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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 530 and 575

RIN: 3206–AK81

Recruitment, Relocation, and Retention Incentives

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations on recruitment, relocation, and retention incentives. The final regulations revise the interim regulations by making a number of technical modifications, corrections, and clarifications. The final regulations continue to provide agencies with additional flexibility to help recruit and retain Federal employees and better meet agency strategic human capital needs.

DATES: *Effective Date:* January 2, 2008.

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SUPPLEMENTARY INFORMATION: On May 13, 2005, the Office of Personnel Management (OPM) published interim regulations (70 FR 25732) to implement section 101 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411, October 30, 2004). Section 101 amended 5 U.S.C. 5753 and 5754 by providing a new authority to make recruitment, relocation, and retention payments. The amended law replaced the former recruitment and relocation bonus and retention allowance authority provided by 5 U.S.C. 5753 and 5754. The 60-day comment period for the interim regulations ended July 12, 2005.

During the comment period, we received comments from eight agencies, one employee organization, and eight individuals. A number of the commenters stated they are pleased with the flexibilities provided by the interim regulations. They believe the enhanced recruitment, relocation, and retention incentive (3Rs) authorities will allow agencies to be more competitive with the private sector and assist in recruiting and retaining highly qualified employees and candidates. The commenters support the approach taken by OPM to provide agencies with maximum flexibility and discretion to craft plans for administering the incentives to best meet their needs.

The Supplementary Information for the interim regulations posed a number of questions about whether the 3Rs regulations should provide agencies with the authority to pay recruitment incentives to help recruit current employees (as authorized by 5 U.S.C. 5753(b) under conditions that would be described in OPM regulations) and to pay retention incentives to help retain employees likely to leave for a different Federal position (as authorized by 5 U.S.C. 5754(b) under conditions that would be described in OPM regulations) and, if so, under what circumstances.

The comments we received in response to these questions are not addressed in these final regulations, but will be addressed in a future **Federal Register** notice. This **Federal Register** notice addresses the remaining comments and makes a number of technical revisions and clarifications in the 3Rs regulations, which are summarized below.

Comments Applicable to Recruitment, Relocation, and Retention Incentives

Definition of Basic Pay (§§ 530.202, 575.102, 575.202, and 575.302)

An individual expressed confusion about the definition of *basic pay* in the aggregate limitation on pay regulations at § 530.202 and the definition of *rate of basic pay* in the recruitment, relocation, and retention incentive regulations at §§ 575.102, 575.202, and 575.302, respectively. The commenter questioned why the terms themselves are different and why they are defined differently.

Similar terms may be used and defined in different ways in title 5, Code of Federal Regulations, depending on the purpose of the term and statutory requirements. Differences in the term *basic pay* for the purpose of the aggregate limitation on pay and the term *rate of basic pay* for the purpose of the 3Rs are necessary based on how each term is used in its respective subpart of the regulations. Each term must be read only within the context of the subpart of the regulation in which it is defined. In the aggregate limitation on pay regulations, an employee's *basic pay* is added to certain other payments authorized under title 5, United States Code, to determine whether the employee's total pay has reached the aggregate limitation on pay in the calendar year. In the 3Rs regulations, an employee's *rate of basic pay* is used to compute recruitment and relocation incentive payment limits and retention incentive payments.

Eligible Categories of Employees (§§ 575.103, 575.203, and 575.303)

An agency questioned whether employees under administratively determined (AD) pay systems are covered by the 3Rs authorities. The agency wanted to ensure that AD employees are covered.

OPM has not regulated that all AD positions are eligible for recruitment, relocation, and retention incentives. Under 5 U.S.C. 5753(a)(1)(B) and 5754(a)(1)(B), OPM may approve coverage of a category of non-General Schedule (non-GS) employees under the 3Rs authorities at the request of the head of an Executive agency. When we issued the interim regulations implementing the new authorities, OPM approved those categories of non-GS employees that were previously covered under the former recruitment and relocation bonus and retention allowance authorities for coverage under the new authorities, except when such categories are excluded by law (5 U.S.C. 5753(a)(2) and 5754(a)(2)) or regulation (§§ 575.104, 575.204, and 575.304). (See CPM 2005–08 on OPM's Web site at *http://www.opm.gov/oca* for additional information and a list of approved single-agency categories of employees.) If a category of AD employees (or other employee category) is not already approved for coverage, the head of an Executive agency may request OPM approval for coverage of such employees. The coverage of each category of AD positions requires separate OPM approval.

The same agency noted the regulations at §§ 575.103, 575.203, and

575.303 cover employees in a position under the Executive Schedule paid under 5 U.S.C. 5311–5317. The agency stated Executive Schedule positions are filled using presidential appointments and such appointments are excluded from coverage under §§ 575.104, 575.204, and 575.304. The agency commented that the regulations appear to be contradictory and suggested the coverage of Executive Schedule positions be restated or clarified.

We agree most Executive Schedule positions are filled using presidential appointments and, thus, employees appointed to such positions would not be eligible for 3Rs payments under §§ 575.104, 575.204, and 575.304. However, we are retaining the provision in §§ 575.103, 575.203, and 575.303 stating employees appointed to or in Executive Schedule positions are eligible for 3Rs payments to ensure that an employee in an Executive Schedule position that is not otherwise excluded by § 575.104, 575.204, and 575.304 (*e.g.*, not a presidential appointee) remains eligible for such payments.

Another agency asked for clarification on whether employees of nonappropriated fund instrumentalities (NAFI) are eligible for recruitment, relocation, and retention incentives. We have not made a change to the regulations in response to this comment. An employee in a NAFI position meeting the definition of a prevailing rate position in 5 U.S.C. 5342(a)(3) is eligible for recruitment, relocation, and retention incentives, as long as the position is not otherwise excluded by §§ 575.104, 575.204, and 575.304. (See §§ 575.103(f), 575.203(f), and 575.303(f).) As of the date of publication of these final regulations in the **Federal Register**, all other categories of NAFI positions (*e.g.*, ''white collar'' NAFI positions) are ineligible for 3Rs payments. However, because a NAFI employee is covered by the definition of employee in 5 U.S.C. 5753(a)(3) and 5754(a)(3) and §§ 575.102, 575.202, and 575.302 of the regulations, OPM may extend coverage of the 3Rs authorities to currently excluded categories of NAFI employees upon request of the head of an Executive agency.

