each agency report must include—

(1) A description of how the authority to pay relocation incentives was used by the agency during the previous calendar year;

(2) The number and dollar amount of relocation incentives paid during the previous calendar year to individuals by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.214 Relocation bonus service agreements in effect before May 1, 2005.

This subpart does not apply to a relocation bonus service agreement that was authorized under 5 U.S.C. 5753 and 5 CFR part 575, subpart B, before May 1, 2005. Such service agreements remain in effect until their expiration, subject to regulations applicable to relocation bonuses before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

■ 8. Revise part 575, subpart C, to read as follows:

Subpart C—Retention Incentives

- 575.301 Purpose.
- 575.302 Definitions.
- 575.303 Eligible categories of employees.
- 575.304 Ineligible categories of employees.
- 575.305 Applicability to employees.
- 575.306 Authorizing a retention incentive.
- 575.307 Agency retention incentive plan and approval levels.
- 575.308 Approval criteria and written determination.
- 575.309 Payment of retention incentives.
- 575.310 Service agreement requirements.
- 575.311 Continuation, reduction, and termination of retention incentives.
- 575.312 Internal monitoring requirements and revocation or suspension of authority.
- 575.313 Records and reports.
- 575.314 Retention allowances in effect before May 1, 2005.

Subpart C—Retention Incentives

§ 575.301 Purpose.

This subpart contains regulations implementing 5 U.S.C. 5754, which authorizes payment of retention incentives. An agency may pay a retention incentive to a current employee under the conditions specified in this subpart when an agency determines that the unusually high or unique qualifications of the employee or a special need of the

agency for the employee's services makes it essential to retain the employee and that the employee would be likely to leave the Federal service in the absence of an incentive.

§ 575.302 Definitions.

In this subpart:

Agency means an executive agency or a legislative branch agency included in 5 U.S.C. 5102(a)(1).

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

Competencies means the knowledge, skills, abilities, behaviors, and other characteristics an employee needs to perform the duties of a position.

Employee has the meaning given that term in 5 U.S.C. 2105, except that the term also includes an employee described in 5 U.S.C. 2105(c).

Executive agency has the meaning given that term in 5 U.S.C. 105.

OPM means the Office of Personnel Management.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which an employee is appointed before deductions and including any special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority, and any locality-based comparability payment under 5 CFR part 531, subpart F, or similar payment under other legal authority, but excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Service agreement means a written agreement between an agency and an employee under which the employee agrees to a specified period of employment with the agency in return for payment of a retention incentive.

§ 575.303 Eligible categories of employees.

Except as provided in § 575.304, an agency may pay a retention incentive to a current employee who holds—

(a) A General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority);

(b) A senior-level or scientific or professional position paid under 5 U.S.C. 5376;

(c) A Senior Executive Service position paid under 5 U.S.C. 5383 or a Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service position paid under 5 U.S.C. 3151;

(d) A position as a law enforcement officer, as defined in 5 CFR 550.103;

(e) A position under the Executive Schedule paid under 5 U.S.C. 5311–5317 or a position the rate of pay for which is fixed by law at a rate equal to a rate for the Executive Schedule;

(f) A prevailing rate position, as defined in 5 U.S.C. 5342(a)(3); or

(g) Any other position in a category for which payment of retention incentives has been approved by OPM at the request of the head of an executive agency.

§ 575.304 Ineligible categories of employees.

An agency may not pay a retention incentive to an employee in—

(a) A position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

(b) A position in the Senior Executive Service as a noncareer appointee (as defined in 5 U.S.C. 3132(a)(7));

(c) A position excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character; or

(d) A position not otherwise covered by the exclusions in paragraphs (a), (b), and (c) of this section—

(1) To which an individual is appointed by the President without the advice and consent of the Senate;

(2) Designated as the head of an agency, including an agency headed by a collegial body composed of two or more individual members; or

(3) In which the employee is expected to receive an appointment as the head of an agency.

§ 575.305 Applicability to employees.

(a) An agency may pay a retention incentive to an individual employee under the conditions prescribed in this subpart when the agency determines that—

(1) The unusually high or unique qualifications (*i.e.*, competencies) of the employee or a special need of the agency for the employee's services makes it essential to retain the employee; and

(2) The employee would be likely to leave the Federal service in the absence of a retention incentive.

