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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831 and 842

RIN 3206-AG16

Retirement; Alternative Forms of Annuity

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations on alternative forms of annuity to establish a standard for determining what constitutes a critical medical condition to replace the standard that the Merit Systems Protection Board determined was invalid. The interim regulations also make effective the previously proposed regulations to implement the changes made by the Omnibus Budget Reconciliation Act of 1993—the alternative form of annuity is no longer available for employees whose annuities commence on or after October 1, 1994, except for employees who have a life-threatening affliction or other critical medical condition—and also to revise the list of critical medical conditions considered *prima facie* evidence of eligibility. The regulations are necessary to conform the regulations with current law.

DATES: Interim rules effective November 24, 1995.

Comments must be received on or before December 26, 1995.

ADDRESSES: Send comments to John E. Landers, Chief, Retirement Policy Division; Retirement and Insurance Service; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Harold L. Siegelman, (202) 606-0299.

SUPPLEMENTARY INFORMATION: On November 4, 1994, we published (at 59 FR 55211) proposed regulations on alternative forms of annuity (AFA) to implement the changes in sections 8343a and 8420a of title 5, United States Code, made by the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66. The Act included a provision terminating this benefit for employees whose annuities commence on or after October 1, 1994, except for employees who have a life-threatening affliction or other critical medical condition. We also proposed to revise the list of critical medical conditions considered *prima facie* evidence of eligibility. We received one comment on the proposed regulations.

The commenter expressed concern about applications for annuity who have a critical medical condition that is not on the list of conditions that constitute *prima facie* evidence of medical eligibility. The commenter stated that these applicants should be allowed to qualify based on medical condition. Sections 831.2207(c)(3)(iv) and 842.707(c)(3)(iv) of Title 5, Code of Federal Regulations, already accomplish that goal. A doctor's certification that an applicant has one of the listed conditions is sufficient for an OPM benefits specialist to approve a claim for the alternative form of annuity without review by an OPM doctor. If an applicant claims entitlement to the AFA because of a medical condition not on the list, an OPM doctor reviews the medical evidence to verify that the condition is qualifying.

Subsequent to the publication of the proposed regulations, the Merit Systems Protection Board (MSPB), in the case of *Ora L. Haywood v. OPM*, Docket No. DC0831930087-1-1 (Dec. 4, 1994), decided that OPM's regulation at section 831.2207(c)(3)(i) defining a "life-threatening affliction or other critical medical condition" is invalid. The regulatory standard rejected by MSPB required a "medical condition so severe as to reasonably limit an individual's probable life expectancy to less than one year."

As determined by the Board, the Congress retained the AFA for any nondisability retiree with a "life-threatening affliction or other critical medical condition." The law allows

such employees to recover their retirement contributions during their lifetime. The phrase "life-threatening affliction or other critical medical condition" was first added to section 8343a by section 6001 of Public Law 100-203, December 22, 1987, 101 Stat. 1330-275. Congress had provided an exception to the deferred payment schedule for the alternative annuity lump-sum benefit to this same category annuitants, namely, nondisability annuitants who were suffering from a "life-threatening affliction or other critical medical condition" at the time of retirement.

OPM originally defined a "life-threatening affliction or other critical medical condition" in its interim regulations, published April 8, 1988, in the Federal Register, 53 FR 11633, after the passage of Public Law 100-203. The Supplementary Information in the rulemaking notice explained that the amendment to section 8343a changed the way the lump-sum credit was paid to certain retirees who elected the alternative form of annuity. Retirees whose annuities began after January 3, 1988, and before October 1, 1989, who elected the alternative form of annuity received the lump-sum payment in two installments. The first installment was paid at the time of retirement and the second installment 1 year after the commencing date of annuity.

A retiree who died within 1 year of the date of his retirement due to a life-threatening affliction or other critical condition would not realize the full benefit of his alternative annuity election since he or she would not be alive to receive the second installment of the lump-sum payment. Retirees in this situation were, therefore, permitted to receive the entire amount of the lump-sum benefit in one installment payable at the time of retirement. Retirees whose probable life expectancy was not less than 1 year were likely to be alive to receive payment of the second installment of the lump-sum benefit. Therefore, there would be no need to exclude them from receiving payment in two installments.

Section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, October 27, 1990, 104 Stat. 1388-327, Pub. L. 101-508, made several changes to the Civil Service Retirement law. Among those changes was the suspension of the alternative form of

annuity with a lump-sum payment equal to an employee's retirement contributions, for most Federal employees covered by the Civil Service Retirement System whose voluntary annuities commenced on or after December 2, 1990, but before October 1, 1995. An exception provided for in this legislation was codified at 5 U.S.C. 8343a(f)(2). This exception allowed nondisability annuitants to receive the lump-sum payment if they were suffering from a "life-threatening affliction or other critical medical condition" at the time of retirement.

