

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206-AF38

Pay Administration (General); Lump-Sum Payments for Annual Leave

AGENCY: Office of Personnel Management.

ACTION: Proposed rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to establish a Governmentwide policy for calculating lump-sum payments for accumulated and accrued annual leave for employees who separate from the Federal service.

DATES: Comments must be received on or before September 29, 1997.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Assistant Director for Compensation Policy, Human Resources Systems Service, Office of Personnel Management, Room 6H31, 1900 E Street NW., Washington, DC 20415 (FAX: (202) 606-0824), or email at payleave@opm.gov.

FOR FURTHER INFORMATION CONTACT: Brenda Roberts, (202) 606-2858, FAX (202) 606-0824, or email at payleave@opm.gov.

SUPPLEMENTARY INFORMATION: The Technical and Miscellaneous Civil Service Amendments Act of 1992 (Pub. L. 102-378, October 2, 1992) added section 5553 to title 5, United States Code, to give the Office of Personnel Management regulatory authority for the administration of lump-sum payments for accumulated and accrued annual leave. Under 5 U.S.C. 5551 and 5552, such lump-sum payments are made when an employee (1) separates from the Federal service or (2) enters on active duty in the armed forces and elects to receive a lump-sum payment for accumulated and accrued annual leave. The lump-sum payment must equal the pay the employee would have

received had he or she remained employed until expiration of the period of annual leave.

Section 6306 of title 5, United States Code, provides that when an employee is reemployed in the Federal service prior to the expiration of the lump-sum period, he or she must refund an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum period. In addition, an amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum leave period is recredited to the employee. OPM is authorized to regulate this requirement by 5 U.S.C. 6311.

OPM recognizes that agencies currently calculate lump-sum payments for annual leave and refunds based on their interpretation of the broad statutory language in 5 U.S.C. 5551, 5552, and 6306; OPM's regulations on lump-sum payments for employees who receive nonforeign area cost-of-living allowances, post differentials, or availability pay; and additional guidance provided by the former Federal Personnel Manual, Comptroller General opinions, court decisions, and the Federal Wage System Operating Manual. Consequently, agencies may not have consistent policies for including some types of pay in lump-sum payments for annual leave. On March 3, 1995, OPM asked Directors of Personnel for assistance in developing proposed regulations on lump-sum payments for annual leave. We received comments from 30 agencies. Agency opinions varied widely on what types of pay should be included in or excluded from lump-sum payments. After careful consideration of all agency comments, we are proposing Governmentwide rules for determining how lump-sum payments should be calculated. The proposed regulations are designed to ensure that lump-sum payments are calculated consistently throughout the Federal Government. When OPM issues final regulations on lump-sum payments for annual leave, they will not be made retroactive. The final regulations will apply only to lump-sum payments made by an agency on or after the effective date of the final regulations. The following paragraphs summarize the major provisions of the proposed regulations.

Employees Eligible for a Lump-Sum Payment

Generally, an employee is entitled to a lump-sum payment for accumulated and accrued annual leave when he or she (1) separates or retires from Federal service; (2) dies; or (3) transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, or to a position that is covered by a different leave system, when his or her accumulated and accrued annual leave cannot be transferred. In addition, section 1611 of Pub. L. 104-201, September 23, 1996, added paragraph (c) to 5 U.S.C. 5551 to require the Department of Defense (DOD) to pay a lump-sum payment to an employee for any unused annual leave that was restored under 5 U.S.C. 6304(d)(3) when the employee (1) transfers to a position in any other department or agency of the Federal Government or (2) moves to a position within DOD not located at an installation undergoing closure or realignment. This new entitlement to a lump-sum payment for certain DOD employees became effective on September 23, 1996.

There are five exceptions to the general rule that employees who separate, die, or transfer are entitled to a lump-sum payment:

(1) An employee who enters on active duty in the armed forces may elect to receive a lump-sum payment for accumulated and accrued annual leave or may request that the annual leave remain to his or her credit until he or she returns from active duty.

(2) An employee in a missing status (as defined in 5 U.S.C. 5561(5)) on or after January 1, 1965, is entitled to receive a lump-sum payment for accumulated and accrued annual leave upon return or may elect to have the annual leave restored in a separate leave account under 5 U.S.C. 6304(d)(2). The lump-sum payment is computed based on the pay in effect at the time the annual leave became subject to forfeiture.

(3) An employee who transfers to a position excepted from subchapter I of chapter 63 of title 5, United States Code, by 5 U.S.C. 6301(2)(x)-(xiii) (i.e., certain Presidential appointees or designees) may not receive a lump-sum payment upon appointment to the new position. The annual leave must be held in abeyance for recredit if the employee is

subsequently reemployed without a break in service in a position to which his or her annual leave may be transferred. If the employee does not return to a position to which his or her annual leave can be transferred and later becomes eligible for a lump-sum payment, the lump-sum payment is computed based on the pay in effect at the time the employee initially transferred to the excepted position. The lump-sum period is projected beginning on the effective date of the employee's separation, death, or transfer.

