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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 531, 535, and 536

RIN 3206-AK87

#### Critical Position Pay Authority

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing final regulations to govern the use of a critical position pay authority that allows higher rates of pay for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to the agency's mission. By law, agency requests for critical position pay authority must be approved by OPM in consultation with the Office of Management and Budget.

**DATES:** The regulations are effective on September 25, 2008.

**FOR FURTHER INFORMATION CONTACT:** Joe Ratcliffe, (202) 606-2838; FAX: (202) 606-4264; or *e-mail*: [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** On April 25, 2007, the U.S. Office of Personnel Management issued proposed regulations (72 FR 20440) to govern the use of a critical position pay authority that enables the head of a Federal agency to request higher rates of pay for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to an agency's mission. The 60-day comment period ended on June 25, 2007. OPM received comments from nine individuals, one employee association, and five agencies. The comments are addressed in this final rule.

One commenter did not approve of the critical pay authority statute and

recommended the authority not be used. OPM disagrees with that assessment and believes the Government must use all available human resources management tools at its disposal to ensure Federal agencies are able to recruit and retain qualified employees.

Several commenters asked whether specific positions might qualify for a critical position pay rate or recommended the critical position pay authority be used for certain positions. Employing agencies will decide internally whether to request use of a critical position pay authority. While OPM encourages use of a critical position pay authority wherever it might be needed and will consider all agency requests for the authority, we cannot speculate in advance as to whether particular positions might qualify.

An agency wrote a letter supporting the proposed regulations.

Section 535.106(a) of the proposed regulations provided a critical position pay rate is not considered a rate of basic pay for application of any saved pay or pay retention provisions (e.g., 5 U.S.C. 5363). An employee association and an agency expressed concern about an employee's pay if a critical position pay authority is terminated. Both the employee association and the agency recommended revising the regulations to allow for pay retention in such cases. We disagree. Under 5 U.S.C. 5377(e), a critical position pay authority must be terminated if conditions no longer warrant payment of the critical pay rate. Providing an entitlement to a saved rate or retained rate based on a critical position pay rate would be inconsistent with the requirement to terminate the authority. To conform with § 535.106(a), these final regulations revise § 536.102(b) to clarify that an agency may not provide grade or pay retention under 5 CFR part 536 to an employee in a covered pay system who is reduced in pay upon termination of a critical position pay authority. However, upon termination of critical position pay authority the employee's pay will be set under § 535.105(e) at the rate to which the employee would be entitled had he or she not received critical pay. We also note 5 U.S.C. 5377(e)(2) provides that termination of a critical position pay authority may not take effect until the authority has been available for the position for at least 1 calendar year, so

long as the conditions justifying the authority are still met.

An employee association recommended that all efforts be made to utilize current employees and create opportunities within all career paths necessary to meet the needs of the agency prior to using the critical position pay authority. We agree, but no changes to the proposed regulations are needed. Section 535.104(a) provides that an agency may request a critical position pay authority only after determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Section 535.104(d)(11) requires an agency applying for a critical position pay authority to document why it could not, through diligent and comprehensive recruitment efforts and without using a critical position pay authority, fill the position within a reasonable period with an individual who could perform the duties and responsibilities in a manner sufficient to fulfill the agency's mission.

An employee association recommended amending § 535.107 to provide for public access to reports to Congress on the use of the critical position pay authority. OPM provides for public access to reports to Congress through the OPM Web site. No revision to § 535.107 is necessary.

An agency asked whether the critical position pay authority can be applied to a group or class of positions. Under 5 U.S.C. 5377(b)(1), each individual position must be analyzed to determine eligibility. However, relevant factors considered may be similar for a group of similar positions. In such cases, OPM would assess each position in the group against common factors. Once each individual position in a group has been certified as meeting the section 5377(b)(1) requirements, approval may apply to the group. Each individual employee approved for a critical position pay rate must be "exceptionally well qualified for the position" as required by 5 U.S.C. 5377(b)(2).

