

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 831, 841 and 842

RIN 3206-AL69

#### Customs and Border Protection Officer Retirement

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is amending its regulations, to reflect changes in the retirement benefits available to customs and border protection officers under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS). These rules incorporate amendments to CSRS and FERS retirement law pursuant to section 535 of the Department of Homeland Security Appropriations Act, 2008. The Act provides early retirement and enhanced annuity benefits for customs and border protection officers employed by the United States Department of Homeland Security under CSRS and FERS; requires an increase in the percentage rate of withholdings from the basic pay of customs and border protection officers; and establishes mandatory retirement of customs and border protection officers at age 57.

**DATES:** Effective July 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** Patrick Jennings, (202) 606-0299.

**SUPPLEMENTARY INFORMATION:** On October 1, 2010, after consultation with the Department of Homeland Security, OPM published (at 75 FR 60645) proposed regulations and requested comments concerning section 535 of the Department of Homeland Security Appropriations Act, 2008 (the Act), Division E of the Consolidated Appropriations Act, 2008, Public Law 110-161 (approved December 26, 2007),

112 Stat. 1844, at 2075, which enacted new human resource management provisions applicable to specified Customs and Border Protection employees. Section 535 of the Act provides that individuals defined as "customs and border protection officers" will be prospectively added as a new group with special human resource management provisions essentially similar to those applicable to other special retirement groups including law enforcement officers, nuclear materials couriers, and firefighters. The principal elements of those structures include: (1) A maximum entry age (to maintain a young and vigorous workforce and to permit a career to be completed by mandatory retirement age); (2) early optional retirement eligibility; (3) enhanced annuity provisions (to make a shorter career economically feasible); (4) mandatory retirement (generally at age 57, but with agency authority to extend to age 60), and (5) higher employer and employee retirement contribution rates. The effective date of section 535 is July 6, 2008.

In addition to the provisions that will be continuing and that apply to individuals employed as customs and border protection officers, section 535 of the Act also includes unique provisions applicable to individuals who are customs and border protection officers on its effective date. These incumbents will not be subject to mandatory retirement, but are eligible for partial annuity computation credit for future service as a customs and border protection officer.

#### Covered Individuals

The same definition is applicable to both FERS and CSRS:

[T]he term "customs and border protection officer" means an employee in the Department of Homeland Security (A) who holds a position within the GS-1895 job series (determined applying the criteria in effect as of September 1, 2007) or any successor position, and (B) whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry, including any such employee who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties (as described in subparagraph (B)) in 1 or more positions (as described in subparagraph (A)) for at least 3 years.

This definition, while similar to the statutory definition of "law enforcement officer," contains important differences that distinguish it from that definition. For the first time in a special retirement coverage definition, there is specific reference to a Federal occupational series—the Customs and Border Protection job series (GS-1895). Two points are significant in this regard. First, only positions in this series are eligible for "primary" coverage. Second, in addition to position classification, there is an additional requirement that the duties of the specific position must include specified activities. Thus, not all positions in the GS-1895 job series will meet the requirements for primary coverage, although it is probable that those that are not eligible for primary coverage will generally meet the requirements for secondary (supervisory or administrative) coverage.

The provision for extending coverage to "any successor position" is also novel. Primary coverage is based upon the GS-1895 series as of September 1, 2007, and it is possible that position classification standards and/or the manner in which positions are described may be changed in the future. The logical interpretation is that this is intended to provide authority for coverage should positions with the same elements currently classified in the GS-1895 series be assigned to another series at some time in the future so long as they would have been covered under the GS-1895 series as it existed on September 1, 2007.

Secondary coverage is not limited to positions in the GS-1895 series. However, section 535 of the Act permits secondary coverage using language equivalent to that applicable to other special retirement groups (*i.e.*, law enforcement officers, firefighters, etc.). Thus, as in the law enforcement officer retirement regulations, secondary coverage will generally be limited to continuous employment in supervisory and/or administrative positions that could not be performed by individuals without prior experience in a customs and border protection officer primary position.

As with other special retirement groups, the final authority on position coverage for retirement purposes is OPM, although coverage determinations are delegated to the Department of Homeland Security. Statutorily, OPM is

also the final authority on position classification, the other aspect of retirement coverage eligibility.

### Incumbent Employees

Section 535 of the Act has provisions concerning mandatory retirement and annuity computation that are applicable to individuals who, depending upon the provision, were first appointed as a customs and border protection officer prior to the effective date, or are customs and border protection officers on the effective date.

**Mandatory retirement:** Sections 831.1608(c) and 842.1006(d) of the rule address the provisions of section 535(e)(2)(A) of the Act, which provide that mandatory retirement “shall not apply to an individual first appointed as a customs and border protection officer before the effective date” of July 6, 2008. Unlike another provision of section 535 (i.e., section 535(e)(2)(C)), section 535(e)(2)(A) does not specify that the individual has to be a customs and border protection officer on the effective date. Thus, an individual previously appointed as a customs and border protection officer before July 6, 2008, but not so employed on that date would not be subject to mandatory retirement upon returning to customs and border protection officer employment following that break in service.

**Prior service and secondary coverage:** Sections 831.1604(b) and 842.1003(c) of the rule address the provisions of section 535(e)(2)(B) of the Act, which provide special rules for treatment of pre-enactment customs and border protection officer service. These special rules are relevant to secondary customs and border protection officer coverage determinations. Section 535 of the Act is explicit that its provisions are prospective, stating in section 535(e)(2)(B)—

(B) TREATMENT OF PRIOR CBPO SERVICE.—

(i) GENERAL RULE.—Except as provided in clause (ii), nothing in this section or any amendment made by this section shall be considered to apply with respect to any service performed as a customs and border protection officer before the effective date under paragraph (1).

(ii) EXCEPTION.—Service described in section 8331(31) or 8401(36) of title 5, United States Code (as amended by this section) rendered before the effective date under paragraph (1) may be taken into account to determine if an individual who is serving on or after such effective date then qualifies as a customs and border protection officer by virtue of holding a supervisory or administrative position in the Department of Homeland Security.