OPM's interim regulations implementing Public Law 101-508 were published on February 19, 1991, using the same definition of "life-threatening affliction or other critical medical condition." The regulations implementing this provision are found at 5 CFR 831.2203(h)(1)(i) and 831.2207(c)(2) and (3). A "life-threatening affliction or other critical medical condition" is defined at 5 CFR 831.2207(c)(3)(i) as a "medical condition so severe as to reasonably limit an individual's probable life expectancy to less than one year."

MSPB concluded that OPM's regulatory interpretation at sections 831.2207 and 831.2208 of Title 5, Code of Federal Regulations, was appropriate for the bifurcated payments in the original statute because the 1-year deferral of the lump-sum payment would be against equity and good conscience for individuals suffering from medical conditions that would likely be fatal within a year. However, in the context of continued eligibility under the 1990 (and 1993) provisions, MSPB found that standard unacceptable. MSPB stated that the purpose of the provision was to allow critically-ill employees to recover their contributions during their lifetime.

To conform our regulations with the Board determination of the purpose of the provision, we calculated the time that a newly-retired, nondisability retiree receiving the average monthly annuity must collect annuity to recover the average amount of employee contributions. On average, nondisability CSRS annuitants must receive annuity for 22 months to recover their contributions. Thus, an individual who at the time of retirement has a medical condition which is not likely to limit his or her life expectancy to less than 2 years will usually live long enough to recover all of his or her retirement contributions in the form of monthly annuity benefits. Accordingly, we are amending sections 831.2207(c)(3)(i) and 842.707(c)(3)(i) of Title 5, Code of

Federal Regulations, to replace the 1-year standard with a 2-year standard.

The amendments to paragraph (e) of section 831.2203 and paragraph (b) of section 842.704 correct obsolete procedures that have become inappropriate because of statutory changes. When AFA was available to all nondisability retirees, we notified all employees of their payment options. The current law permits AFA in a very small number of cases. Notice of AFA election rights to all retiring employees is no longer appropriate. An eligible employee must notify OPM and submit qualifying medical evidence to initiate the election process. The regulations have been amended to reflect this change.

Waiver of General Notice of Proposed Rulemaking

Under section 553(b)(3)(B) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking for the change in the definition of a "life-threatening affliction or other critical medical condition." Delaying the implementation of the 2-year standard would be contrary to the public interest. Because MSPB has already invalidated the current 1-year standard in our regulations, a delay in application of the new 2-year standard serves no purpose.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will only affect federal employees and agencies and retirement payments to retired Government employees and their survivors.

List of Subjects in 5 CFR Parts 831 and 842

Administrative practice and procedure, Air traffic controllers, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.
James B. King,
Director.

Accordingly, OPM is amending 5 CFR parts 831 and 842 as follows:

PART 831—RETIREMENT

1. The authority citation for part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.108 also

issued under 5 U.S.C. 8336(d)(2); § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); § 831.204 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 105-508, 104 Stat. 1388-339; § 831.303 also issued under 5 U.S.C. 8334(d)(2); § 831.502 also issued under 5 U.S.C. 8337; § 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964-1965 Comp.; § 831.621 also issued under section 201(d) of the Federal Employees Benefits Improvement Act of 1986, Pub. L. 99-251, 100 Stat. 23; subpart S also issued under 5 U.S.C. 8345(k); subpart V also issued under 5 U.S.C. 8343a and section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, 101 Stat. 1330-275; § 831.2203 also issued under section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; 104 Stat. 1388-328.

2. In section 831.2203, paragraph (e) is revised, paragraphs (h)(1) introductory text, (h)(1)(i), and (h)(1)(ii) are redesignated as paragraphs (h)(1)(i) introductory text, (h)(1)(i)(A), and (h)(1)(i)(B), respectively, and a new paragraph (h)(1)(ii) is added to read as follows:

§ 831.2203 Eligibility.

* * * * *

(e) An election of the alternative form of annuity must be in writing and received by OPM on or before the date of final adjudication. After the date of final adjudication, an election of the alternative form of annuity is irrevocable.

* * * * *

(h)(1) * * *

(ii) An individual whose annuity commences on or after October 1, 1994, may elect an alternative form of annuity only if that individual is an employee or Member who meets the conditions and fulfills the requirements described in § 831.2207(c) (2) and (3).

* * * * *

3. In section 831.2207, paragraph (c)(3)(i) is revised, paragraph (c)(3)(ii)(G) is removed and reserved, paragraph (c)(3)(ii)(V) is removed, and paragraphs (c)(3)(ii) (B), (H), (K), and (M) are revised to read as follows:

§ 831.2207 Partial deferred payment of the lump-sum credit if annuity commences after January 3, 1988, and before October 1, 1989.