Finally, we are revising the introductory text in §§ 575.103, 575.203, and 575.303 to clarify that only an *Executive agency* (as defined in §§ 575.102, 575.202, and 575.302) may pay recruitment, relocation, and retention incentives to the categories of non-GS employees listed in those sections. (See 5 U.S.C. 5753(a)(1)(B) and 5754(a)(1)(B).) These sections continue to provide that an agency in the executive branch or legislative branch may pay recruitment, relocation, and retention incentives to GS employees. (See the definition of agency in §§ 575.102, 575.202, and 575.302.)

Payment Approval Levels (§§ 575.107, 575.207, and 575.307)

An individual questioned whether the authority to approve 3Rs requests could be delegated to the immediate supervisor of the employee receiving the 3Rs incentive provided the supervisor is the head of a departmental element who reports to the head of an agency and the employee receiving the incentive is not a member of the Senior Executive Service. The commenter noted the second-level supervisory or managerial approval requirement seems contrary to OPM's intent to expeditiously hire and retain the best and brightest and stated ''this new requirement will actually slow the process and hamper efforts to review and approve 3R incentives in a timely manner.''

We understand the need for streamlined and efficient agency approvals of 3Rs incentives. However, this need must be balanced with an appropriate and judicious use of the authorities. We note that the second-level supervisory or management approval of 3Rs incentives is not a new requirement-*i.e.*, it was required by the regulations for the former recruitment and relocation bonus and retention allowance authorities and was carried over into the new regulations. Since no additional approval levels have been added, we foresee no slowing of the approval process because of the new regulations.

We note that several provisions in the regulations make it possible to approve incentives without a second-level supervisory or managerial review. For example, the regulations at § 575.107(b)(2) allow an agency to establish criteria in advance so an employment candidate's supervisor or equivalent-level official may offer a recruitment incentive within a pre-established range without further review or approval. Also, the relocation incentive regulations at § 575.207(b)(2) do not require higher-level approval when approving coverage of individual employees under a previously approved group relocation incentive authorization under § 575.208(b). Finally, under § 575.307(b)(2), second-level supervisory or managerial approval is not required when approving coverage of individual employees under a previously approved group retention incentive authorization.

In addition, agencies have considerable discretion when they craft their 3Rs plans to decide which officials will have approval authority for these incentives. (See §§ 575.107(a)(1), 575.207(a)(1), and 575.307(a)(1).) If agencies require very high-level reviews for these incentives, the approval process may become slow and unwieldy. However, this is a matter that must be decided at the agency level.

Paying Recruitment, Relocation, and Retention Incentives Concurrently (§§ 575.109, 575.209, and 575.309)

Two agencies requested the regulations specify whether the service agreement periods for more than one type of incentive should be served concurrently or sequentially. Another agency pointed out the regulations do not address the ability to offer a recruitment incentive followed by a relocation incentive and suggested the explanation of the order of and the basis for offering multiple incentives be described more thoroughly in each respective section under §§ 575.109, 575.209, and 575.309.

We agree that the regulations should clarify these issues. The interim retention incentive regulations at § 575.309(g) provided an agency may not commence a retention incentive service agreement (or begin paying a retention incentive without a service agreement) during a period of employment established under a service agreement required for the payment of a recruitment incentive or a relocation incentive. After a retention incentive service agreement has commenced (or retention incentive payments without a service agreement have commenced), the retention incentive regulations allowed an agency to pay a relocation incentive without affecting the payment of an existing retention incentive. However, the interim recruitment and relocation incentive regulations were silent on paying recruitment, relocation, and retention incentives concurrently and whether employees should serve multiple 3Rs service agreements concurrently or sequentially.

These final regulations provide the following rules regarding concurrent recruitment, relocation, and retention incentive payments:

- New § 575.105(c) provides that an agency may not commence a recruitment incentive service agreement during (1) a period of employment established under a service agreement required for a relocation incentive, or (2) during a period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving a previously authorized retention incentive without a service agreement.

• New § 575.205(d) provides that an agency may not commence a relocation incentive service agreement during (1) a period of employment established under any service agreement required for a recruitment incentive, or (2) a period of employment established under any service agreement required for a previously authorized relocation incentive.

• New § 575.205(e) provides that an agency may commence a relocation incentive service agreement during a period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving previously authorized retention incentive payments without a service agreement. (This provision was formerly in § 575.309(g).) This new paragraph also clarifies that the service period under two such service agreements must run concurrently.

• Revised § 575.309(g) provides that an agency may not commence a retention incentive service agreement (or begin paying a retention incentive without a service agreement) during (1) a period of employment established under any service agreement required for payment of a recruitment incentive or a relocation incentive or (2) a period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving a previously authorized retention incentive without a service agreement.

Except as provided in § 575.205(e), these regulatory changes prohibit the simultaneous payment of multiple incentives and prohibit concurrent 3Rs service agreements. However, the recruitment, relocation, and retention incentive authorities provide substantial flexibility to make sizable incentive payments in situations in which offering multiple incentives may otherwise be attractive. For example, if an employee fulfilling a recruitment incentive service agreement is relocated to a different geographic area in a difficult to fill position, the regulations provide the agency the flexibility to terminate the recruitment incentive service agreement under § 575.111(a) and authorize a relocation incentive under 5 CFR part 575, subpart B, in its place. In this case, the employee would not be disadvantaged because under § 575.111(e), the employee would be entitled to all recruitment incentive payments attributable to completed service and to retain any portion of a recruitment incentive payment already received that is attributable to uncompleted service. The agency could consider any remaining recruitment incentive payments and time remaining under the recruitment incentive service agreement in determining the amount of the relocation incentive and length of the relocation incentive service agreement.

Similarly, if an employee receiving a group retention incentive under § 575.305(b) is still likely to leave Federal service and has unusually high or unique qualifications that are not adequately covered by the group retention incentive authorization, the agency could terminate the group retention incentive under § 575.311(a) for the individual employee and authorize an individual retention incentive under § 575.305(a) for the employee. The agency could consider the amount of the group retention incentive and time remaining under the group retention incentive service agreement, if any, in determining the amount of the new retention incentive and length of any new retention incentive service agreement.