The meaning of clause (ii) is that if an individual is in a secondary

(supervisory or administrative) position on July 6, 2008, that individual's eligibility to be a customs and border protection officer will be determined by looking back at the individual's employment history to determine whether the requirements for coverage would have been met if the provisions of 535 had been in effect during the earlier employment history.

There is one potential issue in this regard resulting from the fact that the GS-1895 series dates back only to July of 2004, and that standard is the one in effect on September 1, 2007. Thus, a cursory reading of this provision could be interpreted to mean that only if there has been three years of post-July 2004 primary service actually classified in the GS-1895 series followed by a direct transfer to a secondary position can an individual in a secondary position be found to be a customs and border protection officer on July 6, 2008. This would permit such coverage only if an individual transferred into a secondary position on or after July 1, 2007. This would mean that some customs and border protection officers in secondary supervisory and administrative customs and border protection officer positions on July 6, 2008, would not be entitled to retirement coverage under the law when the law went into effect.

Despite the lack of relevant legislative history, such a rigid interpretation would be inconsistent with the statutory scheme. There is however an alternative interpretation yielding a reasonable result, which OPM has adopted for this rule. Prior to the establishment of the GS-1895 series, it was preceded by three precursor position series; GS-1816, Immigration Inspection, GS-1890, Customs Inspection, and GS-1801, Canine Enforcement Officer. Most positions classified under those series would now be classified under the GS-1895 series.

Accordingly, for purposes of evaluating whether pre-July 2004 service is qualifying as primary service, positions classified prior to July 2004 in the GS-1816, GS-1890, or GS-1901 series should be considered as meeting the requirement of being a “position within the GS-1895 job series (determined applying the criteria in effect as of September 1, 2007).” However, merely being in one of those three series does not mean that the position was a primary position. The additional requirements relating to the type of work performed must also be satisfied.

### Proportional Annuity Computation

Sections 831.1612(c) and 842.1009(c) of the rule address the unique

provisions of section 535(e)(2)(C) of the Act, which provide for proportional annuity computations that are applicable only to individuals who are customs and border protection officers on July 6, 2008, based on an appointment to a customs and border protection officer prior to that date. Unlike the mandatory retirement exemption, the provisions of section 535(e)(2)(C) of the Act do not apply to a previously appointed customs and border protection officer who is not employed as a customs and border protection officer on July 6, 2008. A previously employed customs and border protection officer who returns after July 6, 2008, would not be eligible, nor would a U.S. Customs and Border Protection employee not in a customs and border protection officer position on July 6, 2008. Under the provisions of section 535(e)(2)(C), individuals do not receive credit for pre-July 6, 2008, service counted towards special retirement eligibility or computation. However, they are eligible to have post-July 5, 2008 customs and border protection officer service credited in their annuity computation at a higher rate even though they may not meet the requirements for special customs and border protection officer retirement. Service in other special retirement categories such as law enforcement officer or firefighter cannot be added to customs and border protection officer service for use in a proportional annuity computation.

Thus, a customs and border protection officer employed on July 6, 2008, and covered by CSRS would have all full months of customs and border protection officer service computed using an annual multiplier of 2.5 percent per year of such service up to 20 years. A customs and border protection officer employed on July 6, 2008, and covered by FERS would have all full months of customs and border protection officer service computed using an annual multiplier of 1.7 percent per year of such service up to 20 years.

### Elections

Sections 831.1612(a) and 842.1009(a) of the rule address the provisions of section 535(e)(3) of the Act, which require that individuals who are customs and border protection officers on December 26, 2007, must be given the right to elect to be covered by or excluded from its provisions when it becomes effective on July 6, 2008. For such incumbents, section 535 provides a substantial lifetime annuity increase in return for a small increase in retirement contributions deducted from

pay. Incumbents on July 6, 2008, are exempt from mandatory retirement. Although the Department of Homeland Security has already provided affected employees with the opportunity to elect to be excluded from the customs and border protection officer provisions, the proposed rule describes the terms of the election opportunity provided by the Department of Homeland Security in the event that there is any question about an employee's election opportunity in the future.

#### Current Law Enforcement Officers

Sections 831.1612(b) and 842.1009(b) of the rule address the provisions of section 535(e)(5) of the Act, which specifies that nothing in section 535 or any amendment made by it shall be considered to afford any election or to otherwise apply with respect to anyone who as of December 25, 2007, was a law enforcement officer employed by U.S. Customs and Border Protection.

#### Technical and Conforming Amendments to Existing Regulations

The rule makes various technical and conforming amendments to 5 CFR §§ 831.502, 841.403, 841.503, 842.208, 842.403, 842.801, and 842.901 to add references to customs and border protection officers. Section 831.502 is also being reissued in its entirety to correct typographical errors in the existing paragraph designations.

#### Comments

We received several comments regarding the proposed rule and they are addressed below. We have not addressed comments we received that were aimed at substantive benefit and procedural issues outside the scope of the regulations.

One commenter asked for an extension until November 3, 2010, to submit comments on the proposed rule because he had not immediately known that the proposed rule had been published. The proposed rule, with a request for comments, was published in the **Federal Register** and posted on Regulations.gov. This process provided adequate notice to the public of the proposed rule and of OPM's request for comments on the rule. The reasons provided by the commenter for asking for an extension are insufficient and would unnecessarily delay the publication of the final rule. The same commenter noted that the regulations make a distinction between primary and secondary positions. This commenter asked why the distinction is being made since "previous experience in a primary position is required." This commenter also asked that the provisions of

§ 831.1607 be waived or phased-in over a period of time for current officers. Section 831.1607(a) provides in part that the Department of Homeland Security deduct and withhold an additional 0.5% an employee's base pay, as required under 5 U.S.C. 8334(a), when the employee is entitled to retirement coverage as a customs and border protection officer. With regard to primary and secondary positions, the regulations follow the general structure of the retirement regulations of other special groups such as law enforcement officers, firefighters, and nuclear materials couriers. All of these regulations draw a distinction between primary (or rigorous) positions and secondary positions, and the proposed rule incorporates substantially similar provisions. The distinction between primary and secondary provisions is based on the statutory distinction between front-line positions and secondary positions in all of the definitions for special groups. With regard to 5 U.S.C. 8334(a), OPM has no authority to waive or phase-in the statute.