(b) Except as provided in paragraph (c) of this section, an agency may pay a retention incentive to a group or category of employees under the conditions prescribed in this subpart when the agency determines that—

(1) The unusually high or unique qualifications (*i.e.*, competencies) of the group or category of employees or a special need of the agency for the employees' services makes it essential to

retain the employees in that group or category; and

(2) There is a high risk that a significant number of the employees in the group would be likely to leave the Federal service in the absence of a retention incentive.

(c) An agency may not include in a group retention incentive authorization an employee covered by § 575.303(b), (c), (e) or those in similar categories of positions approved by OPM to receive retention incentives under § 575.303(g).

(d) A retention incentive may be paid only when the employee's rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) is at least "Fully Successful" or equivalent.

§ 575.306 Authorizing a retention incentive.

(a) *Authority of authorized agency official.* An authorized agency official retains sole and exclusive discretion, subject only to OPM review and oversight, to—

(1) Determine when the unusually high or unique qualifications (*i.e.*, competencies) of an employee or a special need of the agency for the employee's services makes it essential to retain the employee and when the employee would be likely to leave the Federal service in the absence of a retention incentive;

(2) Determine when a group or category of employees has unusually high or unique qualifications (*i.e.*, competencies) or when an agency has a special need for the employees' services that makes it essential to retain the employees in that group or category and when there is a high risk that a significant number of employees in the group would be likely to leave the Federal service in the absence of a retention incentive;

(3) Approve a retention incentive for an employee (or group or category of employees, except as prohibited by § 575.305(c)) in a position (or positions) listed in § 575.303;

(4) Establish the criteria for determining the amount of a retention incentive and the length of a service period under §§ 575.309 and 575.310, respectively;

(5) Request a waiver from OPM of the limitation on the maximum amount of a retention incentive for an employee (or group or category of employees) under § 575.309(e); and

(6) Establish the criteria for terminating a service agreement or retention incentive payments under § 575.311.

(b) *Factors for authorizing a retention incentive for an individual employee.*

An agency must consider the following factors, as applicable to the case at hand, in determining whether the unusually high or unique qualifications of an employee or a special need of the agency for an employee's services makes it essential to retain the employee and that the employee would be likely to leave the Federal service in the absence of a retention incentive:

(1) Employment trends and labor market factors such as the availability and quality of candidates in the labor market possessing the competencies required for the position and who, with minimal training, cost, or disruption of service to the public, could perform the full range of duties and responsibilities of the employee's position at the level performed by the employee;

(2) The success of recent efforts to recruit candidates and retain employees with competencies similar to those possessed by the employee for positions similar to the position held by the employee;

(3) Special or unique competencies required for the position;

(4) Agency efforts to use non-pay authorities to help retain the employee instead of or in addition to a retention incentive, such as special training and work scheduling flexibilities or improving working conditions;

(5) The desirability of the duties, work or organizational environment, or geographic location of the position;

(6) The extent to which the employee's departure would affect the agency's ability to carry out an activity, perform a function, or complete a project that the agency deems essential to its mission;

(7) The salaries typically paid outside the Federal Government; and

(8) Other supporting factors.

(c) *Factors for authorizing a retention incentive for a group or category of employees.* (1) An agency must consider the factors in paragraph (b) of this section as they relate to determining whether a group or category of employees—

(i) Has unusually high or unique qualifications (*i.e.*, competencies) or that the agency has a special need for the employees' services that makes it essential to retain the employees in that category; and

(ii) That it is reasonable to presume that there is a high risk that a significant number of employees in the targeted category would be likely to leave the Federal service in the absence of a retention incentive.

(2) An agency must narrowly define a targeted category of employees using

factors that relate to the conditions described in paragraph (c)(1) of this section. Factors that may be appropriate include the following: occupational series, grade level, distinctive job duties, unique competencies required for the position, assignment to a special project, minimum agency service requirements, organization or team designation, geographic location, and required rating of record. (While a rating of record of higher than the "Fully Successful" rating of record required by § 575.305(d) may be a factor used in defining the targeted category, a rating of record by itself is not sufficient to justify a retention incentive. A rating of record may function as a supporting factor in authorizing an incentive or setting the incentive rate only to the extent it directly relates to the conditions in paragraph (d) of this section.)

(d) An agency must document the determinations required under paragraphs (b) and (c) of this section as required by § 575.308.