Definition of ''Fully Successful'' (§§ 575.110(d), 575.111(b), 575.205(c), 575.210(d), 575.211(b), 575.305(d), 575.306(c)(2), 575.310(d), 575.311(b), and 575.311(f)(5)(ii))

An agency requested clarification of the definition of ''fully succeed'' [sic] due to variances in Federal performance ratings. The agency questioned whether the intent is to limit the payment of recruitment incentives to only those employees whose rating of record is at the highest level under the applicable performance appraisal system and recommended that employees at least one level below the highest level be eligible, so as to accommodate the ratings of new hires.

Because recruitment incentives may be paid only to newly-appointed Federal employees (or former employees with a 90-day break in service), the regulations do not require an employee to have a ''Fully Successful'' or higher rating of record to receive a recruitment incentive. However, the regulations at §§ 575.205(c) and 575.305(d) provide that a relocation and retention incentive may be paid to an employee only when the employee's rating of record (or 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. In addition, the regulations at §§ 575.110(d), 575.111(b), 575.210(d), 575.211(d), 575.310(d), 575.311(b), and 575.311(f)(5)(ii) require agencies to terminate 3Rs service agreements and retention incentive payments when no service agreement is required if the employee receives a rating of record of less than ''Fully Successful'' or equivalent. We note ''Fully Successful'' is not intended to refer to a rating of record that is the highest level under an applicable performance appraisal system, unless the performance appraisal system is a pass-fail system.

Repayment Waivers (§§ 575.111(g) and 575.211(g))

Sections 575.111(g) and 575.211(g) of the interim regulations provided that the head of an agency may use the authority in 5 U.S.C. 5584 to waive a debt resulting from an employee's failure to reimburse the agency for the full amount of a recruitment or relocation incentive repayment requirement when the employee fails to fulfill a required service period. An individual commented that OPM appears to have the authority to permit agencies to waive repayment of recruitment and relocation incentives without reliance on 5 U.S.C. 5584 because 5 U.S.C. 5753(g) permits OPM to promulgate ''regulations relating to repayment of a bonus under this section under appropriate circumstances when the agreed upon service period has not been completed.'' The commenter also noted such waivers should not be routine, but circumstances are likely to arise under which repayment of unliquidated amounts would constitute an undue hardship, such as for unforeseen and compelling personal reasons.

We agree that it is appropriate for OPM to use its regulatory authority at 5 U.S.C. 5753(g) to provide agencies with the authority to waive the requirement to repay recruitment or relocation incentive payments attributable to uncompleted service when a service agreement is terminated under §§ 575.111(b) and 575.211(b), rather than relying on the agency's authority to waive recovery of an erroneous payment under 5 U.S.C. 5584. We are revising the regulations at §§ 575.111(g) and 575.211(g) to remove the reference to an agency's authority to waive a debt under 5 U.S.C. 5584. We also are adding new paragraphs §§ 575.111(h) and 575.211(h) to provide an authorized agency official with the authority to waive the requirement for an employee to repay recruitment or relocation incentive payments attributable to uncompleted service under §§ 575.111(f) and 575.211(f) when collection of the excess payments from the employee would be against equity and good conscience and not in the best interests of the United States. Agencies should ensure such waiver authority is used judiciously. (See also the conforming changes in §§ 575.107(a)(1) and 575.207(a)(1).)

Agencies continue to have the authority under 5 U.S.C. 5584 to waive recovery of recruitment or relocation incentives or other pay or allowances that are paid erroneously.

Reporting Requirements (§§ 575.113, 575.213, and 575.313)

An agency requested the **SUPPLEMENTARY INFORMATION** or final regulations clarify that the Department of Defense (DOD) and United States Coast Guard (USCG) are not expected to report incentives paid to prevailing rate employees from non-appropriated funds in its submission for OPM's report to Congress. The agency stated, although NAFI prevailing NAFI rate employees are included in the definition of *employee* and in the eligible categories of employees for each type of incentive, a 3Rs payment paid to those employees is paid out of funds not appropriated by Congress.

We do not agree. Incentives paid from non-appropriated funds should be included in the annual report to OPM required by §§ 575.113(b), 575.213(b) and 575.313(b). The congressional reporting requirement in section 101(c) of the Federal Workforce Flexibility Act of 2004 does not make a distinction between appropriated and non-appropriated fund positions. Agencies should report required 3Rs data and information for both types of employees.

Comments Applicable to Recruitment Incentives

Definition of ''Newly Appointed'' (§ 575.102)

An agency asked for clarification on whether the regulations permit the payment of recruitment incentives to employees moving from either prevailing rate or white-collar NAFI positions to positions covered by the recruitment incentive regulations (e.g., GS). Under 5 U.S.C. 5753(b)(2)(A), a recruitment incentive may be paid to an employee ''newly appointed as an employee of the Federal Government.'' *Newly appointed* is defined in § 575.102 as referring to (1) the first appointment as an employee of the Federal Government, (2) an appointment of a former employee of the Federal Government following a 90-day break-in-service, 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 certain types of employment (e.g., a time-limited appointment).

Under the interim regulations, certain categories of NAFI employees in DOD and USCG were considered *newly appointed* and eligible to receive a recruitment incentive under the conditions prescribed in 5 CFR part 575, subpart A, when moving to a position listed in § 575.103 (i.e., NAFI employees who moved to a position in the same agency after more than a 3-day break in service and NAFI employees who moved to a position in a different agency with or without a break in service). Such NAFI employees did not need the 90-day break in service required by paragraph (2) of the definition of *newly appointed* to receive a recruitment incentive. (See the exemptions in paragraphs (3)(iv) and (v) of that definition in the interim regulations.)

Based on the definition of *employee* in § 575.102 and the definition of *employee* in 5 U.S.C. 5753(a)(3), both of which specifically include a DOD and USCG NAFI employee, as described in 5 U.S.C. 2105(c), we believe it would be more consistent to revise the definition of *newly appointed* in these final regulations to remove the special exemptions from the 90-day break-in-service requirement in paragraphs (3)(iv) and (v) of the definition of *newly appointed* for DOD and USCG NAFI employees. In other words, all DOD and USCG NAFI service will be considered Federal service in applying the 90-day break-in-service rule. DOD and USCG NAFI employees must have a 90-day break-in-service to be eligible for a recruitment incentive upon movement to a position listed in § 575.103 (unless one of the remaining exclusions in the definition of *newly appointed* applies).