Several commenters objected to the requirement at § 831.1604(a)(2) and § 842.1003(b)(2) of the proposed rule which provides that an employee have at least three years of experience in a primary customs and border protection officer position to continue to be covered as a customs and border protection officer upon direct transfer to a secondary supervisory or administrative position (the 3-year experience requirement). This requirement is included in the statutory definition of "customs and border protection officer" at 5 U.S.C. 8331(31) and § 8401(36). OPM has permitted as much flexibility as possible under the law in permitting prior service in occupational series that were precursor series to the GS-1895 series to count toward the 3-year experience requirement at § 831.1604(a)(2) and § 842.1003(b)(2). These special rules are provided at §§ 831.1604(b) and 842.1003(c) of the rules (see *Prior service and secondary coverage* above).

Another commenter indicated that the proposed rule improperly limited precursor series to the Customs and Border Protection Series (GS-1895) only to the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), and Canine Enforcement Officer Series (GS-1801). This commenter also stated that given the similarity between the statutory definition of customs and border protection officer and the statutory definitions for other special groups such as law enforcement officers and firefighters, that only the duties of

a position (i.e., activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry) should be considered when the 3-year experience requirement is applied. First, the regulations do not limit precursor series to the Customs and Border Protection Series (GS-1895) to only the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), and Canine Enforcement Officer Series (GS-1801). Sections 831.1604(b)(1)(i) and 842.1003(c)(1)(i) provide that in addition to the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), and Canine Enforcement Officer Series (GS-1801), a precursor series to the GS-1895 series includes "any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS-1895), and that would have been classified under the GS-1895 series had it then existed." Second, OPM cannot adopt an approach to the 3-year experience requirement that disregards the statutory reference to the GS-1895 series in favor of an approach which considers only the duties performed by an employee. The statutory definition of customs and border protection officer clearly requires that customs and border protection officer retirement coverage in a supervisory or administrative position in the Department of Homeland Security is only permitted when an employee is transferred directly to such a position after performing duties relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry *in one or more positions classified within the GS-1895 job series*. Thus, work experience in a position classified within the GS-1895 job series is one of the conditions that must be satisfied for an employee to continue customs and border protection officer retirement coverage in a supervisory or administrative position. As discussed above, the inclusion of the reference to the GS-1895 job series in the customs and border protection officer definition is the first time in history of special retirement coverage definitions that a specific reference to a Federal occupational series has been included in a definition. Although the regulations are flexible in that they permit service in precursor series to the Customs and Border Protection Series (GS-1895) to be used to satisfy the 3-year experience requirement, the requirement that an employee have experience in the GS-1895 job series to continue customs and border protection officer retirement coverage in a supervisory or

administrative position cannot be disregarded.

Two commenters asked that the proposed rule be changed to allow service as a law enforcement officer to be used to satisfy the requirements for special coverage in a customs and border protection officer position. One commenter, noted that 5 U.S.C. 8336(c) and 8412(d) provide that “any combination” of service as a law enforcement officer, firefighter, nuclear materials courier, customs and border protection officer, etc., can be used to meet the service requirements for entitlement to an immediate retirement under those sections. This commenter stated that service as a law enforcement officer, firefighter, nuclear materials courier, customs and border protection officer, etc., is therefore interchangeable for other purposes as well. This commenter also asked whether a 38-year-old employee with 10 years of service as a customs and border protection officer could transfer to a law enforcement officer position. Law enforcement officer, firefighter, nuclear materials courier, customs and border protection officer, and other types of special service are each defined by the different duties. The duties of a law enforcement officer (investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States) and the duties of a customs and border protection officer (activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry) are entirely different. Each type of special group service is a unique career field and positions within each group are classified under a separate occupational series. Experience in one occupation is not equivalent with experience in another occupation. In fact, one policy goal of special retirement coverage is to encourage career service by an employee in the particular occupation chosen by the employee. However, it is possible for an employee to move, within certain limits, from one of the special group occupations to another without a loss of special retirement coverage. Changing careers is easier for an employee to do early in his or her career, and there should be no obstacle to a 38-year-old employee with 10 years of service as a customs and border protection officer moving to a primary law enforcement officer position. In this situation, an agency would be within its discretion to adjust the usual law enforcement officer maximum entry age (age 37) for the employee by 10 years (i.e., to age 47) because the employee

already has 10 years of service creditable towards entitlement under 5 U.S.C. 8412(d) (assuming the employee is covered by FERS). If the employee remained continuously employed as a law enforcement officer, he would have 29 years of combined customs and border protection officer service and law enforcement officer service when he reached age 57, and would be subject to mandatory separation by virtue of the “any combination of such service” clause of § 8412(d). The second commenter asked that service in a “CBPO (Enforcement) (CBPOE) position, or in the predecessor Senior Immigration Inspector position” be considered as service in a primary customs and border protection officer for purposes of transferring to a secondary position because employees in these positions were law enforcement officers under subchapter III of chapter 83 and chapter 84 of title 5, United States Code, before the enactment of section 535 of the Act. As discussed above, the duties of a law enforcement officer and customs and border protection officer are not equivalent. Furthermore, section 535(e)(5) of the Act clearly provides that nothing in section 535 or any amendment made by it shall be considered to afford any election or to otherwise apply with respect to anyone who as of December 25, 2007, was a law enforcement officer employed by U.S. Customs and Border Protection. Law enforcement officer experience cannot be used to meet the 3-year customs and border protection officer experience requirement under § 831.1604 and § 842.1003(b) of the regulations.