(4) An employee who transfers to a position not covered by the Federal leave system established under chapter 63 of title 5, United States Code, and to which only a portion of his or her annual leave may be transferred, will have the remaining annual leave held in abeyance for recredit until he or she is subsequently reemployed without a break in service in a position to which his or her annual leave may be transferred. If the employee does not return to a position to which his or her annual leave can be transferred and later becomes eligible for a lump-sum payment, the lump-sum payment is computed based on the rate in effect at the time the employee initially transferred to the position to which only a portion of his or her annual leave could be transferred. The lump-sum payment is paid by the current employing agency. The lump-sum period is projected beginning on the effective date of the employee's separation, death, or transfer.

(5) An employee who has been determined by an agency to be in a continuing employment program under which the employee is required to work a "mixed tour of duty" will have his or her annual leave held in abeyance during intermittent duty and recredited when he or she returns to full-time or part-time employment. If the employee separates, transfers, or dies during the period of intermittent employment, he or she is entitled to a lump-sum payment for the annual leave held in abeyance. (A "mixed tour of duty" is a condition of employment for positions in which a fluctuating workload requires an employee to work full-time or part-time for a portion of the year and intermittent for the remainder.)

Employees not Eligible for a Lump-Sum Payment

An employee is *not* entitled to a lump-sum payment for accumulated and accrued annual leave when he or she (1) transfers between positions covered by subchapter I of chapter 63 of title 5, United States Code, except as

provided by 5 U.S.C. 5551(c); (2) transfers to a position not covered by subchapter I of chapter 63 of title 5, United States Code, but to which his or her accumulated and accrued annual leave may be transferred under 5 U.S.C. 6308; (3) transfers to the government of the District of Columbia or the U.S. Postal Service; or (4) is concurrently employed in more than one part-time position and who separates from one of the part-time positions. (If an employee is employed in part-time positions in different agencies, the annual leave accumulated and accrued in the agency from which the employee separates must be transferred to the current employing agency.)

Projecting the Lump-Sum Leave Period

A lump-sum payment for accumulated and accrued annual leave equals the pay an employee would have received had he or she remained in the service until expiration of the period of annual leave. The period of leave used for calculating the lump-sum payment may not be extended due to any holiday occurring after separation. Annual leave donated under the Federal voluntary leave transfer and leave bank programs may not be included in a lump-sum payment and does not serve to extend the lump-sum leave period. (See 5 CFR 630.909(e)(2) and 630.1009(e)(1).) Compensatory time off and unused credit hours accumulated under a flexible work schedule are not annual leave. Therefore, they are not included in a lump-sum payment and do not serve to extend the lump-sum leave period. Any remaining compensatory time off or credit hours (not in excess of 24) may be paid separately as part of a final salary payment when an employee separates. (See 5 CFR 550.114(d) and 551.531(d) and 5 U.S.C. 6126.)

The lump-sum payment is projected beginning on the first workday (counting any holiday) occurring after the date of separation, death, or transfer, as applicable, and including subsequent workdays and holidays. An agency must project the lump-sum leave period so that any annual leave restored under 5 U.S.C. 6304(d) is used before projecting any accumulated annual leave to the employee's credit in his or her regular annual leave account. (Under 5 CFR 630.306 and 630.309, annual leave that is restored must be used by a certain date. Projecting the lump-sum leave period so that restored annual leave is used before regular annual leave will preclude the forfeiture of restored annual leave for employees who are reemployed in the Federal service prior

to the expiration of the lump-sum leave period.)

Calculating the Lump-Sum Payment

Under 5 U.S.C. 5551, "the lump-sum payment shall equal the pay (excluding any differential under section 5925 and any allowance under section 5928) the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave." The term "pay" is not further defined in law. In these proposed regulations, we have attempted to offer an interpretation of the "pay" to be included in a lump-sum payment that is consistent with former Federal Personnel Manual guidance, Comptroller General opinions, and agency practices.

The proposed regulations provide that the following types of pay and adjustments are to be included in a lump-sum payment for annual leave:

(1) An employee's rate of basic pay. An employee's rate of basic pay is defined as the rate fixed by law or administrative action for the position held by the employee and includes any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990; a locality rate of pay under subpart F of part 531 of title 5, Code of Federal Regulations; a special law enforcement adjusted rate of pay under subpart C of part 531, including a rate continued under § 531.307; and any continued rate of pay under subpart G of part 531.

(2) Any statutory adjustments in pay and any general system-wide increases in pay that are authorized by law (or the President's alternative plan) under sections 5303, 5304, 5304a, 5305, 5318, 5363, 5372, 5372a, 5376, 5382, or 5392 of title 5, United States Code, *prior* to the date of separation, death, or transfer *and* which become effective during the lump-sum leave period. The lump-sum payment is adjusted to reflect the increased rate beginning on the effective date of the pay adjustment.

(3) For a prevailing rate employee, the scheduled rate of pay under 5 U.S.C. 5343 and any applicable wage adjustment that is determined under 5 U.S.C. 5343 if the employee separates, dies, or transfers after issuance of an official order to conduct a wage survey for his or her applicable wage area in accordance with 5 CFR 532.231(d)(3)

and which becomes effective during the lump-sum leave period. The lump-sum payment is adjusted to reflect the increased rate beginning on the effective date of the wage adjustment.

(4) A within-grade increase authorized under 5 U.S.C. 5335 (if the employee's work is of an acceptable level of competence) or under 5 U.S.C. 5343(e)(2) (if the employee's work performance rating is satisfactory or better) and the employee has completed the required waiting period prior to separation, death, or transfer. (See 5 CFR 531.404 and 532.417.)