§ 575.307 Agency retention incentive plan and approval levels.

(a) Before paying retention incentives under this subpart, an agency must establish a retention incentive plan. This plan must include the following elements:

(1) The designation of officials with authority to review and approve payment of retention incentives, subject to paragraph (b) of this section;

(2) The categories of employees who are prohibited from receiving retention incentives;

(3) Required documentation for determining that an employee would be likely to leave the Federal service;

(4) Any requirements for determining the amount of a retention incentive;

(5) The payment methods that may be authorized;

(6) Requirements governing service agreements which, at a minimum, must include—

(i) The criteria for determining the length of a service period under a service agreement;

(ii) The conditions for terminating a service agreement;

(iii) The obligations of the agency and the employee, as applicable, if an agency terminates a service agreement; and

(iv) The conditions for terminating retention incentive payments when no service agreement is required (see § 575.310(f)); and

(7) Documentation and recordkeeping requirements sufficient to allow reconstruction of the action and fulfill the requirements of §§ 575.312 and 575.313.

(b)(1) Except as provided in paragraph (b)(2) of this section, an authorized agency official who is at least one level higher than the employee's (or group of employees') supervisor must review and approve each determination to pay a retention incentive to an individual or group of employees, unless there is no official at a higher level in the agency.

(2) The higher level approval required by paragraph (b)(1) of this section is not needed when approving coverage of individual employees under a previously approved group retention incentive authorization.

(c) Unless the head of the agency determines otherwise, an agency retention incentive plan must apply uniformly across the agency.

§ 575.308 Approval criteria and written determination.

(a) An agency in its sole and exclusive discretion, subject only to OPM review and oversight, may approve a retention incentive for an individual employee or group or category of employees using the approval criteria in § 575.306.

(b) For each determination to pay a retention incentive under this subpart, an agency must document in writing—

(1) The basis for determining that the unusually high or unique qualifications of the employee (or group of employees) or a special need of the agency for the employee's (or group of employees') services makes it essential to retain the employee(s);

(2) The basis for determining that the employee (or a significant number of employees in a group) would be likely to leave the Federal service in the absence of a retention incentive; and

(3) The basis for establishing the amount and timing of the approved retention incentive payment and the length of the required service period.

§ 575.309 Payment of retention incentives.

(a) An authorized agency official must determine the criteria for determining the amount of a retention incentive. An agency must establish a single retention incentive rate for each individual or group of employees that is expressed as a percentage of the employee's rate of basic pay. Except as provided in paragraph (e) of this section, a retention incentive rate may not exceed—

(1) 25 percent, if authorized for an individual employee; or

(2) 10 percent, if authorized for a group or category of employees.

(b) An agency may pay a retention incentive in—

(1) Installments after the completion of specified periods of service; or

(2) A single lump-sum payment after completion of the full service period.

(c)(1) An installment payment is derived by multiplying the rate of basic pay the employee earned in the installment period by a percentage not to exceed the incentive percentage rate established for the employee under paragraph (a) of this section. For example, an agency establishes a retention incentive percentage rate of 10 percent for an employee. The employee has a service agreement that provides for a retention incentive installment payment after completion of 6 pay periods of service at the full percentage rate established for the employee. The employee earns \$15,000 during the 6 pay periods of service. Upon completion of that service period, the employee will receive the accrued retention incentive installment payment of \$1,500 ($\$15,000 \times .10$).

(2) If the retention incentive installment payment percentage is less than the full percentage rate established for the employee under paragraph (a) of this section, any accrued portion of the retention incentive that is not paid as an installment payment during the service period must be paid as part of a final installment payment to the employee after completion of the full service period under the terms of the service agreement established under § 575.310. For example, an agency establishes a retention incentive percentage rate of 10 percent for an employee. The employee's service agreement provides for a 7 percent retention incentive installment payment after completion of 6 pay periods of service. The employee earns \$15,000 during the 6 pay periods of service. Upon completion of that installment period, the employee accrues a retention incentive installment payment of \$1,500 ($\$15,000 \times .10$). However, under the terms of the service agreement, the employee will receive a \$1,050 retention incentive installment payment ($\$15,000 \times .07$). The agency must pay the accrued but unpaid portion of the retention incentive payment of \$450 ($\$1,500 - \$1,050$) as a final lump-sum payment upon completion of the full service period required by the service agreement.