One commenter asserted that § 831.1605 of the proposed rule is inconsistent with the existing CSRS law enforcement officer regulations at 5 CFR 831.906(e) and the court’s decision in *Hall v. Department of the Treasury*, 264 F.3d 1050 (Fed. Cir. 2001). This commenter also asserted that § 831.1605 of the proposed rule “engraft the more restrictive FERS regulations [at 5 CFR 842.906]” onto the CSRS customs and border protection officer regulations. Section § 831.1605 of the proposed rule is not inconsistent with the court’s decision in *Hall*. In the section of the court’s decision where it discussed 5 CFR 831.906(e), it merely cited the provisions at § 831.906(e) and determined that the Treasury had waived its timeliness defense under § 831.906(e) when it decided the merits of Mr. Hall’s complaint without addressing the question of timeliness. *Hall*, 264 F.3d at 1061. The court’s decision in *Hall* does not require OPM

to use the rule at § 831.906(e) for other special groups. The rule at § 831.1605 of the proposed rule is based on § 831.805(c) of subpart H of title 5, Code of Federal Regulations—the regulations pertaining to CSRS nuclear materials courier retirement coverage. Although § 831.1605 of the proposed rule is different from 5 CFR 831.906(e), it provides a reasonable amount of flexibility for the consideration of untimely requests. If an employee in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8334(c) fails to seek a determination from the Department of Homeland Security within 6 months after entering the position, or after any significant change in the position, that his or her position is properly covered by the higher withholding rate, the agency head’s determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed. Furthermore, because the presumption is a defense to an untimely request, the Department of Homeland Security may decide not to assert the presumption of correctness as a defense. In other words, the Department of Homeland Security may waive the defense by addressing the merits of the employee’s claim, as occurred in *Hall*.

One commenter asked that the deadline for past service credit requests at § 831.1606(c) be changed to after the date of publication of the final rule. We agree. The date at § 831.1606(c) was arrived at during the drafting of the proposed rule. At the time, the June 30, 2011 date was in the future. We have changed the date to June 30, 2012.

#### **Executive Order 12866, Regulatory Review**

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

#### **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 retirement payments to retired employees, spouses, former spouses, and insurable interest survivors.

#### **List of Subjects in 5 CFR Parts 831, 841 and 842**

Administrative practice and procedure, Air traffic controllers,

Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

**John Berry,**

*Director.*

For the reasons discussed in the preamble, OPM is amending 5 CFR parts 831, 841, and 842, as set forth below:

**PART 831—RETIREMENT**

- 1. The authority citation for part 831 is revised to read as follows:

**Authority:** 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2), and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also issued under Sec. 7(b) and (e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under Sec. 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.206 also issued under Sec. 1622(b) of Pub. L. 104–106, 110 Stat. 515; Sec. 831.301 also issued under Sec. 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and Sec. 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337, and Sec. 1(3), E.O. 11228, 3 CFR 1965–1965 Comp. p. 317; Sec. 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); Secs. 831.663 and 831.664 also issued under Sec. 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under Sec. 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under Sec. 636 of Appendix C to Pub. L. 106–554, 114 Stat. 2763A–164; Subpart P also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Subpart V also issued under 5 U.S.C. 8343a and Sec. 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

- 2. Revise 831.502 to read as follows:

**§ 831.502 Automatic separation; exemption.**

(a) When an employee meets the requirements for age retirement on any day within a month, he is subject to automatic separation at the end of that month. The department or agency shall notify the employee of the automatic separation at least 60 days in advance of the separation. If the department or

agency fails through error to give timely notice, the employee may not be separated without his consent until the end of the month in which the notice expires.

(b) The head of the agency, when in his or her judgment the public interest so requires, may exempt a law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer from automatic separation until that employee becomes 60 years of age.

(c) The Secretary of Transportation and the Secretary of Defense, under such regulations as each may prescribe, may exempt an air traffic controller having exceptional skills and experience as a controller from automatic separation until that controller becomes 61 years of age.

(d) When a department or agency lacks authority and wishes to secure an exemption from automatic separation for one of its employees other than a Presidential appointee, beyond the age(s) provided by statute, i.e., age 60 for a law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer, and age 61 for an air traffic controller, the department or agency head shall submit a recommendation to that effect to OPM.

(1) The recommendation shall contain:

(i) A statement that the employee is willing to remain in service;

(ii) A statement of facts tending to establish that his/her retention would be in the public interest;

(iii) The period for which the exemption is desired, which period may not exceed 1 year; and,

(iv) The reasons why the simpler method of retiring the employee and immediately reemploying him or her is not being used.

(2) The recommendation shall be accompanied by a medical certificate showing the physical fitness of the employee to perform his or her work.

(e) OPM may approve an exemption only before the automatic separation date applicable to the employee. For this reason, the department or agency shall forward the recommendation to OPM at least 30 days before this separation date.

- 3. Add subpart P to part 831 to read as follows:

**Subpart P—Customs and Border Protection Officers**

Sec.

831.1601 Applicability and purpose.

831.1602 Definitions.

831.1603 Conditions for coverage in primary positions.

831.1604 Conditions for coverage in secondary positions.

831.1605 Evidence.

831.1606 Requests from individuals.

831.1607 Withholdings and contributions.

831.1608 Mandatory separation.

831.1609 Reemployment.

831.1610 Review of decisions.

831.1611 Oversight of coverage determinations.

831.1612 Elections of Retirement Coverage, exclusions from retirement coverage, and proportional annuity computations.

**Subpart P—Customs and Border Protection Officers**

**§ 831.1601 Applicability and purpose.**

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement 5 U.S.C. 8336(c), which establishes special retirement eligibility for customs and border protection officers employed under the Civil Service Retirement System; 5 U.S.C. 8331(3)(C) and (G), pertaining to basic pay; 5 U.S.C. 8334(a)(1) and (c), pertaining to deductions, contributions, and deposits; 5 U.S.C. 8335(b), pertaining to mandatory retirement; and 5 U.S.C. 8339(d), pertaining to computation of annuity.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8347 to prescribe regulations to carry out subchapter III of chapter 83 of title 5 of the United States Code, and in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies, and pursuant to the authority given the Director of OPM in Section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844, at 2075.