An agency commented that the proposed regulations did not address whether positions with a critical position pay authority are affected by adjustments to levels I and II of the Executive Schedule. We disagree. Section 535.105(c) provides that the

head of an agency may make subsequent adjustments in the rate of pay for a position with a critical position pay authority each January at the same time general pay adjustments are authorized for Executive Schedule employees under 5 U.S.C. 5318. Also, such adjustments may not exceed the new rate for Executive Schedule level II or other applicable maximum rate established for the critical position. We added a sentence to § 535.104(c) to clarify that the President may establish a maximum limitation on a critical rate of pay that is approved at a rate above level I of the Executive Schedule.

An agency asked OPM to consider whether the proposed regulations could allow for more timely and meaningful use of a critical position pay authority and whether the proposed regulations might be revised so that agencies could use the authority more quickly to better compete with non-Federal employers. It is not feasible, given the level of review required under 5 U.S.C. 5377, for the regulations to provide for immediate application of a critical position pay authority. However, OPM will work with agencies to provide pre-hire approval under the critical position pay authority.

Two agencies asked whether the documentation requirements might be substantially reduced for agencies applying for a critical position pay authority. Government programs involving increased spending are appropriately subject to considerable public scrutiny. OPM believes the documentation requirements in the proposed regulations are appropriate.

An agency said the proposed regulations appeared not to preclude use of a critical position pay authority for excepted service positions, and asked whether this was correct. Agencies are not restricted from seeking use of a critical position pay authority for excepted service positions.

An agency said that some of its staff believed the term *administrative field* in § 535.103(b) should be defined in the regulations. OPM believes such a definition is unnecessary. In considering whether to apply for a critical position pay authority, an agency is free to decide internally whether it believes the position is one that requires a very high level of expertise in a scientific, technical, professional, or administrative field. OPM will consider all agency requests for a critical position pay authority.

An agency asked whether a critical position pay authority could be approved for a particular geographic area or across the board for certain types of positions rather than for one position

at a time. By statute, the authority is intended to be applied by position and not by geographic area. In addition, under 5 U.S.C. 5377 only 800 positions Governmentwide may be approved for a critical position pay authority at any given time. An agency asked whether the regulations could be revised so that heads of agencies could delegate the decision of whether to apply for a critical position pay authority to subordinate positions, such as heads of major components. The definition of *head of an agency* in § 535.102 already provides for such delegated authority.

An agency asked OPM to clarify how recruitment, relocation, and retention incentives are to be calculated in conjunction with a critical position pay authority, particularly in calculating the locality pay portion. Employees receiving critical position pay may not receive locality pay under 5 U.S.C. 5304 or similar authority. However, employees who are eligible for recruitment, relocation, or retention incentives under 5 CFR 575 subparts A, B, and C will remain eligible for the incentives while receiving critical position pay, subject to applicable pay limitations (e.g., the aggregate limitation on pay under 5 U.S.C. 5307). An employee's rate of basic pay is used to compute the maximum amount of a recruitment or relocation incentive that may be paid to an employee. Retention incentive lump sum and installment payments are computed by multiplying the retention incentive percentage rate established for the employee by the total amount of the basic pay the employee earned during the service or installment period. A critical position pay rate would be the rate of basic pay used for these recruitment, relocation, or retention incentive calculations. There are examples of calculating incentives in the fact sheets "Recruitment and Relocation Incentive Payment and Termination Calculations" and "Retention Incentive Payment and Termination Calculations" on OPM's Web site.

An agency recommended revising § 535.105 to clarify eligibility for premium pay. OPM believes that such revision of the regulations is unnecessary. However, we note in response to the comment that eligibility for premium pay under 5 U.S.C. chapter 55, subchapter V, depends on the employee's pay system (disregarding the use of the critical pay authority) and the coverage rules in 5 U.S.C. 5541(2) and 5 CFR 550.101.

An agency recommended revising § 535.104(d) to specify procedures and circumstances for submitting urgent requests for a critical position pay

authority, such as in cases where expedited processing of requests for a critical position pay authority is in the interest of national security or public health or safety. OPM believes that handling of cases where expedited processing might be warranted is an administrative matter that need not be addressed in the regulations. However, if an agency believes expedited processing of a request for a critical position pay authority is in the interest of national security or public health or safety or is otherwise warranted, the agency should indicate that in its request.