(3) An agency may not pay a retention incentive as an initial lump-sum payment at the start of a service period or in advance of fulfilling the service period for which the retention incentive is being paid.

(d) A retention incentive payment paid as a single lump-sum payment upon completion of the full service period required by the service agreement is derived by multiplying the retention incentive percentage rate established under paragraph (a) of this

section by the total basic pay the employee earned during the full service period.

(e)(1) An authorized agency official may request that OPM waive the limitation in paragraph (a) of this section and permit the agency to pay an individual employee or group of employees a retention incentive of up to 50 percent of the employee's basic pay based on a critical agency need. In addition to the determination required by § 575.308, the authorized agency official must determine that the employee's (or group of employees') unusually high or unique qualifications (*i.e.*, competencies) are critical to the successful accomplishment of an important agency mission, project, or initiative (*e.g.*, programs or projects related to a national emergency or implementing a new law or critical management initiative).

(2) Waiver requests must include—

(i) A description of the employee's work requirements and responsibilities or, if requesting a group retention incentive, a description of the group or category of employees and the number of employees to be covered by the proposed retention incentive;

(ii) A description of the critical agency need the proposed retention incentive would address;

(iii) The written documentation required by § 575.308;

(iv) The proposed retention incentive percentage rate and a justification for that percentage;

(v) The timing and method of making the retention incentive payments;

(vi) The service period required; and

(vii) Any other information pertinent to the case at hand.

(3) OPM may require that waiver requests for groups or categories of employees be coordinated with other agencies having similarly situated employees in the same category.

(4) Notwithstanding § 575.310(f), an authorized agency official must require a signed written service agreement for any employee who may receive a higher retention incentive as a result of approval of a waiver of the maximum limit on the amount of a retention incentive under paragraph (e)(1) of this section.

(f) An agency may not offer or authorize a retention incentive for an individual prior to employment with the agency.

(g) An agency may not commence a retention incentive service agreement (or begin paying a retention incentive) during a period of employment established under any service agreement required for payment of a recruitment incentive under 5 CFR part 575, subpart

A, or a relocation incentive under 5 CFR part 575, subpart B. After a retention incentive service agreement has commenced (or retention incentive payments have commenced), an agency may pay a relocation incentive without affecting the payment of a retention incentive.

(h) A retention incentive is not part of an employee's rate of basic pay for any purpose.

(i) Payment of a retention incentive is subject to the aggregate limitation on pay under 5 CFR part 530, subpart B.

§ 575.310 Service agreement requirements.

(a) Before paying a retention incentive, an agency must require an employee, including each employee covered by a group retention incentive authorization and any employee who may receive a higher retention incentive as a result of an approved waiver of the maximum limit on the amount of a retention incentive under § 575.309(e), to sign a written service agreement to complete a specified period of employment with the agency (or successor agency in the event of a transfer of function). An authorized agency official must determine the length of a service period. A written service agreement is not required under the condition described in paragraph (g) of this section.

(b) The service agreement must include the commencement and termination dates of the required service period. The service period must begin on the first day of a pay period and end on the last day of a pay period.

(c) The service agreement must specify the retention incentive percentage rate established under § 575.309(a); whether the incentive will be paid in installments or in a lump-sum payment upon completion of the service period provided in the service agreement; whether any installment payments will be paid at less than the full retention incentive percentage rate established under § 575.309(a), with the accrued but unpaid incentive payment being paid in a lump sum upon completion of the full service period required by the service agreement under § 575.309(c)(2); and the timing of incentive payments.

(d) The service agreement must include the conditions under which the agency must terminate the service agreement before the employee completes the agreed-upon service period (*i.e.*, if an employee is demoted or separated for cause, receives a rating of record of less than "Fully Successful" or equivalent, or otherwise fails to fulfill the terms of the service agreement)

under § 575.311. The service agreement must specify the effect of a termination, including the conditions under which the agency will pay an additional retention incentive payment for partially completed service under § 575.311(e) and (f).

(e) The service agreement may include any other terms or conditions that, if violated, will result in a termination of the service agreement under § 575.311(b). For example, the service agreement may specify the employee's work schedule, type of position, and the duties he or she is expected to perform. In addition, the service agreement may address the extent to which periods of time on detail, in a nonpay status, or in paid leave status are creditable towards the completion of the service period.