* * * * *

(c) * * *

(3)(i) For the purpose of this section, *life-threatening affliction or other critical medical condition* means a medical condition so severe as to reasonably limit an individual's probable life expectancy to less than 2 years.

(ii) * * *

(B) Aortic stenosis (severe).

* * * * *

(H) Severe cardiomyopathy—Class IV.

(K) Cardiac aneurysm not amenable to surgical treatment.

* * * * *

(M) Severe hepatic failure.

* * * * *

§§ 831.2203, 831.2208 [Amended]

4. In the list below, for each section and paragraph indicated in the left two

columns, remove the reference indicated in the third column where it appears in the paragraph, and add the reference indicated in the fourth column:

Section	Paragraph	Remove	Add
831.2203 ..	Newly designated (h)(1)(i) introductory text	1995	1994
831.2203 ..	(h)(2) introductory text	(h)(1)(ii)	(h)(1)(i)(B)
831.2208 ..	(a) introductory text	1995	1994
831.2208 ..	(b)	1995	1994
831.2208 ..	(c)(2)(ii)	831.2203(h)(1)(i)	831.2203(h)(1)(i)(A)

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

5. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 7202(m)(2) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 and 5 U.S.C. 8402(c)(1); §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; § 842.707 also issued under section 6001 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203; § 842.708 also issued under section 4005 of the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239 and section 7001 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508; subpart H also issued under 5 U.S.C. 1104.

6. In section 842.703, paragraphs (d)(1) introductory text, (d)(1)(i), and (d)(1)(ii) are redesignated as paragraphs (d)(1)(i) introductory text, (d)(1)(i)(A), and (d)(1)(i)(B), respectively, and a new

paragraph (d)(1)(ii) is added to read as follows:

§ 842.703 Eligibility.

* * * * *

(d)(1) * * *

(ii) An individual whose annuity commences on or after October 1, 1994, may elect an alternative form of annuity only if that individual is an employee or Member who meets the conditions and fulfills the requirements described in § 842.707(c) (2) and (3).

* * * * *

7. In section 842.704, paragraph (b) is revised to read as follows:

§ 842.704 Election requirements.

* * * * *

(b) An election of the alternative form of annuity must be in writing and received by OPM on or before the date of final adjudication. After the date of final adjudication, an election of the alternative form of annuity is irrevocable.

* * * * *

8. In section 842.707, paragraph (c)(3)(i) is revised, paragraph (c)(3)(ii)(G) is removed and reserved, paragraph (c)(3)(ii)(V) is removed, and paragraphs (c)(3)(ii) (B), (H), (K), and (M) are revised to read as follows:

§ 842.707 Partial deferred payment of the lump-sum credit if annuity commences after January 3, 1988, and before October 1, 1989.

* * * * *

(c) * * *

(3)(i) For the purpose of this section, *life-threatening affliction or other critical medical condition* means a medical condition so severe as to reasonably limit an individual's probable life expectancy to less than 2 years.

(ii) * * *

(B) Aortic stenosis (severe).

* * * * *

(H) Severe cardiomyopathy—Class IV.

* * * * *

(K) Cardiac aneurysm not amenable to surgical treatment.

* * * * *

(M) Severe hepatic failure.

* * * * *

§§ 842.703, 842.708 [Amended]

9. In the list below, for each section and paragraph indicated in the left two columns, remove the reference indicated in the third column where it appears in the paragraph, and add the reference indicated in the fourth column:

Section	Paragraph	Remove	Add
842.703	Newly designated (d)(1)(i) introductory text	1995	1994
842.703	(d)(2) introductory text	(d)(1)(ii)	(d)(1)(i)(B)
842.708	(a) introductory text	1995	1994
842.708	(b)	1995	1994
842.708	(c)(2)(ii)	842.703(d)(1)(i)	842.703(d)(1)(i)(A)

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 106, 109, 110, 111, 128, 129, and 144, and 48 CFR Part 2209

Lease Guarantee; Prepayment of Small Business Investment Company and Certified Development Company Debentures; Small Business Investment Company Investigations; Pollution Control; Grants for Small Business Research; Management Assistance; Discounted Prepayment of Disaster Home Loans; and Contractor Qualifications

AGENCY: Small Business Administration.
ACTION: Final rule.

SUMMARY: In response to President Clinton's government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. SBA has determined that eight Parts of its regulations should be entirely eliminated as obsolete, unnecessary or duplicative. This rule eliminates those eight Parts. The reasons for eliminating each of these Parts are set forth below in the Supplementary Information of this rule.

DATES: This rule is effective on October 25, 1995.