An agency recommended revising § 535.105(e) to address agency flexibility to apply highest previous rate rules in setting basic pay if a critical position pay authority is discontinued for a General Schedule (GS) position. We agree. Revised § 535.105(e) provides if an agency discontinues critical position pay for a given GS position (on its own initiative or because OPM, in consultation with OMB, terminates the authority), the employee's rate of basic pay will be set at the rate to which the employee would be entitled had he or she not received critical pay, as determined by the head of the agency, unless the employee is eligible for a higher payable rate under the GS maximum payable rate rule in § 531.221 and the agency chooses to apply that rule. The pay set under the maximum payable rate rule may not exceed step 10 of the GS grade. To conform with the revised § 535.105(e), these final regulations revise § 531.221(a) to provide that the GS maximum payable rate rule may be used upon "termination of a critical position pay authority under 5 CFR part 535". These final regulations also revise § 531.221(a) to provide that when highest previous rate is based on a critical position pay rate, an agency must follow the rules in § 531.221(d). Section 531.221(d) provides the rules for when highest previous rate is based on a rate under a non-GS pay system. It is appropriate to follow the rules in § 531.221(d) even though GS employees who receive critical position pay will be covered by the GS pay plan code because a critical pay rate is not considered a GS rate.

An agency recommended revising § 535.105(e) to require agencies to provide documentation to employees under a critical position pay authority showing the rate of basic pay the employee would receive absent the critical position pay authorization, since the responsibility for subsequent pay rate determinations could rest with another agency should the employee transfer to another agency. The agency

said that such documentation might appear in the "remarks" section of the employee's SF-50. We think such a requirement is not necessary in the regulations.

An agency recommended revising § 535.106 to address daily and biweekly aggregate limitations to ensure internal pay equity. We are not making such a revision because the limitations on critical position pay in 5 U.S.C. 5377 are on annual rates, not daily or biweekly aggregate pay.

An agency suggested that OPM issue guidance that discusses the process of reviewing requests for a critical position pay authority and provides greater detail concerning the review process and its standards and timelines. OPM believes the regulations provide sufficient detail for agencies that might consider requesting an authority. The broad language used in the regulations to describe the types of positions that might be considered for a critical position pay authority allows for flexibility, and it is not practical to publish detailed standards that could apply effectively in every situation. Timing in the review process is an administrative matter and may vary by request.

An agency suggested OPM define what constitutes "a very high level of expertise." OPM believes it is not possible to write a definition of that term that would cover all the different positions and contexts for which it might be appropriate to apply a critical position pay authority. This is a matter for agency judgment.

In § 535.107, we removed language regarding the use of estimated rates to make the regulation conform with the language in the statute at 5 U.S.C. 5377(h)(2). Also, we made certain other minor changes in the language of the proposed regulations to improve clarity.

#### Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with Executive Order 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 affect only Federal agencies and employees.

#### List of Subjects in 5 CFR Parts 531, 535, and 536

Administrative practice and procedure; Freedom of information; Government employees; Law enforcement officers; Reporting and recordkeeping requirements; Wages.

U.S. Office of Personnel Management.

**Michael W. Hager,**  
*Acting Director.*

■ Accordingly, the U.S. Office of Personnel Management amends title 5, Code of Federal Regulations, by amending part 531, adding a new part 535, and amending part 536 as follows:

#### PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 1. The authority citation for part 531 continues to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

#### Subpart B—Determining Rate of Basic Pay

■ 2. Amend § 531.221 as follows:  
■ a. Revise the first sentence of paragraph (a)(1) to read as follows; and  
■ b. Add paragraph (a)(4) to read as follows:

#### § 531.221 Maximum payable rate rule.

(a) *General.* (1) An agency may apply the maximum payable rate rule as described in this section to determine an employee's payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon reemployment, transfer, reassignment, promotion, demotion, change in type of appointment, or termination of a critical position pay authority under 5 CFR part 535. \* \* \*

(4) In applying this section, an agency must follow the rules in paragraph (d) of this section when highest previous rate is based on a critical position pay rate under 5 CFR part 535.  
\* \* \*

■ 3. Add part 535 to read as follows:

#### PART 535—CRITICAL POSITION PAY AUTHORITY

Sec.  
535.101 Purpose.  
535.102 Definitions.  
535.103 Authority.  
535.104 Requests for and granting critical position pay authority.  
535.105 Setting and adjusting rates of basic pay.  
535.106 Treatment as a rate of basic pay.  
535.107 Annual reporting requirements.

**Authority:** 5 U.S.C. 5377; E.O. 13415, 71 FR 70641.

#### § 535.101 Purpose.

The purpose of this part is to provide a regulatory framework for the critical position pay authority authorized by 5 U.S.C. 5377. The Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions under this part.

#### § 535.102 Definitions.

*Agency* has the meaning given that term in 5 U.S.C. 5102.

*Critical position* means a position for which OPM has granted authority to the head of an agency to exercise the pay-setting authority provided in 5 U.S.C. 5377.

*Critical position pay authority* means the authority that may be granted to the head of an agency by OPM under 5 U.S.C. 5377 to set the rate of basic pay for a given critical position under the provisions of that section.

*Critical position pay rate* means the specific rate of pay established by the head of an agency for an employee in a critical position based upon the exercise of the critical position pay authority. A critical position pay rate is a rate of basic pay to the extent provided in § 535.106.

*Employee* means an employee (as defined in 5 U.S.C. 2105) in or under an agency.

*Head of an agency* means the agency head or an official who has been delegated the authority to act for the agency head in the matter concerned.

#### § 535.103 Authority.

(a) Subject to a grant of authority from OPM in consultation with OMB and all other requirements in this part, the head of an agency may fix the rate of basic pay for a critical position at a rate not less than the rate of basic pay that would otherwise be payable for the position, but not greater than—

(1) The rate payable for level II of the Executive Schedule (unless paragraph (a)(2) or (a)(3) of this section applies);

(2) The rate payable for level I of the Executive Schedule in exceptional circumstances based on information and data that justify a rate higher than the rate payable for level II of the Executive Schedule; or

(3) A rate in excess of the rate for level I of the Executive Schedule that is established in rare circumstances with the written approval of the President.

(b) The head of an agency may exercise his or her critical position pay authority only—

(1) When such a position requires expertise of an extremely high level in

a scientific, technical, professional, or administrative field and is critical to the agency's successful accomplishment of an important mission; and

(2) To the extent necessary to recruit or retain an individual exceptionally well-qualified for the critical position.

(c) If critical position pay authority is granted for a position, the head of an agency may determine whether it is appropriate to exercise the authority with respect to any proposed appointee or incumbent of the position.

(d) An agency granted critical position pay authority may continue to use the authority for an authorized position as long as needed. OPM will monitor the use of critical position pay authorities annually, through the agency's required reports under § 535.107, and will terminate the authority associated with a given position after notifying the agency if, in OPM's judgment in consultation with OMB, the authority is no longer needed.

**§ 535.104 Requests for and granting critical position pay authority.**

(a) An agency may request critical position pay authority only after determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Agency requests must include the information in paragraph (d) of this section. OPM, in consultation with OMB, will review agency requests. OPM will advise the requesting agency as to whether the request is approved and when the agency's critical position pay authority becomes effective.

(b) A request for critical position pay authority (or authorities) must be signed by the head of an agency and submitted to OPM. Requests covering multiple positions must include a list of the positions in priority order. The head of an agency may request coverage of positions of a type not listed in 5 U.S.C. 5377(a)(2), as authorized by 5 U.S.C. 5377(i)(2) and Executive Order 13415.

(c) Requests for critical position pay authority to set pay above the rate for level II of the Executive Schedule and up to the rate for level I of the Executive Schedule because of exceptional circumstances require information and data that justify the higher pay. Requests for critical position pay authority to set pay above the rate for level I of the Executive Schedule due to rare circumstances require approval by the President. The head of an agency must submit such requests to OPM with the information required in paragraph (d) of this section. If OPM, in consultation with OMB, concurs with a request to set

pay above the rate for level I of the Executive Schedule, OPM will seek the President's approval. The President may establish a maximum limitation on the critical pay rate.

(d) At a minimum, all requests for critical position pay authority must include:

- (1) Position title;
- (2) Position appointment authority (for Senior Executive Service positions, appointment authority for any incumbent);
- (3) Pay plan and grade/level;
- (4) Occupational series of the position;
- (5) Geographic location of the position;
- (6) Current salary of the position or incumbent;
- (7) Name of incumbent (or "Vacant");
- (8) Length of time the incumbent has been in the position or length of time the position has been vacant;
- (9) A written evaluation of the need to designate the position as critical. Such an evaluation must include—
  - (i) The kinds of work required by the position and the context within which it operates;
  - (ii) The range of positions and qualification requirements that characterize the occupational field, including those that require extremely high levels of expertise;
  - (iii) The rates of pay reasonably and generally required in the public and private sectors for similar positions; and
  - (iv) The availability of individuals who possess the qualifications to do the work required by the position;
- (10) Documentation, with appropriate supporting data, of the agency's experience and, as appropriate, the experience of other organizations, in efforts to recruit or retain exceptionally well-qualified individuals for the position or for a position sufficiently similar with respect to the occupational field, required qualifications, and other pertinent factors, to provide a reliable comparison;
- (11) Assessment of why the agency could not, through diligent and comprehensive recruitment efforts and without using the critical position pay authority, fill the position within a reasonable period with an individual who could perform the duties and responsibilities in a manner sufficient to fulfill the agency's mission. This assessment must include a justification as to why the agency could not, as an effective alternative, use other human resources flexibilities and pay authorities, such as recruitment, relocation, and retention incentives under 5 CFR part 575;
- (12) An explanation regarding why the position should be designated a

critical position and made eligible for a higher rate of pay under this part within its organizational context (i.e., relative to other positions in the organization) and, when applicable, how it compares with other critical positions in the agency. The agency must include an explanation of how it will deal with perceived inequities among agency employees (e.g., situations in which employees in positions designated as critical would receive higher rates of pay than their peers, supervisors, or other employees in positions with higher-level duties and responsibilities);

(13) Documentation of the effect on the successful accomplishment of important agency missions if the position is not designated as a critical position, including an explanation and justification for OPM and OMB to expedite processing in cases where the agency believes that urgency warrants expedited processing;

(14) Any additional information the agency may deem appropriate to demonstrate that higher pay is needed to recruit or retain an employee for a critical position;

(15) Unless the position is an Executive Schedule position, a copy of the position description and qualification standard for the critical position; and

(16) The desired rate of basic pay for requests to set pay above the rate for level II of the Executive Schedule and justification to show that such a rate is necessary to recruit and retain an individual exceptionally well-qualified for the critical position.

**§ 535.105 Setting and adjusting rates of basic pay.**

(a) The rate of basic pay for a critical position may not be less than the rate of basic pay, including any locality-based comparability payments established under 5 U.S.C. 5304 or special rate supplement under 5 U.S.C. 5305 (or other similar payment or supplement under other legal authority) that would otherwise be payable for the position.

(b) If critical position pay authority is granted for a position, the head of an agency may set pay initially at any amount up to the rate of pay for level II or level I of the Executive Schedule, as applicable, without further approval unless a higher maximum rate is approved by the President under § 535.104(c).

(c) The head of an agency may make subsequent adjustments in the rate of basic pay for a critical position each January at the same time general pay adjustments are authorized for Executive Schedule employees under section 5318 of title 5, United States

Code. Such adjusted rates may not exceed the new rate for Executive Schedule level II or other applicable maximum established for the critical position. However, the employee must have at least a rating of Fully Successful or equivalent, and subsequent adjustments must be based on labor market factors, recruitment and retention needs, and individual accomplishments and contributions to an agency's mission.

(d) Employees receiving critical position pay are not entitled to locality-based comparability payments established under 5 U.S.C. 5304, special rate supplements under 5 U.S.C. 5305, or other similar payments or supplements under other legal authority.

(e) If an agency discontinues critical position pay for a given position (on its own initiative or because OPM, in consultation with OMB, terminates the authority under § 535.103(d)), the employee's rate of basic pay will be set at the rate to which the employee would be entitled had he or she not received critical pay, as determined by the head of the agency, unless the employee is eligible for a higher payable rate under the General Schedule maximum payable rate rule in § 531.221 and the agency chooses to apply that rule.

#### **§ 535.106 Treatment as rate of basic pay.**

A critical position pay rate is considered a rate of basic pay for all purposes, including any applicable premium pay, except—

(a) Application of any saved pay or pay retention provisions (e.g., 5 U.S.C. 5363); or

(b) Application of any adverse action provisions (e.g., 5 U.S.C. 7512).