(5) Annual premium pay for standby duty (5 U.S.C. 5545(c)(1)), annual premium pay for administratively uncontrollable overtime (AUO) work (5 U.S.C. 5545(c)(2)), and availability pay for criminal investigators (5 U.S.C. 5545a). The lump-sum payment is calculated using the percentage rate received by the employee immediately prior to separation, death, or transfer.

(6) For certain employees, night pay earned for nonovertime hours (5 U.S.C. 5545), Sunday premium pay (5 U.S.C. 5546(a)), and night differential for prevailing rate employees earned during nonovertime hours (5 U.S.C. 5343(f)).

The amount of night pay and/or Sunday premium pay to include in a lump-sum payment is based on the average amount of night pay and/or Sunday premium pay earned by the employee during the 12 administrative workweeks immediately prior to separation, death, or transfer (or a lesser period if the employee was not employed for the full 12 weeks prior to separation, death, or transfer).

Night differential for prevailing rate employees is included for all regularly scheduled nonovertime periods of night shift duty covered by the unused annual leave as if the employee had continued to work beyond the effective date of separation. The night shift differential is paid at the percentage rate received by the employee for the last full workweek immediately prior to separation. When a night shift has been formally canceled or an employee has been regularly scheduled for continuous day shift work on or before the date of separation, the lump-sum leave payment is computed on the day rate.

As a result of the decision in *Armitage, et. al. v. United States* (Fed. Cir. No. 92-5157, April 12, 1993), employees who are regularly scheduled to work on Sunday are entitled to Sunday premium pay for periods of paid leave. Based on this decision, OPM revised its regulations in December 1994 to require the payment of Sunday premium pay for periods of paid leave or excused absence (5 CFR 550.171).

Under the proposed regulations, certain employees covered by the Armitage decision are entitled to include night pay earned during nonovertime hours, Sunday premium pay, and night differential for prevailing rate employees earned during nonovertime hours in their lump-sum payments for annual leave.

However, recently enacted legislation prohibits the use of funds appropriated by the Treasury, Postal Service, and General Government Appropriations Act, 1997, as contained in section 101(f) of Public Law 104-208, the Omnibus Consolidated Appropriations Act, 1997, for the payment of Sunday premium pay and night differential pay to employees who do not actually perform work during the time corresponding to such Sunday premium or night differential pay. This provision became effective on September 30, 1996, and will expire on September 30, 1997, unless legislation is enacted to continue it. Employees covered by this Act may not receive Sunday premium and night differential pay during periods of paid leave. The restriction on paying Sunday premium pay during periods when work is not performed has been in effect for employees of the Federal Aviation Administration under the Transportation and Related Agencies Appropriations Acts for fiscal years 1995, 1996, and 1997.

(7) Overtime pay under the Fair Labor Standards Act of 1938, as amended (FLSA), for overtime hours regularly scheduled during an employee's uncommenced tour of duty as defined in 5 CFR 630.201.

(8) Nonforeign area cost-of-living allowances under 5 U.S.C. 5941, nonforeign area post differentials under 5 U.S.C. 5941, and foreign area post allowances under 5 U.S.C. 5924(1) (as authorized by section 220 of the U.S. Department of State's Standardized Regulations (Government Civilians, Foreign Areas)) if the employee was receiving such differential or allowance immediately prior to separation, death, or transfer in the nonforeign or foreign area. Current OPM regulations in 5 CFR 591.210(b)(1) already require a nonforeign area cost-of-living allowance and a nonforeign post differential to be included in a lump-sum payment if the employee separates in the nonforeign area. However, it should be noted that 5 U.S.C. 5551 specifically excludes a foreign area post differential (5 U.S.C. 5925) and foreign area danger pay (5 U.S.C. 5928) from lump-sum payments for annual leave.

OPM proposes to delegate authority to the head of each agency to determine other kinds of pay authorized in statutes

other than title 5, United States Code, that should be included in a lump-sum payment, consistent with 5 U.S.C. 5551, 5552, and 6306. No other types of pay or pay adjustments may be included in a lump-sum payment for annual leave unless specifically authorized by the head of an agency through the authority delegated by OPM.

Refund of Lump-Sum Payment

Under 5 U.S.C. 6306, when an employee who receives a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551 is reemployed in the Federal service prior to the end of the period covered by the lump-sum payment, the employee must refund to the employing agency an amount equal to the payment covering the period between the date of reemployment and the expiration of the lump-sum period. This rule applies whether an employee is reemployed in a position covered by chapter 63 of title 5, United States Code, or a different formal leave system. The refund is based on the pay used to compute the lump-sum payment; e.g., an employee who received a lump-sum payment based on the pay for a GS-11 position must refund the lump-sum payment based on the same GS-11 pay, even if he or she is reemployed at a lower or higher grade level. The refund is deposited in the Treasury of the United States to the credit of the employing agency.

An agency may permit an employee to refund the lump-sum payment for annual leave in installments. If an agency permits the lump-sum refund to be paid in installments, the employee must pay the lump-sum payment refund in full within 1 year after the date of reemployment. The annual leave will be recredited to the employee's annual leave account on the date the refund is paid in full.