Payment and Repayment Requirements (§ 575.111)

An agency recommended amending § 575.111(b) and (f) to state employees must repay recruitment incentive payments for any part of the service period in which they did not meet all of the terms of the service agreement; e.g., for periods of unsatisfactory performance. The same agency recommended the regulations require full repayment of a recruitment incentive if employment is terminated due to falsified employment documents or pre-employment conditions.

The regulations at § 575.111(b) require an agency to terminate a recruitment incentive service agreement when an employee receives a rating of record of less than ''Fully Successful'' or equivalent or when an employee otherwise fails to fulfill the terms of the service agreement. If an agency terminates a service agreement for such reasons, § 575.111(f) provides that the employee is entitled to keep any portion of recruitment incentive payments already received that are attributable to completed service; however, the employee is obligated to repay any recruitment incentive payments received attributable to uncompleted service. Under this section, if an employee has received recruitment incentive payments less than the amount attributable to completed service when the service agreement is terminated, the agency is not obligated to pay the employee the amount attributable to completed service, unless the agency agreed to such payment in the employee's service agreement. Agencies may want to consider not paying all of a recruitment incentive as an up-front, lump-sum payment in advance of the employee fulfilling a service period and, instead, paying all or part of a recruitment incentive after an employee successfully completes all or part of the service period.

We agree the regulations should require full repayment of a recruitment incentive if employment is terminated due to falsified employment documents or pre-employment conditions. We are adding a new paragraph (j) to § 575.111 to require an employee to repay all recruitment incentive payments if an agency terminates a service agreement when an employee is separated as a result of material false or inaccurate statements or deception or fraud in examination or appointment, or as a result of failing to meet employment qualifications.

An individual commented, if an applicant accepts an offer of employment along with a recruitment incentive, an agency should not be able to cancel the agreement (unless for poor performance) without paying out the full amount of the incentive (regardless of the installment plan). The individual stated if an applicant accepts a recruitment incentive offer in good faith, allowing the agency to terminate the service agreement without paying the full incentive seemed unfair.

We disagree. The regulations provide appropriate protections for an employee if the agency terminates a service agreement when the employee is not at fault. Section 575.111(e) provides that such an employee is entitled to receive recruitment incentive payments attributable to completed service and to keep any recruitment incentive payments already received for completed and uncompleted service. An agency should not be obligated to pay additional recruitment incentive payments for service that is not completed under a terminated service agreement.

An agency commented the recruitment incentive repayment

requirements are not consistent with the student loan repayment regulations which require full repayment if a service agreement is not completed. The student loan repayment program is based on a different statutory authority with different repayment requirements if the service agreement is not fulfilled. Under 5 U.S.C. 5379, an employee is obligated to reimburse the paying agency for the full amount of the student loan repayment benefits provided when the employee voluntarily separates from Federal service, or is separated involuntarily due to misconduct or poor performance, and does not complete the terms of the student loan repayment service agreement. There is no similar statutory requirement for recruitment incentives in 5 U.S.C. 5753. Under 5 U.S.C. 5753(c)(2), OPM has the authority to regulate the terms and conditions under which recruitment incentives are payable, including the conditions under which a service agreement may be terminated and the effect of the termination. Consistent with the former recruitment bonus authority, the recruitment incentive regulations at § 575.111 generally require a pro-rated repayment of incentive payments received that are attributable to uncompleted service if a service agreement is not fulfilled.

The same agency commented that § 575.111(f) is vague and stated clarification is needed on whether agencies have the discretion to define completed service as the duration of the service agreement. The agency questioned whether it may require full repayment if the employee fails to complete a service period or must the repayment amount be prorated based on the portion of the agreement served.

Under § 575.110(a), a service period is the period of employment that an employee agrees to fulfill in exchange for a recruitment incentive, as documented in the employee's service agreement. ''Completed service,'' as used in § 575.111, is the amount of time the employee has fulfilled under the service agreement, and ''uncompleted service'' is the amount of time the employee has not fulfilled under the service agreement. We are clarifying the recruitment and relocation incentive regulations by adding a new paragraph (i) to §§ 575.111 and 575.211 to provide that in determining the amount of recruitment and relocation incentive payments attributable to completed and uncompleted service, agencies must prorate the full amount of the authorized incentive payments across the length of the service period. (See the fact sheet at *http://www.opm.gov/oca/PAY/HTML/rectermcalc.asp* for additional information.)

Additional Changes

We are making the following additional changes to the recruitment incentive regulations to correct technical errors and make minor clarifications:

• Revising the definition of *employee* and replacing the definition of *employee of the Federal Government* with *Federal Government* in § 575.102 to eliminate redundancy and circular language regarding NAFI employees. These final regulations also revise paragraphs (2) and (3) in the definition of *newly appointed* in § 575.102 consistent with these new definitions.

• Revising paragraph (3)(i) of the definition of *newly appointed* in § 575.102 to clarify a ''nonpermanent appointment'' excludes a Schedule C appointment under 5 CFR part 213. An agency may not pay a recruitment incentive to an employee moving from a Schedule C appointment to a non-Schedule C appointment, unless the employee has a 90-day break in service.

• Adding employment under the Student Career Experience Program under 5 CFR 213.3202(b) as a new paragraph (3)(vi) in the definition of *newly appointed* in § 575.102. A similar provision was included in the former recruitment bonus regulations, but it was inadvertently left out of the interim recruitment incentive regulations.

• Adding an appointment as an expert or consultant under 5 U.S.C. 3109 and 5 CFR part 304 as a new paragraph (3)(iv) in the definition of *newly appointed* in § 575.102. Service under a temporary expert and consultant appointment is already not counted as Federal service in applying the 90-day break-in-service requirement in the existing definition of *newly appointed.* This addition will ensure that service under an intermittent ''expert and consultant'' appointment that is not a temporary appointment also is disregarded in applying the 90-day break-in-service requirement.

• Revising § 575.106(b)(1) to clarify a factor for determining when a position is likely to be difficult to fill is the availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for ''the position or similar positions.'' The language in the interim regulations stated only the success of recent efforts to recruit candidates for ''similar positions.''

• Clarifying § 575.107(b)(1) to provide an authorized agency official must review and approve the recruitment incentive determination before paying the incentive to the employee.

Comments Applicable to Relocation Incentives

Definition of Temporary Relocation (§ 575.205(a)(2))

An agency commented that the Supplementary Information of the interim regulations stated that a relocation incentive may be paid for a temporary relocation. The agency suggested ''temporary relocation'' should be defined.