#### **§ 535.107 Annual reporting requirements.**

(a) OPM must submit an annual report to Congress on the use of the critical position pay authority. Agencies must submit the following information to OPM by January 31 of each year on their use of critical position pay authority for the previous calendar year:

(1) The name, title, pay plan, and grade/level of each employee receiving a higher rate of basic pay under this subpart;

(2) The annual rate or rates of basic pay paid in the preceding calendar year to each employee in a critical position;

(3) The beginning and ending dates of such rate(s) of basic pay, as applicable;

(4) The rate or rates of basic pay that would have been paid but for the grant of critical position pay. This includes what the rate or rates of basic pay were, or would have been, without critical position pay at the time critical position

pay is initially exercised and any subsequent adjustments to basic pay that would have been made if critical position pay authority had not been exercised; and

(5) Whether the authority is still needed for the critical position(s).

### **PART 536—GRADE AND PAY RETENTION**

■ 4. The authority citation for part 536 continues to read as follows:

**Authority:** 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103–89, 107 Stat. 981; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92–502; § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004, Pub. L. 108–411, 118 Stat. 2305.

#### **Subpart A—General Provisions**

■ 5. Amend § 536.102 as follows:

■ a. Remove “or” at the end of paragraph (b)(7);

■ b. Remove the period at the end of paragraph (b)(8) and add “; or” in its place; and

■ c. Add paragraph (b)(9) to read as follows:

#### **§ 536.102 Coverage.**

\* \* \* \* \*

(b) \* \* \*

(9) Is reduced in pay upon termination of a critical position pay authority under 5 CFR part 535.

\* \* \* \* \*

[FR Doc. E8–19758 Filed 8–25–08; 8:45 am]

**BILLING CODE 6325–39–P**

### **OFFICE OF PERSONNEL MANAGEMENT**

#### **5 CFR Part 894**

**RIN 3206–AL03**

#### **Federal Employees Dental and Vision Insurance Program**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to administer the Federal Employee Dental and Vision Benefits Enhancement Act of 2004, signed into law December 23, 2004. This law establishes dental and vision benefits programs for Federal employees, annuitants, and their eligible family members.

**DATES:** September 25, 2008.

#### **FOR FURTHER INFORMATION CONTACT:**

Nataya Battle, (202) 606–1874, or e-mail at [nataya.battle@opm.gov](mailto:nataya.battle@opm.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On December 23, 2004, Public Law 108–496, 118 Stat. 4001, was signed into law. This law established a dental benefits and vision benefits program for Federal employees, annuitants, and their eligible family members. The first effective date of coverage was December 31, 2006.

On October 15, 2007, OPM published interim regulations in the **Federal Register** (72 FR 58243–58248) to administer the Federal Employees Dental and Vision Insurance Program (FEDVIP). Comments were requested by December 15, 2007. OPM received comments from an employee union, a participating health plan in the FEHB Program, and an independent organization.

One comment addressed the role of the carriers and the Administrator in the handling of the enrollment process. OPM contracts with the Administrator which has agreed to handle all aspects of the enrollment process on behalf of the carriers. Therefore the regulations have been revised to substitute “Administrator” for “carrier” wherever there is a reference to the enrollment process.

Another comment addressed concerns that OPM does not review appeals for denial of a claim. The dental and vision carriers conduct their own disputed claims process and are required to use an independent third party to conduct a final analysis of any dispute, upon appeal. This process was established to ensure an independent evaluation is conducted, but at minimal cost to Program enrollees.

A comment indicated that it was not clear whether enrollment or coverage would be denied for preexisting dental conditions. Under this Program, neither enrollment nor benefits coverage is denied due to a preexisting dental condition. However, since the dental program was established in order to provide benefits for dental services for teeth and their surrounding tissues, a carrier may determine that coverage does not extend to replacements for teeth missing before the effective date of enrollment in the Program.

Another comment suggested revising the language in § 894.601(a) to remove the reference to coverage ending at the end of the pay period “in which you were last eligible” and in § 894.601(b) to remove the reference to coverage ending at the end of the pay period for which the last premium allotment was made;