**§ 831.1602 Definitions.**

In this subpart—

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of the Department of Homeland Security (DHS), except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of the Department of Homeland Security, or to the Deputy Secretary of the Department of Homeland Security, and who is the sole such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of the Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department

of Homeland Security occupying a position within the Customs and Border Protection Officer (GS-1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position, and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS-1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS-1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

#### **§ 831.1603 Conditions for coverage in primary positions.**

(a) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8336(c).

(b) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8336(c) for any purpose under this subpart.

#### **§ 831.1604 Conditions for coverage in secondary positions.**

(a) An employee's service in a position that has been determined by the employing agency head to be a secondary position is covered under the provisions of 5 U.S.C. 8336(c) if all of the following criteria are met:

(1) The employee is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including a position for which no CSRS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8336(d)(1) of title 5, United States Code, is not considered in determining whether the service in secondary positions is continuous for this purpose.

(b) For the purpose of applying the criteria at paragraphs (a)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), Canine Enforcement Officer Series (GS-1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS-1895), and that would have been classified under the GS-1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS-1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (b)(1)(i) or (b)(1)(ii) of this section; or

(ii) An executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at

paragraph (b)(1)(i) or (b)(1)(ii) of this section is a mandatory prerequisite.

(c) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8336(c) for any purpose under this subpart.

#### **§ 831.1605 Evidence.**

(a) An agency head's determination under §§ 831.1603(a) and 831.1604(a) must be based solely on the official position description of the position in question and any other official description of duties and qualifications.

(b) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8334(c), and the employee does not, within 6 months after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

#### **§ 831.1606 Requests from individuals.**

(a) An employee who requests credit for service under 5 U.S.C. 8336(c) bears the burden of proof with respect to that service, and must provide the employing agency with all pertinent information regarding duties performed.

(b) An employee who is currently serving in a position that has not been approved as a primary or secondary position, but who believes that his or her service is creditable as service in a primary or secondary position may request the agency head to determine whether or not the employee's current service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for current service must be made within 6 months after entering the position or after any significant change in the position.

(c) A current or former employee (or the survivor of a former employee) who believes that a period of past service in an unapproved position qualifies as service in a primary or secondary position and meets the conditions for credit may request the agency head to determine whether or not the

employee's past service should be credited and, if it qualifies, whether it should be credited as service in a primary or secondary position. A written request for past service must be made no later than June 30, 2012.

(d) The agency head may extend the time limit for filing under paragraph (b) or (c) of this section when, in the judgment of such agency head, the individual shows that he or she was prevented by circumstances beyond his or her control from making the request within the time limit.

**§ 831.1607 Withholdings and contributions.**

(a) During the service covered under the conditions established by § 831.1603 and § 831.1604, the Department of Homeland Security will deduct and withhold from the employee's base pay the amount required under 5 U.S.C. 8334(a) for such positions and submit that amount, together with agency contributions required by 5 U.S.C. 8334(a), to OPM in accordance with payroll office instructions issued by OPM.

(b) If the correct withholdings and/or Government contributions are not submitted to OPM for any reason whatsoever, the Department of Homeland Security must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Homeland Security waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM without delay as soon as possible.

(c) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Homeland Security will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or redeposit, including the additional amount required for covered service, and the deposit or redeposit is later determined to be erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(d) The additional employee withholding and agency contribution for covered or creditable service properly made as required under 5 U.S.C. 8334(a)(1) or deposited under 5 U.S.C. 8334(c) are not separately refundable, even in the event that the employee or

his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8339(d).

(e) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to a primary or secondary position, the additional withholdings and agency contributions will not be made. While an employee who does hold a primary or secondary position is detailed or temporarily promoted to a position which is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

**§ 831.1608 Mandatory separation.**

(a) Except as provided in paragraph (c) of this section, the mandatory separation provisions of 5 U.S.C. 8335(b) apply to customs and border protection officers appointed in primary and secondary positions. A mandatory separation under section 8335(b) is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter. Section 831.502 provides the procedures for requesting an exemption from mandatory separation.

(b) In the event an employee is separated mandatorily under 5 U.S.C. 8335(b), or is separated for optional retirement under 5 U.S.C. 8336(c), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position which did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart, such separation will be considered erroneous.

(c) The customs and border protection officer mandatory separation provisions of 5 U.S.C. 8335(b) do not apply to an individual first appointed as a customs and border protection officer before July 6, 2008.

**§ 831.1609 Reemployment.**

An employee who has been mandatorily separated under 5 U.S.C. 8335(b) is not barred from reemployment in any position except a primary position after age 60. Service by a reemployed annuitant is not covered by the provisions of 5 U.S.C. 8336(c).

**§ 831.1610 Review of decisions.**

(a) The final decision of the agency head issued to an employee as the result of a request for determination filed under § 831.1606 may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of the agency head denying an individual coverage

while serving in an approved secondary position because of failure to meet the conditions in § 831.1604(a) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

**§ 831.1611 Oversight of coverage determinations.**

(a) Upon deciding that a position is a customs and border protection officer position, the agency head must notify OPM (Attention: Associate Director, Retirement Services, or such other official as may be designated) stating the title of each position, occupational series, position description number (or other unique identifier), the number of incumbents, and whether the position is primary or secondary. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position.

(b) The Department of Homeland Security must establish and maintain a file containing all coverage determinations made by the agency head under § 831.1603 and § 831.1604, and all background material used in making the determination.

(c) Upon request by OPM, the Department of Homeland Security will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Homeland Security must submit to OPM a list of all covered positions and any other pertinent information requested.

**§ 831.1612 Elections of Retirement Coverage, exclusions from retirement coverage, and proportional annuity computations.**

(a) *Elections of coverage.* (1) The Department of Homeland Security must provide an employee who is a customs and border protection officer on December 26, 2007, the opportunity to elect not to be treated as a customs and border protection officer under section 535(a) and (b) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, 121 Stat. 2042.

(2) An election under this paragraph (a) is valid only if made on or before June 22, 2008.

(3) An individual eligible to make an election under this paragraph who fails to make such an election on or before June 22, 2008, is deemed to have elected to be treated as a customs and border protection officer for retirement purposes.

(b) *Exclusion from coverage.* The provisions of this subpart and any other



specific reference to customs and border protection officers in this part do not apply to employees who on December 25, 2007, were law enforcement officers under subpart I of this part or subpart H of part 842 within U.S. Customs and Border Protection. These employees cannot elect to be treated as a customs and border protection officer under paragraph (a) of this section, nor can they be deemed to have made such an election.

(c) *Proportional annuity computation.* The annuity of an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008, must, to the extent that its computation is based on service rendered as a customs and border protection officer on or after that date, be at least equal to the amount that would be payable—

(1) To the extent that such service is subject to the Civil Service Retirement System, by applying section 8339(d) of title 5, United States Code, with respect to such service; and

(2) To the extent such service is subject to the Federal Employees' Retirement System, by applying section 8415(d) of title 5, United States Code, with respect to such service.

**PART 841—FEDERAL EMPLOYEES RETIREMENT SYSTEM—GENERAL ADMINISTRATION**

■ 4. The authority citation for part 841 continues to read as follows:

**Authority:** 5 U.S.C. 8461; Sec. 841.108 also issued under 5 U.S.C. 552a; subpart D also issued under 5 U.S.C. 8423; Sec. 841.504 also issued under 5 U.S.C. 8422; Sec. 841.507 also issued under section 505 of Pub. L. 99–335; subpart J also issued under 5 U.S.C. 8469; Sec. 841.506 also issued under 5 U.S.C. 7701(b)(2); Sec. 841.508 also issued under section 505 of Pub. L. 99–335; Sec. 841.604 also issued under Title II, Pub. L. 106–265, 114 Stat. 780.

■ 5. Revise § 841.403(c) to read as follows:

**§ 841.403 Categories of employees for computation of normal cost percentages.**

\* \* \* \* \*

(c) Law enforcement officers, members of the Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and employees under section 302 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees.

\* \* \* \* \*

■ 6. Revise § 841.503(b) to read as follows:

**§ 841.503 Amounts of employee deductions.**

\* \* \* \* \*

(b) The rate of employee deductions from basic pay for FERS coverage for a Member, law enforcement officer, firefighter, nuclear materials courier, customs and border protection officer, air traffic controller, member of the Supreme Court Police, Congressional employee, or employee under section 302 of the Central Intelligence Agency Act of 1964 for Certain Employees is seven and one-half percent of basic pay, minus the percent of tax which is (or would be) in effect for the payment, for the employee cost of social security.

\* \* \* \* \*

**PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY**

■ 7. The authority citation for part 842 is revised to read as follows:

**Authority:** 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under Secs. 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under Sec. 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by Sec. 153 of Pub. L. 104–134, 110 Stat. 1321–102; Sec. 842.107 also issued under Secs. 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and Sec. 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under Sec. 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.109 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515; Sec. 842.208 also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and Sec. 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.304 and 842.305 also issued under Sec. 321(f) of Pub. L. 107–228, 116 Stat. 1383, Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under Sec. 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under Sec. 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under Sec. 4005 of Pub. L. 101–239, 103 Stat. 2106 and Sec. 7001 of Pub. L. 101–508, 104 Stat. 1388; Subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under Sec. 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164; Sec. 842.811 also issued under Sec. 226(c)(2) of Public Law 108–176, 117 Stat. 2529; Subpart J also issued under Sec. 535(d) of Title V of Division E of Pub. L. 110–161, 121 Stat. 2042.

■ 8. Revise the section heading, and paragraphs (a)(1) and (2) of § 842.208 to read as follows:

**§ 842.208 Firefighters, customs and border protection officers, law enforcement officers, members of the Capitol or Supreme Court Police, and nuclear materials couriers.**

(a) \* \* \*

(1) After completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 25 years; or

(2) After becoming age 50 and completing any combination of service as a firefighter, customs and border protection officer, law enforcement officer, member of the Capitol or Supreme Court Police, or nuclear materials courier totaling 20 years.

\* \* \* \* \*

■ 9. Revise § 842.403 (b)(2)(ii) to read as follows:

**§ 842.403 Computation of basic annuity.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) Is not a customs and border protection officer, a Member, Congressional employee, military reserve technician, law enforcement officer, firefighter, nuclear materials courier, or air traffic controller.

■ 10. Revise 842.801 to read as follows:

**§ 842.801 Applicability and purpose.**

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110–161, 121 Stat. 2042.

■ 11. Revise 842.901 to read as follows:

**§ 842.901 Applicability and purpose.**

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility



for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

■ 12. Add subpart J to part 842 to read as follows:

#### Subpart J—Customs and Border Protection Officers

842.1001 Applicability and purpose.

842.1002 Definitions.

842.1003 Conditions for coverage.

842.1004 Evidence.

842.1005 Withholding and contributions.

842.1006 Mandatory separation.

842.1007 Review of decisions.

842.1008 Oversight of coverage determinations.

842.1009 Elections of Retirement Coverage, exclusions from retirement coverage, and proportional annuity computations.

#### Subpart J—Customs and Border Protection Officers

##### § 842.1001 Applicability and purpose.

(a) This subpart contains regulations of the Office of Personnel Management (OPM) to supplement—

(1) 5 U.S.C. 8412(d) and (e), which establish special retirement eligibility for law enforcement officers, members of the Capitol Police and Supreme Court Police, firefighters, nuclear materials couriers, customs and border protection officers, and air traffic controllers employed under the Federal Employees Retirement System (FERS);

(2) 5 U.S.C. 8422(a), pertaining to deductions;

(3) 5 U.S.C. 8423(a), pertaining to Government contributions; and

(4) 5 U.S.C. 8425, pertaining to mandatory retirement.

(b) The regulations in this subpart are issued pursuant to the authority given to OPM in 5 U.S.C. 8461(g) to prescribe regulations to carry out the provisions of 5 U.S.C. chapter 84, in 5 U.S.C. 1104 to delegate authority for personnel

management to the heads of agencies and pursuant to the authority given the Director of OPM in section 535(d) of the Department of Homeland Security Appropriations Act, 2008, Division E of Public Law 110–161, 121 Stat. 1844.

##### § 842.1002 Definitions.

As used in this subpart:

*Agency head* means the Secretary of the Department of Homeland Security. For purposes of an approval of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security, except that the designated representative must be a department headquarters-level official who reports directly to the Secretary of Homeland Security, or to the Deputy Secretary of Homeland Security, and who is the sole such representative for the entire department. For the purposes of a denial of coverage under this subpart, agency head is also deemed to include the designated representative of the Secretary of Department of Homeland Security at any level within the Department of Homeland Security.

*Customs and border protection officer* means an employee in the Department of Homeland Security occupying a position within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position and whose duties include activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry. Also included in this definition is an employee engaged in this activity who is transferred directly to a supervisory or administrative position in the Department of Homeland Security after performing such duties in 1 or more positions within the GS–1895 job series (determined applying the criteria in effect as of September 1, 2007), or any successor position, for at least 3 years.

*Employee* means an employee as defined by 5 U.S.C. 8401(11).

*First-level supervisors* are employees classified as supervisors who have direct and regular contact with the employees they supervise. First-level supervisors do not have subordinate supervisors. A first-level supervisor may occupy a primary position or a secondary position if the appropriate definition is met.

*Primary position* means a position classified within the Customs and Border Protection Officer (GS–1895) job series (determined applying the criteria in effect as of September 1, 2007) or any successor position whose duties include the performance of work directly

connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

*Secondary position* means a position within the Department of Homeland Security that is either—

(1) Supervisory; i.e., a position whose primary duties are as a first-level supervisor of customs and border protection officers in primary positions; or

(2) Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary customs and border protection officer position is a prerequisite.

##### § 842.1003 Conditions for coverage.

(a) *Primary positions.* (1) An employee's service in a position that has been determined by the employing agency head to be a primary customs and border protection officer position is covered under the provisions of 5 U.S.C. 8412(d).

(2) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a primary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

(3) A first-level supervisor position may be determined to be a primary position if it satisfies the conditions set forth in § 842.1002.

(b) *Secondary positions.* An employee's service in a position that has been determined by the employing agency head to be a secondary position is covered under the provisions of 5 U.S.C. 8412(d) if all of the following criteria are met:

(1) The employee, while covered under the provisions of 5 U.S.C. 8412(d) as a customs and border protection officer, is transferred directly (i.e., without a break in service exceeding 3 days) from a primary position to a secondary position; and

(2) The employee has completed 3 years of service in a primary position, including service for which no FERS deductions were withheld; and

(3) If applicable, the employee has been continuously employed in secondary positions since transferring from a primary position without a break in service exceeding 3 days, except that a break in employment in secondary positions which begins with an involuntary separation (not for cause), within the meaning of 8414(b)(1)(A), is not considered in determining whether the service in secondary positions is continuous for this purpose.

(c) For the purpose of applying the criteria at paragraph (b)(1) through (3) of this section to evaluate transfers, service, and employment periods that occurred before September 1, 2007—

(1) A primary position, covered under the provisions of 5 U.S.C. 8412(d), is deemed to include:

(i) A position whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry that was classified within the Immigration Inspector Series (GS-1816), Customs Inspector Series (GS-1890), Canine Enforcement Officer Series (GS-1801), or any other series which the agency head determines were predecessor series to the Customs and Border Protection Series (GS-1895), and that would have been classified under the GS-1895 series had it then existed; and

(ii) A position within the Customs and Border Protection Series (GS-1895) whose duties included the performance of work directly connected with activities relating to the arrival and departure of persons, conveyances, and merchandise at ports of entry.

(2) A secondary position is deemed to include:

(i) A first-level supervisor of an employee in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section; or

(ii) A executive, managerial, technical, semiprofessional, or professional position for which experience in a position described at paragraph (c)(1)(i) or (c)(1)(ii) of this section is a mandatory prerequisite.

(d) An employee who is not in a primary position, nor covered while in a secondary position, and who is detailed or temporarily promoted to a secondary position is not covered under the provisions of 5 U.S.C. 8412(d) for any purpose under this subpart.

#### § 842.1004 Evidence.

(a) The agency head's determination under § 842.1003(a) that a position is a primary position must be based solely on the official position description of the position in question, and any other official description of duties and qualifications. The official documentation for the position must establish that it satisfies the requirements defined in § 842.1002.

(b) A determination under § 842.1003(b) must be based on the official position description and any other evidence deemed appropriate by the agency head for making the determination.

(c) If an employee is in a position not subject to the one-half percent higher withholding rate of 5 U.S.C. 8422(a)(3), and the employee does not, within 6 months of entering the position formally and in writing seek a determination from the employing agency that his or her service is properly covered by the higher withholding rate, the agency head's determination that the service was not so covered at the time of the service is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

#### § 842.1005 Withholding and contributions.

(a) During service covered under the conditions established by § 842.1003(a) or (c), the Department of Homeland Security will deduct and withhold from the employee's base pay the amounts required under 5 U.S.C. 8422(a) and submit that amount to OPM in accordance with payroll office instructions issued by OPM.

(b) During service described in paragraph (a) of this section, the Department of Homeland Security must submit to OPM the Government contributions required under 5 U.S.C. 8423(a) in accordance with payroll office instructions issued by OPM.

(c) If the correct withholdings and/or Government contributions are not timely submitted to OPM for any reason whatsoever, including cases in which it is finally determined that past service of a current or former employee was subject to the higher deduction and Government contribution rates, the Department of Homeland Security must correct the error by submitting the correct amounts (including both employee and agency shares) to OPM as soon as possible. Even if the Department of Homeland Security waives collection of the overpayment of pay under any waiver authority that may be available for this purpose, such as 5 U.S.C. 5584, or otherwise fails to collect the debt, the correct amount must still be submitted to OPM as soon as possible.

(d) Upon proper application from an employee, former employee or eligible survivor of a former employee, the Department of Homeland Security will pay a refund of erroneous additional withholdings for service that is found not to have been covered service. If an individual has paid to OPM a deposit or reposit, including the additional amount required for covered service, and the deposit is later determined to be

erroneous because the service was not covered service, OPM will pay the refund, upon proper application, to the individual, without interest.

(e) The additional employee withholding and agency contributions for covered service properly made are not separately refundable, even in the event that the employee or his or her survivor does not qualify for a special annuity computation under 5 U.S.C. 8415(d).

(f) While an employee who does not hold a primary or secondary position is detailed or temporarily promoted to such a position, the additional withholdings and agency contributions will not be made.

(g) While an employee who holds a primary or secondary position is detailed or temporarily promoted to a position that is not a primary or secondary position, the additional withholdings and agency contributions will continue to be made.

#### § 842.1006 Mandatory separation.

(a) Except as provided in paragraph (d) of this section, the mandatory separation provisions of 5 U.S.C. 8425 apply to customs and border protection officers, including those in secondary positions. A mandatory separation under 5 U.S.C. 8425 is not an adverse action under part 752 of this chapter or a removal action under part 359 of this chapter.

(b) Exemptions from mandatory separation are subject to the conditions set forth under 5 U.S.C. 8425. An exemption may be granted at the sole discretion of the head of the employing agency or by the President in accordance with 5 U.S.C. 8425(c).

(c) In the event that an employee is separated mandatorily under 5 U.S.C. 8425, or is separated for optional retirement under 5 U.S.C. 8412(d) or (e), and OPM finds that all or part of the minimum service required for entitlement to immediate annuity was in a position that did not meet the requirements of a primary or secondary position and the conditions set forth in this subpart or, if applicable, in part 831 of this chapter, such separation will be considered erroneous.

(d) The customs and border protection officer mandatory separation provisions of 5 U.S.C. 8425 do not apply to an individual first appointed as a customs and border protection officer before July 6, 2008.

#### § 842.1007 Review of decisions.

(a) The final decision of the agency head denying an individual's request for approval of a position as a primary or secondary customs and border

protection officer position made under § 842.1003(a) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(b) The final decision of the agency head denying an individual coverage while serving in an approved secondary position because of failure to meet the conditions in § 842.1003(b) may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

**§ 842.1008 Oversight of coverage determinations.**

(a) Upon deciding that a position is a customs and border protection officer, the Department of Homeland Security must notify OPM (Attention: Associate Director, Retirement Services, or such other official as may be designated) stating the title of each position, the occupational series of the position, the number of incumbents, whether the position is primary or secondary, and, if the position is a primary position, the established maximum entry age, if one has been established. The Director of OPM retains the authority to revoke the agency head's determination that a position is a primary or secondary position.

(b) The Department of Homeland Security must establish and maintain a file containing all coverage determinations made by the agency head under § 842.1003(a) and (b), and all background material used in making the determination.

(c) Upon request by OPM, the Department of Homeland Security will make available the entire coverage determination file for OPM to audit to ensure compliance with the provisions of this subpart.

(d) Upon request by OPM, the Department of Homeland Security must submit to OPM a list of all covered positions and any other pertinent information requested.

**§ 842.1009 Elections of retirement coverage, exclusions from retirement coverage, and proportional annuity computations.**

(a) *Election of coverage.* (1) The Department of Homeland Security must provide an individual who is a customs and border protection officer on December 26, 2007, with the opportunity to elect not to be treated as a customs and border protection officer under section 535(a) and (b) of the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, 121 Stat. 2042.

(2) An election under this paragraph is valid only if made on or before June 22, 2008.

(3) An individual eligible to make an election under this paragraph who fails to make such an election on or before June 22, 2008, is deemed to have elected to be treated as a customs and border protection officer for retirement purposes.

(b) *Exclusion from coverage.* The provisions of this subpart and any other specific reference to customs and border protection officers in this part do not apply to employees who on December 25, 2007, were law enforcement officers, under subpart H of this part or subpart I of part 831, within U.S. Customs and Border Protection. These employees cannot elect to be treated as a customs and border protection officer under paragraph (a) of this section, nor can they be deemed to have made such an election.

(c) *Proportional annuity computation.* The annuity of an employee serving in a primary or secondary customs and border protection officer position on July 6, 2008, must, to the extent that its computation is based on service rendered as a customs and border protection officer on or after that date, be at least equal to the amount that would be payable—

(1) To the extent that such service is subject to the Civil Service Retirement System, by applying section 8339(d) of title 5, United States Code, with respect to such service; and

(2) To the extent such service is subject to the Federal Employees' Retirement System, by applying section 8415(d) of title 5, United States Code, with respect to such service.

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**DEPARTMENT OF HOMELAND SECURITY**

**Office of the Secretary**

**6 CFR Part 5**

[Docket No. DHS-2011-0037]

**Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security Transportation Security Administration—023 Workplace Violence Prevention Program System of Records**

**AGENCY:** Privacy Office, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, "Department of Homeland

Security/Transportation Security Administration—023 Workplace Violence Prevention Program System of Records" from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the "Department of Homeland Security/Transportation Security Administration—023 Workplace Violence Prevention Program System of Records" from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

**DATES:** *Effective Date:* This final rule is effective July 18, 2011.

**FOR FURTHER INFORMATION CONTACT:** For general questions please contact: Ted Calhoun, Office of Law Enforcement, TSA-18, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598-6018; e-mail [Ted.Calhoun@dhs.gov](mailto:Ted.Calhoun@dhs.gov). For privacy issues please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Department of Homeland Security (DHS) Transportation Security Administration (TSA) published a notice of proposed rulemaking (NPRM) in the **Federal Register**, 75 FR 7978, February 23, 2010, proposing to exempt portions of the DHS/TSA-023 Workplace Violence Prevention Program system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The DHS/TSA-023 Workplace Violence Prevention Program system of records notice (SORN) was published concurrently in the **Federal Register**, 75 FR 8096, February 23, 2010, and comments were invited on both the NPRM and SORN.

**Public Comments**

DHS/TSA received one comment on the NPRM and no comments on the SORN.

*NPRM*

DHS/TSA received one comment from the public that supported the proposed rule. No other substantive or significant comments were received.

*SORN*

TSA received no comments on the SORN.

After consideration of the public comment received, the Department will implement the rulemaking as proposed.