We do not agree. Section 575.205(a) provides an agency may pay a relocation incentive to an employee who must relocate to a different geographic area ''permanently or temporarily.'' Because there is no minimum length for a relocation incentive service agreement as there is for recruitment incentives, it is not necessary to define what is meant by ''temporary relocation.'' Note that under § 575.205(b) employees must establish a residence in the new geographic area before an agency may pay a relocation incentive to an employee, even when the employee is relocated to a different geographic area on a temporary basis.

Payment to Former NAFI Employees (§ 575.205(a))

An agency requested clarification of whether relocation incentives may be paid to DOD or USCG NAFI employees who move to appropriated fund positions. An agency may pay a relocation incentive to a white-collar or prevailing rate NAFI employee in a DOD or USCG NAFI position who moves without a break in service to an appropriated fund position that is eligible for relocation incentives under § 575.203 and that is in a different geographic area. Consistent with the definition of *employee* in 5 U.S.C. 5753(a)(3), *employee* is defined in § 575.202 to mean an employee as defined in 5 U.S.C. 2105 ''except that the term also includes an employee described in 5 U.S.C. 2105(c) * * *.'' Section 2105(c) of title 5, United States Code, covers DOD and USCG NAFI employees.

To help clarify this further, § 575.202 includes a revised definition of *employee* and replaces the definition of *employee of the Federal Government* with *Federal Government* to eliminate redundancy and circular language regarding NAFI employees. Also, we are revising § 575.205(a) to provide that an agency may pay a relocation incentive under the conditions in 5 CFR part 575, subpart B, to an *employee* (as that term is newly defined) who (1) relocates to a

different geographic area (temporarily or permanently) to accept a position listed in § 575.203 in an agency that is likely to be difficult to fill and (2) is an *employee* of the *Federal Government* (as those terms are newly defined) immediately before the relocation.

Additional Changes

We are making the following additional changes to the relocation incentive regulations to correct technical errors and make minor clarifications:

- Revising § 575.206(a)(4) to replace the term ''recruitment incentive'' with ''relocation incentive.''
- Revising § 575.206(b)(1) to clarify a factor for determining when a position is likely to be difficult to fill is the availability and quality of candidates possessing the competencies required for the position, including the success of recent efforts to recruit candidates for ''the position or similar positions.'' The language in the interim regulations stated only the success of recent efforts to recruit candidates for ''similar positions.''
- Revising § 575.207(b)(1) to clarify an authorized agency official must review and approve a relocation incentive determination before paying the incentive to the employee.
- Revising § 575.210(e) by removing the words ''agree to'' in the second sentence so that the language is parallel to § 575.110(e) of the recruitment incentive regulations.

Comments Applicable to Retention Incentives

Group Retention Incentives (§ 575.309(a)(2))

An agency recommended that the limit on an agency's authority to approve group retention incentives under § 575.309(a)(2) be raised from 10 percent to 25 percent. The agency stated with the increase in the maximum retention incentive amount from 25 to 50 percent, it would be appropriate to raise the agency authority to approve group retention incentives from the current 10 percent to 25 percent.

We do not agree. The 10 percent limitation on an agency's authority to approve group retention incentives is provided by statute at 5 U.S.C. 5754(e)(1)(B). The law requires OPM approval of group retention incentives in excess of 10 percent. (See 5 U.S.C. 5754(f).)

Computing Lump-Sum Retention Incentives (§ 575.309(d))

An agency recommended the regulations describe how to calculate the total basic pay earned during a full service period for the purpose of calculating a retention incentive paid at the end of the service period. We are adding an example to § 575.309(d) that shows how to compute a retention incentive for the full period of service under a service agreement (including the total amount of basic pay earned during the full period of service) consistent with the example in § 575.309(c)(1).

Grandfathered Retention Allowances (§ 575.314)

An individual requested clarification on why an agency would not renew or continue a retention allowance that was originally authorized before May 2005 after the issuance of the new retention incentive regulations. The commenter observed that terminating retention allowances seems counterproductive to the purpose of the allowances which is to recruit and retain persons with unique skills.

Under section 101(d)(3) of Public Law 108–411 and § 575.314 of the regulations, retention allowances authorized before May 1, 2005, were required to continue to be paid until the allowance was reauthorized or terminated, but not later than April 30, 2006. Agencies were required to pay such grandfathered retention allowances subject to regulations applicable to retention allowances before May 1, 2005. Under the former retention allowance regulations, agencies had the flexibility to terminate retention allowances if a retention allowance was not needed to retain the employee, labor-market factors made it more likely to recruit a candidate with the qualifications possessed by the employee, the agency's need for the employee's services was reduced to a level that made paying an allowance unnecessary, or budgetary considerations made it difficult to continue paying the allowance. When a grandfathered retention allowance was terminated, an agency could have authorized a new retention incentive in its place under the conditions described in 5 CFR part 575, subpart C, as in effect starting on May 13, 2005. Any decision to terminate a grandfathered retention allowance before April 30, 2006 (the required termination date under the statute), and whether to replace that allowance with a new retention incentive was subject to agency discretion based on the needs of the agency and the requirements of the retention incentive law and regulations. We note that, by law, all grandfathered retention allowances should have been terminated by April 30, 2006.

Additional Changes

We are making the following additional changes to the retention incentive regulations to correct technical errors and make minor clarifications:

- Revising § 575.307(a)(6)(iii) to remove the requirement that agency retention incentive plans address the obligations of an employee if an agency terminates a service agreement. Because retention incentive payments are not paid in advance of an employee fulfilling the period of service attributable to the payments, employees do not have repayment obligations if a service agreement is terminated.
- Revising § 575.307(b)(1) to clarify an authorized agency official must review and approve each retention incentive before paying an incentive to an employee.
- Revising the examples in § 575.309(c)(1) and (c)(2) to clarify how the amount of pay an employee earned during the service period is computed.
- Revising § 575.311 to clarify and make consistent the conditions under which agencies have the discretion and are required to terminate a retention incentive paid under a service agreement and a retention incentive paid without a service agreement. We also are adding a new paragraph to this section to clarify how to compute retention incentive payments that may be owed to an employee for completed service if an agency terminates a retention incentive service agreement.