ADDRESSES: Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, Office of General Counsel, U.S. Small Business Administration, 409 3rd Street, S.W., Washington, D.C. 20416.

FOR FURTHER INFORMATION CONTACT: John W. Klein, Chief Counsel for Special Programs, Office of General Counsel, at (202) 205-6645.

SUPPLEMENTARY INFORMATION: On March 4, 1995, President Clinton issued a Memorandum to all federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. SBA has identified eight Parts of its regulations which can be completely eliminated because they are obsolete, unnecessary or duplicative. Those eight Parts are: 13 CFR Part 106, Lease Guarantee; 13 CFR Part 109, Prepayment of Small Business Investment Company and Certified Development Company Debentures; 13 CFR Part 110, Investigations; Small

Business Investment Companies; 13 CFR Part 111, Pollution Control; 13 CFR Part 128, Grants for Small Business Research; 13 CFR Part 129, Management Assistance; 13 CFR Part 144, Discounted Prepayment of Disaster Home Loans; and 48 CFR Part 2209, Contractor Qualifications. Because SBA has determined that each of the Parts to be eliminated by this rule is obsolete, SBA finds that notice of proposed rulemaking and public comment thereon are unnecessary within the meaning of 5 U.S.C. 553(b). As such, this rule is published in final form.

Brief descriptions of each of these eight Parts and the reasons for their elimination are set forth below.

13 CFR Part 106, Lease Guarantee: Part 106 sets forth the Agency's policy and procedures with respect to the Lease Guarantee Program, which is authorized by 15 U.S.C. § 692. The program was designed to assist certain qualified small business concerns to obtain leases of commercial and industrial property by authorizing SBA to guarantee the payment of rentals under such leases. Congress has not appropriated funds for this program since fiscal year 1977, and no application for a guarantee has been accepted since that time. For this reason, SBA believes that the regulations pertaining to the program may be eliminated as unnecessary. Moreover, there are less than a dozen lease guarantees still in effect.

Sections 106.1 through 106.10 relate to the lease guarantee application process prior to the granting of SBA's assistance and, therefore, should be deleted. Although sections 106.11 through 106.18 relate to servicing provisions, SBA notes that to the extent legal enforceability of certain servicing rights and responsibilities may be required, the contractual documents which govern the remaining lease guarantee transactions provide such enforceability. Thus, these sections are unnecessary and may be eliminated.

13 CFR Part 109, Prepayment of Small Business Investment Company and Certified Development Company Debentures: As directed by Congress, SBA promulgated Part 109 to implement legislation allowing certain debentures to be refinanced. The regulation allowed refinancing of older debentures sold to the Federal Financing Bank by Small Business Investment Companies and Certified Development Companies. These older debentures, because they were sold when interest rates were higher, developed large prepayment premiums when interest rates fell. These premiums would be passed along

to small business borrowers who attempted to prepay their loans.

In response to the problem, Congress passed the Small Business Prepayment Penalty Relief Act of 1994, Public Law 103-403, 108 Stat. 4198, found also in 15 USC 697f. This statutory provision allowed a one-time window of opportunity for borrowers affected by the older debenture prepayment premium to request participation in a refinancing program which would eliminate the large premium. SBA gave notice of the opportunity to affected borrowers. Many borrowers took advantage of the opportunity. SBA paid the difference between the new refinanced amount and the debenture premium, from a special \$30 million fund established by Congress for that purpose.

Because the purpose of the Small Business Prepayment Penalty Relief Act of 1994 and Part 109 have been accomplished and the one-time window of opportunity is now closed, SBA believes that Part 109 should be eliminated.

13 CFR Part 110, Investigations; Small Business Investment Companies: This Part concerns the investigation procedures for SBA's Small Business Investment Company (SBIC) program. These regulations were promulgated in 1962, and were authorized by Title VI of the Small Business Investment Act of 1958. The program assists small business concerns by providing venture capital through SBICs. However, the regulations contained in Part 110 have not been utilized by the program for several years. The scope of examinations and investigations has been amended by statute for the SBIC program and through the Inspector General Act of 1978, as amended, 5 U.S.C. Appendix. In part, these regulations are also now redundant because they address the same information contained in Part 134 regarding proceedings before SBA's Office of Hearings and Appeals (OHA), a regulation promulgated long after Part 110. Additionally, Part 101 of these regulations is currently under revision and will cover Inspector General investigations pertaining to agency programs.

13 CFR Part 111, Pollution Control: Part 111 sets forth the Agency's policy and procedures with respect to the Pollution Control Guarantee Program. Under the program, SBA was authorized to guarantee fully (100 percent) the periodic payments due by small businesses in connection with the purchase or lease of pollution control facilities under a "qualified contract." In 1988, funding for the program was