An employee who is reemployed in the Federal service after the expiration of the lump-sum period is not required to refund any portion of a lump-sum payment. An employee who is reemployed prior to the expiration of the lump-sum period in a Federal position that does not have a formal leave system and whose annual leave cannot be recredited is not required to refund any portion of a lump-sum payment. Under 5 U.S.C. 6306(a), an employee who is reemployed in a position listed in 5 U.S.C. 6301(2)(ii), (iii), (vi), or (vii) (i.e., an intermittent position; a temporary, hourly-rate position in construction work; a position as an employee of either or both Houses of Congress; or certain positions in corporations supervised by

the Farm Credit Administration) is not required to refund any portion of a lump-sum payment.

Recredit of Annual Leave

When an individual is reemployed in the Federal service prior to the expiration of the lump-sum leave period in a position covered by subchapter I of chapter 63 of title 5, United States Code, an amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum leave period must be recredited to the employee by the employing agency. Upon full payment of the lump-sum payment refund, the agency must recredit the employee's annual leave to his or her account. The recredited annual leave is available for use by the employee on or after the date it is recredited.

When an individual is reemployed in the Federal service prior to the expiration of the lump-sum leave period in a position covered by a different formal leave system, the amount of annual leave to be recredited to the employee by the employing agency must be converted based on the rules for recrediting annual leave in 5 CFR 630.501(b).

If any part of the lump-sum refund is for a period of annual leave restored under 5 U.S.C. 6304(d), the restored leave is credited in a separate leave account, and the expiration date for its use is the same date as that originally established during the former employment. If the originally established expiration date for the restored leave occurs before the date of reemployment, a refund is required for all of the unexpired portion, but none of that restored leave may be recredited. Therefore, an agency may wish to consider delaying the date of reemployment until expiration of the period represented by restored annual leave.

In most cases, the annual leave recredited is subject to the maximum annual leave limitation in 5 U.S.C. 6304(a), (b), (c), or (f), as appropriate, for the position in which reemployed. For example, if an employee is reemployed in a position covered by 5 U.S.C. 6304(a), the maximum annual leave limitation is 240 hours. If the annual leave to be recredited is in excess of the maximum annual leave ceiling permitted for the position in which reemployed, a new maximum leave ceiling is established for the employee as follows:

(1) If the maximum leave ceiling in the former position (prior to separation or transfer) is higher than the maximum

leave ceiling in the current position in which reemployed, a new maximum annual leave ceiling is established at the lesser of: (a) The employee's former maximum annual leave ceiling at the time of separation or transfer, or (b) the amount of annual leave to be recredited. The employee's new maximum leave ceiling is subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than the maximum leave ceiling for the position in which reemployed.

(2) If a member of the Senior Executive Service (SES) had a personal leave ceiling established under 5 CFR 630.301(d) prior to separation or transfer that is higher than the maximum leave ceiling in the current position in which employed, a new personal leave ceiling is established at the lesser of: (a) The employee's personal leave ceiling established under 5 CFR 630.301(d) prior to separation or transfer, or (b) the amount of annual leave to be recredited. The new personal leave ceiling is subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than the maximum leave ceiling for the position in which reemployed.

Under 5 U.S.C. 6306(b), when an employee is reemployed in a position listed in 5 U.S.C. 6301(2)(x)-(xiii) (i.e., certain Presidential appointees or designees), the amount of annual leave to be recredited is to be held in abeyance and remain to the employee's credit. The employee will receive a lump-sum payment for the annual leave if he or she later separates, transfers, or dies. If, instead, the employee transfers to a position covered by chapter 63 of title 5, or to a position covered by a different formal leave system, the annual leave to the employee's credit must be recredited to the employee by the employing agency.

Income Tax and Deductions

Under 5 U.S.C. 5551, a lump-sum payment to a separated or transferred employee is considered pay for income tax purposes. A lump-sum payment is not subject to deductions for retirement under the Civil Service Retirement System or the Federal Employees Retirement System, health benefits under the Federal Employees Health Benefits program, life insurance under the Federal Employees Group Life Insurance program, or savings under the Thrift Savings Plan. An employee does not accrue leave for the period covered by the lump-sum payment. Finally, a lump-sum payment is subject to garnishment under parts 581 and 582 of

title 5, Code of Federal Regulations, and to administrative offset (for collection of debts to the Federal Government under part 102 of title 4, Code of Federal Regulations).

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 employees and agencies.

List of Subjects in 5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is proposing to amend part 550 of title 5 of the Code of Federal Regulations as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

1. Subpart L is added to read as follows:

Subpart L—Lump-sum Payment for Accumulated and Accrued Annual Leave

- 550.1201 Purpose, applicability, and administration.
- 550.1202 Definitions.
- 550.1203 Eligibility.
- 550.1204 Projecting the lump-sum leave period.
- 550.1205 Calculating a lump-sum payment.
- 550.1206 Refund of lump-sum payment and recredit of annual leave.

Subpart L—Lump-sum Payment for Accumulated and Accrued Annual Leave

Authority: 5 U.S.C. 5553, 6306, and 6311.

§ 550.1201 Purpose, applicability, and administration.