(f) A written service agreement is not required if the agency—

(1) Pays the retention incentive in biweekly installments; and

(2) Sets each biweekly installment payment at the full retention incentive percentage rate established for the employee under § 575.309(a).

§ 575.311 Continuation, reduction, and termination of retention incentives.

(a) An authorized agency official may unilaterally terminate a retention incentive service agreement based solely on the management needs of the agency. For example, an agency may terminate a service agreement when the employee's position is affected by a reduction in force, when there are insufficient funds to continue the planned retention incentive payments, when conditions no longer warrant payment at the level originally approved or at all, or when the agency assigns the employee to a different position (if the different position is not within the terms of the service agreement).

(b) An authorized agency official must terminate a retention incentive service agreement if the employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), if the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than "Fully Successful" or equivalent, or if the employee otherwise fails to fulfill the terms of the service agreement.

(c) The termination of a service agreement is not grievable or appealable.

(d) The agency must notify an employee in writing when it terminates a retention incentive service agreement.

(e) If an authorized agency official terminates a service agreement under

paragraph (a) of this section, the employee is entitled to retain any retention incentive payments that are attributable to completed service and to receive any portion of a retention incentive payment owed by the agency for completed service.

(f) If an authorized agency official terminates a service agreement under paragraph (b) of this section, the employee is entitled to retain retention incentive payments previously paid by the agency that are attributable to the completed portion of the service period. If the employee received retention incentive payments that are less than the amount that would be attributable to the completed portion of the service period, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment under the terms of the retention incentive service agreement.

(g)(1) For retention incentives that are paid when no service agreement is required under § 575.310(f), an agency must review each determination to pay the incentive at least annually to determine whether payment is still warranted. An authorized agency official must certify this determination in writing.

(2) An agency may continue paying a retention incentive to an employee when no service agreement is required as long as the conditions giving rise to the original determination to pay the incentive still exist.

(3) An agency must reduce or terminate a retention incentive authorization when no service agreement is required whenever payment at the level originally approved is no longer warranted. An agency may consider the following factors in determining whether to reduce or terminate a retention incentive—

(i) Whether a lesser amount (or none at all) would be sufficient to retain the employee (or group or category of employees);

(ii) Whether labor-market factors make it more likely (or reasonably likely) to recruit a candidate with competencies similar to those possessed by the employee (or group or category of employees);

(iii) Whether the agency's need for the services of the employee (or group or category of employees) has been reduced to a level that makes it unnecessary to continue payment at the level originally approved (or at all);

(iv) Whether budgetary considerations make it difficult to continue payment at the level originally approved (or at all); or

(v) Other supporting factors.

(4) An agency must terminate a retention incentive authorization when no service agreement is required if the employee is demoted or separated for cause (*i.e.*, for unacceptable performance or conduct), the employee receives a rating of record (or an official performance appraisal or evaluation under a system not covered by 5 U.S.C. chapter 43 or 5 CFR part 430) of less than "Fully Successful" or equivalent, or the agency assigns the employee to a different position.

(5) Termination or reduction of a retention incentive is not grievable or appealable under any law or regulation.

(6) If an agency reduces or terminates a retention incentive under paragraph (g) of this section, the agency must notify the employee in writing. The employee is entitled to receive any scheduled incentive payments through the end of the pay period in which the written notice is provided or until the date of separation, if sooner.

§ 575.312 Internal monitoring requirements and revocation or suspension of authority.

(a) Each agency must monitor the use of retention incentives to ensure that its retention incentive plan and the payment of retention incentives are consistent with the requirements and criteria established under 5 U.S.C. 5754 and this subpart.

(b) When OPM finds that an agency is not paying retention incentives consistent with the agency's retention incentive plan and the criteria established under 5 U.S.C. 5754 or this subpart or otherwise determines that the agency is not using this authority selectively and judiciously, OPM may—

(1) Direct the agency to revoke or suspend the authority granted to any organizational component of the agency and, with respect to any category or categories of employees, require that the component obtain approval from the agency's headquarters level before paying a retention incentive to such employees; or

(2) Revoke or suspend the authority granted to the agency under this subpart for all or any part of the agency and, with respect to any category or categories of employees, require that the agency obtain OPM's approval before paying a retention incentive to such employees.

§ 575.313 Records and reports.

(a) Each agency must keep a record of each determination to pay a retention incentive and make such records available for review upon OPM's request.