Finally, a number of commenters noted that the reference to paragraph (g) in § 575.310(a) should be changed to paragraph (f). This error was corrected in the **Federal Register** notice published on December 19, 2005 (70 FR 74995).

Miscellaneous Changes to Other Regulations

Commenters noted incorrect references to the special rate regulations (5 CFR part 530, subpart C) in the aggregate limitation on pay (5 CFR part 530, subpart B), supervisory differential (5 CFR part 575, subpart D), and extended assignment incentive (5 CFR part 575, subpart E) regulations. A commenter also noted an incorrect reference to the prevailing rate night differential authority at 5 U.S.C. 5343(f) in the supervisory differential regulations. These references are corrected in these final regulations.

We are revising the definition of *discretionary payment* in the aggregate limitation on pay regulations at § 530.202 to remove ''extended assignment incentives'' as an example of a discretionary payment, consistent

with the removal of retention incentives as an example of a discretionary payment in the interim regulations. We also are clarifying the definition to provide payments that are authorized to an employee under the terms of a service agreement are not discretionary payments.

Also, to conform with the new §§ 575.111(h) and 575.211(h) and OPM's authority in 5 U.S.C. 5757(f) to prescribe regulations on an employee's entitlement to retain extended assignment incentive payments when an agreement is canceled, these final regulations add a new § 575.513(g) to the extended assignment incentive regulations to provide an authorized agency official with the authority to waive the requirement under § 575.513(b) and (c)(1) to repay excess extended assignment incentive payments if an extended assignment incentive service agreement is terminated when collection of the excess amount would be against equity and good conscience and not in the best interest of the United States. We are removing the reference to 5 U.S.C. 5584 in § 575.513(c)(1) as the authority for waiving recovery of such excess payments.

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

Linda M. Springer,

Director.

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

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 1. The authority citation for part 530 continues 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 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981.

Subpart B—Aggregate Limitation on Pay

■ 2. In § 530.202, revise the first sentence in the definition of *basic pay* and the definition of *discretionary payment* to read as follows:

§ 530.202 Definitions.

* * * * *

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 C, or any locality-based comparability payment under 5 CFR part 531, subpart F, or other similar payment under other legal authority, before any deductions. * * *

* * * * *

Discretionary payment means a payment an agency has discretion to make to an employee. Payments that are authorized to be made to an employee under the terms of a service agreement or preauthorized to be made to an employee at a regular fixed rate each pay period are not *discretionary payments.*

* * * * *

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

■ 3. The authority citation for part 575 continues to read as follows:

Authority: 5 U.S.C. 1104(a)(2) and 5307; subparts A and B also issued under 5 U.S.C. 5753 and sec. 101 of the Federal Workforce Flexibility Act of 2004, Public Law 108–411, 118 Stat. 2305; subpart C also issued under 5 U.S.C. 5754 and sec. 101 of the Federal Workforce Flexibility Act of 2004, Public Law 108–411, 118 Stat. 2305; subpart D also issued under 5 U.S.C. 5755; subpart E also issued under 5 U.S.C. 5757 and sec. 207 of Public Law 107–273, 116 Stat. 1780.

Subpart A—Recruitment Incentives

■ 4. In § 575.102—

■ A. Revise the definition of *employee,*

■ B. Remove the definition of *employee of the Federal Government,*

■ C. Add a new definition of *Federal Government,* and

■ D. Revise paragraphs (2) and (3) in the definition of *newly appointed.*

The revisions and addition read as follows:

§ 575.102 Definitions.

* * * * *

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). For the purpose of determining whether an individual was an employee of the Federal Government during the 90-day period referred to in the definition of *newly appointed, employee* also includes an employee described in 5 U.S.C. 2105(e). For the purpose of § 575.109(d), an *employee* 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.

* * * * *

Federal Government means all entities of the Government of the United States, including the United States Postal Service and the Postal Regulatory Commission.

* * * * *

Newly appointed refers to—* * *

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

(3) An appointment of an individual in the Federal Government when his or her service in the Federal Government during the 90-day period immediately preceding the appointment was limited to one or more of the following:

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

(ii) A non-permanent appointment (excluding a Schedule C appointment under 5 CFR part 213) in the competitive or excepted service;

(iii) 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;

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

(v) Employment under a provisional appointment designated under 5 CFR 316.403; or

(vi) Employment under the Student Career Experience Program under 5 CFR 213.3202(b).

* * * * *

■ 5. In § 575.103—

■ A. Redesignate paragraphs (a) through (g) as paragraphs (a)(1) through (a)(7), respectively,

■ B. Designate the introductory sentence as paragraph (a) introductory text and revise it, and

■ C. Add a new paragraph (b).

The revision and addition read as follows:

§ 575.103 Eligible categories of employees.

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

* * * * *

(b) Except as provided in § 575.104, a legislative agency may pay a recruitment incentive to an employee appointed or placed in a General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority).

■ 6. In § 575.105, add a new paragraph (c) to read as follows:

§ 575.105 Applicability to employees.

* * * * *

(c) An agency may not commence a recruitment incentive service agreement during—

(1) A period of employment established under any service agreement required for a relocation incentive under 5 CFR part 575, subpart B, or

(2) A period of employment established under any service agreement required for a retention incentive or for which an employee receives retention incentive payments without a service agreement under 5 CFR part 575, subpart C.

■ 7. In § 575.106, revise paragraph (b)(1) to read as follows:

§ 575.106 Authorizing a recruitment incentive.

* * * * *

(b) * * *

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

* * * * *

■ 8. In § 575.107, revise paragraphs (a)(1) and (b)(1) to read as follows:

§ 575.107 Agency recruitment incentive plan and approval levels.

(a) * * *

(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, and the designation of officials with authority to waive the repayment of a recruitment incentive under § 575.111(h);

* * * * *

(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. The authorized agency official must review and approve the recruitment incentive determination before the agency may pay the incentive to the employee.

* * * * *

■ 9. In § 575.111—

■ A. Revise the first sentence and the last sentence in paragraph (f),

■ B. Remove the last sentence in paragraph (g), and

■ C. Add new paragraphs (h), (i), and (j).

The revision and additions read as follows:

§ 575.111 Termination of a service agreement.

* * * * *

(f) Except as provided in paragraph (j) of this section, 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 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, except when an authorized agency official waives the requirement to repay the excess amount under paragraph (h) of this section.