(a) *Purpose.* This subpart provides regulations to implement sections 5551, 5552, and 6306 of title 5, United States Code, and must be read together with those sections. 5 U.S.C. 5551 and 5552 provide for a lump-sum payment for accumulated and accrued annual leave when an employee enters on active duty in the armed forces and elects to receive a lump-sum payment for accumulated and accrued annual leave or separates from Federal service. 5 U.S.C. 6306 requires that when an employee is reemployed in the Federal service prior to the expiration of the lump-sum period, he or she shall refund an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum period.

(b) *Applicability.* This subpart applies to—

(1) Any employee who separates, dies, or transfers under the conditions prescribed in § 550.1203; and

(2) Any employee or any individual employed by a territory or possession of the United States who enters on active duty in the armed forces and who elects to receive a lump-sum payment for accumulated and accrued annual leave.

(c) *Administration.* The head of an agency having employees subject to this subpart shall be responsible for the proper administration of this subpart.

§ 550.1202 Definitions.

In this subpart—

Accumulated and accrued annual leave means any annual leave accumulated and accrued, as these terms are defined in § 630.201 of this chapter, plus any annual leave credited to an employee under 5 U.S.C. 6304(c) and § 630.301(d) of this chapter and any annual leave restored under 5 U.S.C. 6304(d). Accumulated and accrued annual leave does not include annual leave received by a leave recipient under the voluntary leave transfer and leave bank programs under subchapters III and IV of chapter 63 of title 5, United States Code, and annual leave advanced to an employee under 5 U.S.C. 6302(d).

Administrative workweek has the meaning given that term in § 610.102 of this chapter.

Agency means—

(1) An executive agency and a military department as defined in sections 105 and 102 of title 5, United States Code, respectively; and

(2) A legislative or judicial agency or a unit of the legislative or judicial branch of the Government that has positions in the competitive service.

Employee has the meaning given that term in 5 U.S.C. 2105.

Lump-sum payment means a final payment to an employee for accumulated and accrued annual leave.

Mixed tour of duty means a condition of employment for positions in which a fluctuating workload requires an employee to work full-time or part-time for a limited portion of the year and intermittent for the remainder.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind.

Transfer means the movement of an employee to another position without a break in service of 1 or more workdays.

§ 550.1203 Eligibility.

(a) A lump-sum payment for accumulated and accrued annual leave shall be paid when an employee—

(1) Separates or retires from the Federal service;

(2) Dies; or

(3) Except as provided in paragraphs (c), (d), and (e), of this section, transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, or to a position that is covered by a different leave system, when his or her accumulated and accrued annual leave cannot be transferred.

(b) An employee who has unused annual leave that was restored under 5 U.S.C. 6304(d)(3) shall receive a lump-sum payment for the restored annual leave from the Department of Defense (DOD) when the employee transfers to a position in any other department or agency of the Federal Government or moves to a position within DOD not located at an installation undergoing closure or realignment.

(c) An employee who enters on active duty in the armed forces may elect to receive a lump-sum payment for accumulated and accrued annual leave or may request that his or her annual leave remain to his or her credit until return from active duty. However, any annual leave previously restored under 5 U.S.C. 6304(d) may not be credited and may be paid in a lump-sum payment when the employee enters active duty.

(d) An employee who transfers to a position in a public international organization under 5 U.S.C. 3582 may elect to receive a lump-sum payment for accumulated and accrued annual leave or may request that his or her annual leave be held in abeyance for recredit upon reemployment without a break in service in the Federal service. If the employee chooses to receive a lump-sum payment and is reemployed in the Federal service within 6 months after transfer to a public international organization, he or she shall refund the amount of the lump-sum payment to the agency. An amount of leave equal to the leave represented by the refund shall be credited to the employee's account under § 550.1206.

(e) Except as provided in paragraph (d)(1) of this section, an employee who transfers to a position excepted from subchapter I of chapter 63 of title 5, United States Code, by 5 U.S.C. 6301(2)(x)–(xiii) shall not receive a lump-sum payment upon appointment to the new position. The accumulated and accrued annual leave shall be held in abeyance for recredit when the employee is subsequently reemployed without a break in service in a position to which his or her accumulated and accrued annual leave may be transferred.

(f) An employee shall receive a lump-sum payment for any annual leave restored under 5 U.S.C. 6304(d) upon transfer to a position excepted by 5 U.S.C. 6301(2)(x)–(xiii). If the employee later becomes eligible for a lump-sum payment under the conditions specified in this section, a lump-sum payment shall be paid at that time for the annual leave held in abeyance. The lump-sum payment shall be computed under § 550.1205(b) based on the pay the employee was receiving immediately before the date of the transfer to the position excepted by 5 U.S.C. 6301(2)(x)–(xiii).

(g) An employee who transfers to a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, and to which only a portion of his or her accumulated and accrued annual leave may be transferred, shall have the annual leave that cannot be transferred held in abeyance for recredit when the employee is subsequently employed without a break in service in a position to which his or her accumulated and accrued annual leave may be transferred. If the employee later becomes eligible for a lump-sum payment under the conditions specified in this section, a lump-sum payment shall be paid at that time for the annual leave held in abeyance. The lump-sum payment shall be computed under § 550.1205(b) based on the pay the employee was receiving immediately before the date the transfer became effective. The employee's current employing agency shall compute and pay the lump-sum payment.

(h) An employee in a missing status (as defined in 5 U.S.C. 5561(5)) on or after January 1, 1965, shall receive a lump-sum payment for accumulated and accrued annual leave or may elect to have such annual leave restored in a separate leave account under 5 U.S.C. 6304(d)(2) upon his or her return to Federal service. The lump-sum payment shall be computed under § 550.1205(b) based on the rate of pay in effect at the time the annual leave became subject to forfeiture under 5 U.S.C. 6304(a), (b), or (c).

(i) A lump-sum payment for accumulated or accrued annual leave shall not be paid to—

(1) An employee who transfers between positions covered by subchapter I of chapter 63 of title 5, United States Code, except to the extent provided by paragraph (b) of this section;

(2) An employee who transfers to a position not covered by subchapter I of chapter 63 of title 5, United States Code, but to which his or her accumulated and

accrued annual leave may be transferred;

(3) An employee who transfers to the government of the District of Columbia or the U.S. Postal Service;

(4) An employee who is concurrently employed in more than one part-time position and who separates from one of the part-time positions, in which case (if the part-time positions are in different agencies) the annual leave accumulated and accrued in the agency from which the employee separates shall be transferred to the current employing agency;

(5) A nonappropriated fund employee of the Department of Defense or the Coast Guard who moves without a break in service of more than 3 days to an appropriated fund position within the Department of Defense or the Coast Guard, respectively, under 5 U.S.C. 6308(b); or

(6) An employee who is determined by an agency to be in a continuing employment program under which the employee is required to work a mixed tour of duty. (The annual leave shall be held in abeyance during intermittent duty and recredited when the employee returns without a break in service to full-time or part-time employment. In addition, any fractional hours of creditable service for annual leave accrual purposes under § 630.204 of this chapter shall be held in abeyance and recredited when the employee returns to full-time or part-time employment.)

§ 550.1204 Projecting the lump-sum leave period.

(a) A lump-sum payment shall equal the pay an employee would have received if he or she had remained in the Federal service until the expiration of the accumulated and accrued annual leave to the employee's credit. The lump-sum period shall be projected beginning on the first workday (counting any holiday) occurring after the date of separation, death, or transfer under the conditions prescribed in § 550.1203 and shall continue counting all subsequent workdays and holidays until the expiration of the period of annual leave. The period of leave used for calculating the lump-sum payment shall not be extended by any holidays under 5 U.S.C. 6103 or applicable Executive order occurring after the date of separation, death, or transfer; annual leave donated to an employee under the leave transfer or leave bank programs under subparts I and J of part 630 of this chapter; compensatory time off earned under 5 U.S.C. 5543 and §§ 550.114(d) or 551.531; or credit hours accumulated under an alternative work schedule under 5 U.S.C. 6126.

(b) For employees whose annual leave was held in abeyance immediately prior to becoming eligible for a lump-sum payment, the lump-sum payment shall be projected beginning on the first workday occurring after the date of separation, death, or transfer under the conditions prescribed in § 550.1203.

(c) An agency shall project the lump-sum leave period so that any annual leave restored under 5 U.S.C. 6304(d) in a separate leave account expires before projecting any accumulated annual leave to the employee's credit in his or her regular annual leave account.

§ 550.1205 Calculating a lump-sum payment.

(a) A lump-sum payment shall be computed based on the types of pay in paragraph (b) of this section in effect at the time an employee becomes eligible for a lump-sum payment under the conditions prescribed in § 550.1203 and any adjustments in pay included in paragraphs (b) (2), (3), and (4) of this section. An agency shall calculate a lump-sum payment by multiplying the number of hours of accumulated and accrued annual leave by the applicable hourly rate of pay, including types of pay listed in paragraph (b) of this section, or by using a mathematically equivalent method, such as multiplying weeks of annual leave by the applicable weekly rate of pay. If a lump-sum payment is calculated using weekly rates, the number of weeks of annual leave must be rounded to the fourth decimal place (e.g., 0.4444). An annual rate of pay shall be converted to an hourly rate of pay by dividing the annual rate of pay by 2,087 and rounding to the nearest cent, counting one-half cent and over as the next higher cent.

(b) A lump-sum payment shall be computed using the following types of pay and pay adjustments, as applicable:

(1) The greatest of the following rates of pay:

(i) An employee's rate of basic pay, including any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Public Law 101-509, 104 Stat. 1465;

(ii) A locality rate of pay under subpart F of part 531 of this chapter or similar provision or law, where applicable;

(iii) A special law enforcement adjusted rate of pay under subpart C of part 531 of this chapter, where applicable, including a rate continued under § 531.307 of this chapter; or

(iv) A continued rate of pay under subpart G of part 531 of this chapter.

(2) Any statutory adjustments in pay or any general system-wide increases in pay that are authorized by law or the President's alternative plan, such as adjustments under sections 5303, 5304, 5305, 5318, 5363, 5372, 5372a, 5376, 5382, or 5392 of title 5, United States Code, prior to the date of separation, death, or transfer, and which become effective during the lump-sum leave period. The lump-sum payment shall be adjusted to reflect the increased rate on and after the effective date of the pay adjustment.

(3) In the case of a prevailing rate employee, a lump-sum payment shall include the scheduled rate of pay under 5 U.S.C. 5343 and any applicable adjustments in prevailing rates that are determined under 5 U.S.C. 5343 when the employee separates after issuance of an official order to conduct a wage survey for his or her applicable wage area in accordance with 5 CFR 532.231(d)(3) and which become effective during the lump-sum leave period. The lump-sum payment shall be adjusted to reflect the increased prevailing rate on and after the effective date of the rate adjustment.

(4) A within-grade increase under 5 U.S.C. 5335 or 5 U.S.C. 5343(e)(2) if the employee has met the requirements of § 531.404 or § 532.417 of this chapter prior to separation, death, or transfer, as applicable.

(5) The following types of premium pay:

(i) Night differential under 5 U.S.C. 5343(f) for nonovertime hours at the percentage rate received by a prevailing rate employee for the last full workweek immediately prior to separation, death, or transfer;

(ii) Night pay under 5 U.S.C. 5545 for nonovertime hours based on the average amount of night pay received by an employee during the 12 workweeks immediately prior to the date the employee became eligible for a lump-sum payment (or a lesser period if the employee was not employed in the position for at least 12 workweeks immediately prior to the date he or she became eligible for a lump-sum payment);

(iii) Sunday premium pay under 5 U.S.C. 5546(a) for nonovertime hours on Sunday based on the average amount of Sunday premium pay received by the employee during the 12 workweeks immediately prior to the date the employee became eligible for a lump-sum payment (or a lesser period if the employee was not employed in the position for at least 12 workweeks immediately prior to the date the

employee became eligible for a lump-sum payment); and

(iv) Premium pay under 5 U.S.C. 5545(c) or 5545a if the employee was receiving premium pay immediately prior to separation, death, or transfer under the conditions prescribed in § 550.1203. The lump-sum payment shall be based on the percentage rate received by the employee immediately prior to separation, death, or transfer.

(6) Overtime pay under the Fair Labor Standards Act of 1938, as amended (FLSA), for overtime work that is regularly scheduled during an employee's established uncommon tour of duty as defined in § 630.201 of this chapter if such uncommon tour of duty was applicable to the employee immediately prior to separation, death, or transfer under the conditions prescribed in § 550.1203. The lump-sum payment shall include the amount of FLSA overtime pay for regularly scheduled overtime work ordered or approved at the time of separation, death, or transfer.

(7) A cost-of-living allowance and/or post differential in a nonforeign area under 5 U.S.C. 5941 if the employee was receiving the allowance and/or post differential immediately prior to separation, death, or transfer in the nonforeign area.

(8) A post allowance in a foreign area under 5 U.S.C. 5924(1) and the *Standardized Regulations* (Government Civilians, Foreign Areas) if the employee was receiving the post allowance immediately prior to separation, death, or transfer in the foreign area.

(c) The head of an agency shall prescribe regulations or standards for the inclusion of any other kinds of pay authorized in statutes other than title 5, United States Code, in a lump-sum payment. Such regulations or standards shall be consistent with 5 U.S.C. 5551, 5552, 6306, and other applicable provisions of law.

(d) Except as provided in paragraph (c) of this section, a lump-sum payment shall exclude any other pay not specifically listed in paragraph (b) of this section.

(e) An employee shall not earn leave for the period covered by a lump-sum payment.

(f) A lump-sum payment is not subject to deductions for retirement under the Civil Service Retirement System or the Federal Employees Retirement System established by chapters 83 and 84 of title 5, United States Code, respectively; health benefits under the Federal Employees Health Benefits program established by chapter 89 of title 5, United States Code; life insurance under

the Federal Employees Group Life Insurance program established by chapter 87 of title 5, United States Code; and savings under the Thrift Savings Plan established by subchapter III of chapter 84 of title 5, United States Code.

(g) When a reemployed annuitant's pay is reduced in accordance with 5 CFR 831.702 of this chapter, the reemployed annuitant's lump-sum payment at the time of his or her separation, death, or transfer under the conditions prescribed in § 550.1203 shall be computed using his or her pay before such reduction.

(h) A lump-sum payment is subject to garnishment under parts 581 and 582 of this chapter and to administrative offset (for recovery of debts to the Federal Government) under 4 CFR part 102.

§ 550.1206 Refund of lump-sum payment and recredit of annual leave.

(a) Except as provided in paragraphs (d), (e), and (f) of this section, when an employee who receives a lump-sum payment for accumulated and accrued annual leave under 5 U.S.C. 5551 is reemployed in the Federal service prior to the end of the period covered by the lump-sum payment, the employee shall refund to the employing agency an amount equal to the pay included in the lump-sum payment under § 550.1205(b) that covers the period between the date of reemployment and the expiration of the lump-sum period. The refund shall be computed based on the pay used to compute the lump-sum payment under § 550.1205(b). An agency may permit an employee to refund the lump-sum payment for annual leave in installments. If an agency permits the lump-sum refund to be paid in installments, the employee shall pay the lump-sum payment refund in full within 1 year after the date of reemployment.

(b) An amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum period shall be recredited to the employee when the full refund is paid to the agency. The recredited annual leave shall be made available for use by the employee on and after the date the annual leave is recredited. Annual leave shall be recredited as follows:

(1) When an employee is reemployed in the Federal service in a position covered by subchapter I of chapter 63 of title 5, United States Code, an amount of annual leave equal to the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum period shall be recredited to the employee by the employing agency.

(2) When an employee is reemployed in the Federal service in a position that is not covered by subchapter I of chapter 63 of title 5, United States Code, but is covered by a different leave system, an amount of annual leave representing the days or hours of work remaining between the date of reemployment and the expiration of the lump-sum period, as determined under § 630.501(b) of this chapter, shall be recredited to the employee by the employing agency. If the unexpired period of leave covers a larger amount of leave than can be recredited under a different leave system, the employee shall refund only the amount that represents the leave that can be recredited.

(3) If any part of the lump-sum refund made under paragraph (a) of this section reflects annual leave restored under 5 U.S.C. 6304(d), the annual leave shall be restored in a separate account, and the time limit for using the restored annual leave shall be the same as that originally established under § 630.306 of this chapter prior to the employee's separation or transfer under the conditions prescribed in § 550.1203.

(c) Except as provided in paragraph (d) of this section, the annual leave recredited under paragraph (b) of this section shall be subject to the maximum annual leave limitation established under 5 U.S.C. 6304 (a), (b), (c), or (f), as appropriate, for the position in which reemployed.

(d) If the annual leave recredited to an employee under paragraph (b) of this section is in excess of the maximum annual leave limitation established under 5 U.S.C. 6304 (a), (b), (c), or (f), as appropriate, for the position in which reemployed, the employee's maximum annual leave limitation shall be determined as follows:

(1) If at the time of separation or transfer an employee was subject to a higher maximum annual leave limitation than the maximum annual leave limitation for the position in which reemployed, a new maximum annual leave limitation shall be established at the lesser of the employee's former maximum annual leave limitation at the time of separation or transfer or the amount of annual leave to be recredited to the employee under paragraph (b) of this section. The new maximum annual leave limitation shall be subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the employee's accumulated annual leave is equal to or less than the maximum annual leave limitation for the position in which reemployed.

(2) A member of the Senior Executive Service (SES) who had a personal leave ceiling established under § 630.301(d) of

this chapter and who is reemployed in a position covered by subchapter I of chapter 63 of title 5, United States Code, shall have a new personal leave ceiling established at the lesser of his or her personal leave ceiling established under § 630.301(d) of this chapter at the time of separation or transfer or the amount of annual leave to be recredited to the SES member under paragraph (b) of this section. The new personal leave ceiling shall be subject to reduction in the same manner as provided in 5 U.S.C. 6304(c) until the SES member's accumulated annual leave is equal to or less than the maximum annual leave limitation for the position in which reemployed.

(e) An employee who is reemployed in a position listed in 5 U.S.C. 6301(2) (ii), (iii), (vi), or (vii) shall not be required to refund a lump-sum payment under paragraph (a) of this section.

(f) An employee who is reemployed in a position that has no leave system to which annual leave can be recredited shall not be required to refund a lump-sum payment under paragraph (a) of this section.

(g) When an employee is reemployed in a position listed in 5 U.S.C. 6301(2) (x)-(xiii), the amount of annual leave to be recredited to the employee under paragraph (b) of this section shall remain to the employee's credit and shall become payable when the employee becomes eligible for a lump-sum payment under the conditions prescribed in § 550.1203. If the employee subsequently transfers to a position covered by subchapter I of chapter 63 of title 5, United States Code, or to a position under a different formal leave system to which his or her annual leave can be recredited, the annual leave to the employee's credit shall be recredited to the employee by the employing agency under § 550.1206(b)(1).

(h) An agency shall document the calculation of an employee's lump-sum payment as provided in § 550.1205(b) so as to permit the subsequent calculation of any refund required under paragraph (a) of this section and any recredit of annual leave required under paragraph (b) of this section.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Docket No. FV97-905-1 PR]

Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Limiting the Volume of Small Florida Red Seedless Grapefruit

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule invites comments on limiting the volume of small red seedless grapefruit entering the fresh market under the marketing order covering oranges, grapefruit, tangerines, and tangelos grown in Florida. The marketing order is administered locally by the Citrus Administrative Committee (committee). This rule would limit the volume of size 48 and/or size 56 red seedless grapefruit handlers could ship during the first 11 weeks of the 1997-1998 season that begins in September. This proposal would provide a sufficient supply of small sized red seedless grapefruit to meet market demand, without saturating all markets with these small sizes. The committee believes this rule is necessary to help stabilize the market and improve grower returns.

DATES: Comments must be received by August 13, 1997.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; Fax: (202) 720-5698. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: William G. Pimental, Southeast Marketing Field Office, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883-2276; telephone: (941) 299-4770, Fax: (941) 299-5169; or Anne Dec, Marketing Order Administration Branch, F&V, AMS, USDA, room 2522-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-5053, Fax: (202) 720-5698. Small businesses may request information on compliance with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and

Vegetable Division, AMS, USDA, room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone (202) 720-2491, Fax: (202) 720-5698.

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement No. 84 and Marketing Order No. 905, both as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided an action is filed not later than 20 days after date of the entry of the ruling.

The order provides for the establishment of grade and size requirements for Florida citrus, with the concurrence of the Secretary. These grade and size requirements are designed to provide fresh markets with citrus fruit of acceptable quality and size. This helps create buyer confidence and contributes to stable marketing conditions. This is in the interest of growers, handlers, and consumers, and is designed to increase returns to Florida citrus growers. The current minimum grade standard for red seedless grapefruit is U.S. No. 1, and the minimum size requirement is size 56 (at least 3⁵/₁₆ inches in diameter).