(b) By March 31 in each of the years 2006 through 2010, each agency must

submit a written report to OPM on the use of the retention incentive authority within the agency during the previous calendar year for use in compiling an OPM report to Congress, as required by section 101(c) of Public Law 108–411. Each agency report must include—

(1) A description of how the authority to pay retention incentives was used in the agency during the previous calendar year;

(2) The number and dollar amount of retention incentives paid during the previous calendar year to individuals by occupational series and grade, pay level, or other pay classification; and

(3) Other information, records, reports, and data as OPM may require.

§ 575.314 Retention allowances in effect before May 1, 2005.

This subpart does not apply to a retention allowance authorized under 5 U.S.C. 5754 and 5 CFR part 575, subpart C, before May 1, 2005. Such allowances must continue to be paid until the retention allowance is reauthorized or terminated or until April 30, 2006, whichever comes first, subject to the regulations applicable to retention allowances before May 1, 2005. (See 5 CFR part 575 and part 530, subpart B, contained in the 5 CFR, parts 1 to 699, edition revised as of January 1, 2005.)

Subpart D—Supervisory Differentials

■ 9. In § 575.402, revise paragraph (b) to read as follows:

§ 575.402 Delegation of authority.

* * * * *

(b) A supervisory differential may not be paid on the basis of supervising a civilian employee whose rate of basic pay exceeds the maximum rate of basic pay established for grade GS–15 on the pay schedule applicable to the GS supervisor, including a schedule for any applicable special rate under 5 CFR part 530, subpart B; locality-based comparability payment under 5 CFR part 531, subpart F; or similar payment or supplement under other legal authority.

■ 10. In § 575.403, revise the definition of *rate of basic pay* to read as follows:

§ 575.403 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position to which the employee is or will be appointed before deductions and including any special rate under 5 CFR part 530, subpart B, or any locality-based comparability payment under 5 CFR part 531, subpart F, or other similar payment or supplement under other legal authority,

but excluding any additional pay of any kind.

* * * * *

■ 11. In § 575.405—

- a. Remove paragraphs (c)(2) through (c)(4) and redesignate paragraphs (c)(5) through (c)(7) as paragraphs (c)(2) through (c)(4), respectively;
- b. Remove paragraph (d)(2) and redesignate paragraphs (d)(3) and (d)(4) as (d)(2) and (d)(3), respectively; and
- c. Revise newly redesignated paragraph (c)(4); paragraph (d)(1); and newly redesignated paragraph (d)(2) to read as follows:

§ 575.405 Calculation and payment of supervisory differential.

* * * * *

(c) * * *

(4) Any other continuing payment, except night, Sunday, or holiday premium pay or hazardous duty pay under 5 U.S.C. chapter 55, subchapter V; recruitment or relocation incentives under 5 U.S.C. 5753; retention incentives under 5 U.S.C. 5754; or similar payments under other legal authority.

* * * * *

(d) * * *

(1) Basic pay, excluding a night or environmental differential under 5 U.S.C. 5354(f) or part 5343(c)(4), respectively, or similar payment under other legal authority;

(2) Any other continuing payment, except Sunday or holiday pay under 5 U.S.C. chapter 55, subchapter V; recruitment or relocation incentives under 5 U.S.C. 5753; retention incentives under 5 U.S.C. 5754; or similar payments under other legal authority; and

* * * * *

Subpart E—Extended Assignment Incentives

■ 12. In § 575.502, revise the definition of *rate of basic pay* to read as follows:

§ 575.502 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any special rate under 5 CFR part 530, subpart B, or locality-based comparability payment

under 5 CFR part 531, subpart F, or similar payment or supplement under other legal authority, but before deductions and exclusive of additional pay of any kind. For example, a *rate of basic pay* may not include nonforeign area cost-of-living allowances under 5 U.S.C. 5941, night shift differentials under 5 U.S.C. 5343(f), or environmental differentials under 5 U.S.C. 5343(c)(4).

* * * * *

■ 13. In § 575.506, revise paragraph (b) to read as follows:

§ 575.506 When is an agency prohibited from paying an extended assignment incentive?

* * * * *

(b) An agency may not begin paying an extended assignment incentive to an otherwise eligible employee who is receiving or fulfilling the requirements of a service agreement for the payment of a recruitment, relocation, or retention incentive. (See 5 CFR part 575, subparts A, B, and C.)

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