* * * * *

(h) If an employee received recruitment incentive payments in excess of the amount that would be attributable to the completed portion of the service period under paragraph (f) of this section, an authorized agency official may waive the requirement to repay the excess amount when, in the judgment of the official, collection of the excess amount would be against equity and good conscience and not in the best interest of the United States.

(i) The full amount of the authorized recruitment incentive must be prorated across the length of the service period to determine the amount of the recruitment incentive attributable to completed service and uncompleted service under this section.

(j) Notwithstanding paragraph (f) of this section, if an agency terminates a service agreement under paragraph (b) of this section when an employee is separated as a result of material false or inaccurate statements or deception or fraud in examination or appointment, or as a result of failing to meet employment qualifications, the employee must repay all recruitment incentive payments received under that service agreement.

Subpart B—Relocation Incentives

■ 10. In § 575.202—

■ A. Revise the definition of *employee,*

■ B. Remove the definition of *employee of the Federal Government,* and

■ C. Add a new definition of *Federal Government.*

The revision and addition read as follows:

§ 575.202 Definitions.

* * * * *

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). For the purpose of determining whether an individual had status as an employee of the Federal Government immediately prior to the relocation (i.e., in § 575.205(a)(2)), *employee* also includes an employee described in 5 U.S.C. 2105(e).

* * * * *

Federal Government means all entities of the Government of the United States, including the United States Postal Service and the Postal Regulatory Commission.

* * * * *

■ 11. In § 575.203—

■ A. Redesignate paragraphs (a) through (g) as paragraphs (a)(1) through (a)(7), respectively,

■ B. Designate the introductory sentence as paragraph (a) introductory text and revise it, and

■ C. Add a new paragraph (b).

The revision and addition read as follows:

§ 575.203 Eligible categories of employees.

(a) Except as provided in § 575.204, an Executive agency may pay a relocation incentive to an employee in the following categories of positions:

* * * * *

(b) Except as provided in § 575.204, a legislative agency may pay a relocation incentive to an employee in a General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority).

■ 12. In § 575.205, revise paragraph (a) and add new paragraphs (d) and (e) to read as follows:

§ 575.205 Applicability to employees.

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

(1) Relocates to a different geographic area (permanently or temporarily) 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; and

(2) Is an employee of the Federal Government immediately before the relocation.

* * * * *

(d) An agency may not commence a relocation incentive service agreement during—

(1) A period of employment established under any service agreement required for a recruitment incentive under 5 CFR part 575, subpart A, or

(2) A period of employment established under any service agreement required for a relocation incentive previously authorized under this subpart.

(e) An agency may commence a relocation incentive service agreement during a period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving previously authorized retention incentive payments without a service agreement under 5 CFR part 575, subpart C. The service period under such a relocation incentive service agreement and the service period required by the retention incentive service agreement, if applicable, must be fulfilled concurrently.

■ 13. In § 575.206, revise paragraphs (a)(4) and (b)(1) to read as follows:

§ 575.206 Authorizing a relocation incentive.

(a) * * *

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

* * * * *

(b) * * *

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

* * * * *

■ 14. In § 575.207, revise paragraphs (a)(1) and (b)(1) to read as follows:

§ 575.207 Agency relocation incentive plan and approval levels.

(a) * * *

(1) The designation of officials with authority to review and approve payment of relocation incentives (subject to paragraph (b) of this section) and the designation of officials with authority to waive the repayment of a relocation incentive under § 575.211(h);

* * * * *

(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 relocation incentive, unless there is no official at a higher level in the agency. The authorized agency official must review and approve the relocation incentive determination before the agency pays the incentive to the employee.

* * * * *

■ 15. In § 575.210(e), revise the second sentence to read as follows:

§ 575.210 Service agreement requirements.

* * * * *

(e) * * * The service agreement must specify the effect of the termination under § 575.211, including the conditions under which the agency will pay an additional relocation incentive payment for partially completed service under § 575.211(e) and (f).

* * * * *

■ 16. In § 575.211—

■ A. Revise the last sentence in paragraph (f),

■ B. Remove the last sentence in paragraph (g), and

■ C. Add new paragraphs (h) and (i).

The revision and additions read as follows:

§ 575.211 Termination of a service agreement.

* * * * *

(f) * * * 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, except when an authorized agency official waives the requirement to repay the excess amount under paragraph (h) of this section.

* * * * *

(h) If an employee received relocation incentive payments in excess of the amount that would be attributable to the completed portion of the service period under paragraph (f) of this section, an authorized agency official may waive the requirement to repay the excess amount when, in the judgment of the official, collection of the excess amount would be against equity and good conscience and not in the best interest of the United States.

(i) The full amount of the authorized relocation incentive must be prorated across the length of the service period to determine the amount of the relocation incentive attributable to completed service and uncompleted service under this section.

Subpart C—Retention Incentives

■ 17. In § 575.303—

■ A. Redesignate paragraphs (a) through (g) as paragraphs (a)(1) through (a)(7), respectively,

■ B. Designate the introductory sentence as paragraph (a) introductory text and revise it, and

■ C. Add a new paragraph (b).

The revision and addition read as follows:

§ 575.303 Eligible categories of employees.

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

* * * * *

(b) Except as provided in § 575.304, a legislative agency may pay a retention incentive to a current employee who holds a General Schedule position paid under 5 U.S.C. 5332 or 5305 (or similar special rate authority).

■ 18. In § 575.307, revise paragraph (a)(6)(iii) and add a new sentence at the end of paragraph (b)(1) to read as follows:

§ 575.307 Agency retention incentive plan and approval levels.

(a) * * *

(6) * * *

(iii) The obligations of the agency if the agency terminates a service agreement; and

* * * * *

(b)(1) * * * The authorized agency official must review and approve the retention incentive determination before the agency pays the incentive to the employee.

* * * * *

■ 19. In § 575.309—

■ A. Revise the fourth sentence in paragraph (c)(1) and the fourth sentence in paragraph (c)(2),

■ B. Add four new sentences at the end of paragraph (d), and

■ C. Revise paragraph (g).

The revisions and additions read as follows:

§ 575.309 Payment of retention incentives.

* * * * *

(c)(1) * * * The employee earns $15,000 during the 6 pay periods of service ($2,500 biweekly rate of basic pay × 6). * * *

(2) * * * The employee earns $15,000 during the 6 pay periods of service ($2,500 biweekly rate of basic pay × 6). * * *

* * * * *

(d) * * * 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 single lump-sum retention incentive payment after completion of the full service period required by the service agreement (i.e., 26 pay periods). The employee earns $65,000 during the 26 pay periods of service ($2,500 biweekly rate of basic pay x 26). Upon completion of the full service period, the employee will receive a single lump-sum retention incentive payment of $6,500 ($65,000 × .10).

* * * * *

(g) An agency may not commence a group or individual retention incentive service agreement or provide a group or individual retention incentive without a service agreement under § 575.310(f) for any biweekly pay period during—

(1) A period of employment established under any service agreement required for the payment of a recruitment incentive under 5 CFR part 575, subpart A, or a relocation incentive under 5 CFR part 575, subpart B, (see 5 CFR 575.205(e) regarding the authority to commence a relocation incentive service agreement during a period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving previously authorized retention incentive payments without a service agreement); or

(2) A period of employment established under a service agreement for a previously authorized retention incentive or for which an employee is receiving a previously authorized retention incentive without a service agreement under § 575.310(f) (including a group retention incentive with or without a service agreement).

* * * * *

■ 20. Revise § 575.311 to read as follows:

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

(a)(1) An authorized agency official must terminate a retention incentive service agreement when conditions change such that the original determination to pay the retention incentive no longer applies (e.g., when the agency assigns the employee to a different position that is not within the terms of the service agreement) or when payment is no longer warranted after considering factors such as—

(i) Whether a retention incentive is needed to retain the employee (or group 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 of employees), or

(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 paying a retention incentive.

(2) An authorized agency official may terminate unilaterally a retention incentive service agreement based solely on the management needs of the agency, even if the conditions giving rise to the original determination to pay the incentive still exist. For example, an agency may terminate a service agreement when there are insufficient funds to continue the planned retention incentive payments.

(b) An authorized agency official must terminate a retention incentive service agreement when—

(1) The employee is demoted or separated for cause (i.e., for unacceptable performance or conduct);

(2) 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

(3) The employee otherwise fails to fulfill the terms of the service agreement.

(c) 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.

(d) 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.

(e) To determine the amount of retention incentive payments that may be owed to an employee for completed service under paragraphs (c) and (d) of this section, multiply the total rate of basic pay the employee earned during the completed portion of the service period by the retention incentive percentage rate established for the employee under § 575.309(a) and subtract the amount of retention incentive payments already paid to the employee from this product. The difference is the amount owed to the employee for completed service.

(f)(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 authorized agency official must reduce or terminate a retention incentive authorization when no service agreement is required whenever conditions change such that the original determination to pay the retention incentive no longer applies (e.g., when the agency assigns the employee to a different position that is not within the terms of the original determination) or when payment is no longer warranted at the level originally approved or at all after considering factors such as—

(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); or

(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).

(4) An authorized agency official may terminate unilaterally a retention incentive authorization when no service agreement is required based solely on the management needs of the agency, even if the conditions giving rise to the original determination to pay the

incentive still exist. For example, an agency may terminate a retention incentive when there are insufficient funds to continue the planned retention incentive payments.

(5) An authorized agency official must terminate a retention incentive authorization when no service agreement is required when—

(i) The employee is demoted or separated for cause (i.e., for unacceptable performance or conduct), or

(ii) 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.

(g) The termination of a retention incentive service agreement or the reduction or termination of a retention incentive under this section is not grievable or appealable.

(h) If an agency terminates a retention incentive service agreement or reduces or terminates a retention incentive paid without a service agreement under this section, the agency must notify the employee in writing. When a retention incentive is terminated under paragraph (f) of this section, 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.

Subpart D—Supervisory Differentials

■ 21. 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 C; locality-based comparability payment under 5 CFR part 531, subpart F; or similar payment or supplement under other legal authority.

* * * * *

■ 22. 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 C; locality-based comparability payment under 5 CFR part 531, subpart F; or similar payment or supplement under other legal authority, but excluding additional pay of any other kind. For example, *rate of basic pay* excludes a night differential under 5 U.S.C. 5343(f), an environment differential under 5 U.S.C. 5343(c)(4), or a similar payment under other legal authority.

* * * * *

■ 23. Revise § 575.405(d)(1) to read as follows:

§ 575.405 Calculation and payment of supervisory differential.

* * * * *

(d) * * *

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

* * * * *

Subpart E—Extended Assignment Incentives

■ 24. In § 575.502, revise the first sentence in 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 C; locality-based comparability payment under 5 CFR part 531, subpart F; or similar payment under other legal authority, but before deductions and exclusive of additional pay of any other kind. * * *

* * * * *

■ 25. In § 575.513—

■ A. Revise paragraph (b) introductory text,

■ B. Revise paragraph (c)(1),

■ C. Remove the last sentence in paragraph (f), and

■ D. Add a new paragraph (g).

The revisions and addition read as follows:

§ 575.513 What are the agency's and the employee's obligations when an employee fails to fulfill the terms of a service agreement?

* * * * *

(b) Except as provided in paragraph (g) of this section, an employee is indebted to the Federal Government and must repay the paying agency for an appropriate portion of an extended assignment incentive received by the employee if—

* * * * *

(c)(1) If an employee does not fulfill the terms of a service agreement under the circumstances prescribed in paragraph (b) of this section and has received incentive payments whose value as a percentage of the planned total sum of incentive payments for the entire service period exceeds the percentage reflecting the portion of the service period completed by the employee, he or she must repay the excess payment and any additional repayment penalty imposed by the agency under paragraph (e) of this section, except when an authorized agency official waives the requirement to repay the excess amount under paragraph (g) of this section.

* * * * *

(g) If an employee received extended assignment incentive payments in excess of the amount that would be attributable to the completed portion of the service period under paragraph (c) of this section, an authorized agency official may waive the requirement to repay the excess amount when, in the judgment of the official, collection of the excess amount would be against equity and good conscience and not in the best interest of the United States.

[FR Doc. E7–23411 Filed 11–30–07; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28980 Directorate Identifier 2007–CE–071–AD; Amendment 39–15282; AD 2007–25–01]

RIN 2120–AA64

Airworthiness Directives; Aircraft Industries, a.s. (Type Certificate No. G24EU Formerly Held by LETECKÉ ZÁVODY a.s. and LET Aeronautical Works) Model L–13 Blanik Gliders

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final Rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation