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## OFFICE OF PERSONNEL MANAGEMENT

**5 CFR Parts 890, 892, 894**

**RIN 3206–AM55**

## Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children; Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums: Conforming Amendments

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

**ACTION:** Final rule.

**SUMMARY:** The United States Office of Personnel Management (OPM) is issuing a final rule to amend the Federal Employees Health Benefits Program (FEHB) regulations regarding coverage for children up to age 26. The regulations also allow children of same-sex domestic partners living in states that do not allow same-sex couples to marry to be covered family members under the FEHB and the Federal Employees Dental and Vision Insurance Program (FEDVIP).

**DATES:** This final rule is effective beginning January 1, 2014.

**FOR FURTHER INFORMATION CONTACT:** Rachel Royster, Program Analyst, *Rachel.Royster@opm.gov* or (202) 606–4181.

**SUPPLEMENTARY INFORMATION:** On July 20, 2012, OPM published proposed regulations in the **Federal Register** (77 FR 42914–42918) to expand coverage of children under the FEHB Program and FEDVIP. Comments were requested to be received on or before September 18, 2012. After reviewing the comments received, OPM has decided to release this final regulation as proposed with several changes. The most significant change to this regulation is that eligibility for the children of same-sex domestic partners is limited to those states in which same-sex couples are unable to marry. We have also made several other minor changes. First, we have added language reflecting that children under the age of 26, or children of any age who are incapable of self-support because of a mental or physical disability which existed before age 26, are considered family members under the FEHB Program. Second, the final rule changes the period of time within which notification of the termination of a domestic partnership must be provided to the employing office from 7 to 30 days, and permits either the enrollee or the domestic partner to provide the notification. These changes will align the rules on such notifications with those for other programs OPM administers, such as the Federal Long Term Care Insurance Program. Third, the language in section 890.302(b)(6) has been modified slightly to make it consistent with the language in sections 892.102 and 894.403. Fourth, the language in section 890.804(b)(i) has been changed slightly to reflect the terminology used in the statute. Fifth, the definition of ''stepchild'' was modified to clarify that the term includes children of former spouses or eligible same-sex domestic partners where the child continues to live with the enrollee in a regular parent-child relationship.

As explained in the proposed rule, this regulation: (1) Brings FEHB rules into compliance with changes to health insurance coverage for children under the Patient Protection and Affordable Care Act, Public Law 111–148, as amended by the Health Care and Education Reconciliation Act, Public Law 111–152 (the Affordable Care Act); (2) extends FEHB and FEDVIP benefits to children of same-sex domestic partners of Federal employees who live in states that do not allow same-sex couples to marry, consistent with Presidential Memoranda issued on June 17, 2009, and June 2, 2010; (3) makes other non-substantive, technical conforming amendments to the FEDVIP rules, which reference current FEHB rules that are being amended by this rule; and (4) updates the Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums (Part 892) rules to reflect the above-referenced changes required by the Affordable Care Act and to implement changes in connection with the extension of FEHB coverage to children of same-sex domestic partners of Federal employees.

### Analysis of and Responses to Public Comments

We received 17 comments on the proposed rule, with a majority relating to the extension of coverage to children of same-sex domestic partners under the FEHB Program and FEDVIP. A majority of commenters (about 3 to 1) supported extending coverage to children of same-sex domestic partners. Other comments and OPM's responses are detailed below. One comment related to the requirement that money deposited in a flexible spending account be forfeited if eligible expenses are not incurred within the timeframe specified by the Internal Revenue Service (IRS). That issue is outside of the scope of this proposed rule and is therefore not addressed below.

*Comment:* Multiple commenters recommended that OPM adopt the policy found in the FEHB Handbook that allows stepchildren to remain on their Federal employee or annuitant parents' insurance even after a domestic partnership between the Federal employee or annuitant and his or her same-sex domestic partner has ended. The commenters noted that currently, the policy governing the FEHB Program allows stepchildren to continue to be covered by the enrollee's Self and Family enrollment after the enrollee divorces the child's natural parent if the child is living with the enrollee in a parent-child relationship. The commenters asserted that extending this policy to children of same-sex domestic partners would protect a child if a relationship between the enrollee and the child continues beyond the enrollee's relationship with his or her same-sex domestic partner. The commenters also requested that OPM expand the current policy to provide coverage for children after the domestic partnership ends not only if the child lives with the enrollee in a parent-child relationship, but also if the enrollee provides ''substantial ongoing support'' for the child.

*Response:* OPM agrees with the commenters and has added language to the definition of ''stepchild'' to clarify that the term shall continue to refer to a child who continues to live with the enrollee in a regular-parent child

relationship after divorce from the spouse, termination of the domestic partnership, or the death of the spouse or domestic partner. OPM considers the fact that the child lives with the enrollee in a regular parent-child relationship as integral in establishing the continued existence of the parent-child relationship between the enrollee and the child. OPM intends for children of same-sex domestic partners to be treated the same as currently eligible stepchildren. OPM does not intend to expand its policy to cover children who are not stepchildren, as defined here, whose only relationship to the enrollee is that of a child of a former spouse or domestic partner.

*Comment:* Two commenters suggested that OPM's proposed definition of stepchild to include the children of same-sex domestic partners is beyond the scope of OPM's authority and violates Section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. 7 (Pub. L. 104–199).

*Response:* OPM is granted the authority in 5 U.S.C. 8913 to prescribe regulations necessary to carry out the FEHB Program. OPM's authority with respect to defining eligible children is especially broad, as Congress, in the FEHB Act, provided a non-exclusive list of examples of the types of children who may be eligible for coverage. OPM has historically, through its regulations and other communications, established rules and provided guidance on specific parent-child relationships and eligibility for FEHBP coverage. Here, exercising its long-held discretion in this area, OPM has determined that coverage may be extended to children of the same-sex domestic partners of certain Federal employees and annuitants through a regulation defining the term ''stepchild'' as that term is used in the law governing the FEHB Program. The definition of ''stepchild'' set forth in this regulation appropriately encompasses and reflects the variety of parent-child relationships that exist today.

It should be noted that, as an alternative to adding a definition of the term ''stepchild,'' OPM also considered including in the regulation a new category of child—the child of a same-sex domestic partner—that would have expanded upon the examples of types of children that Congress provided in the statute (e.g., adopted child, recognized natural child, stepchild and foster child). While there are a number of approaches that would have been reasonable, OPM chose the approach of adding a definition of the term ''stepchild'' because this nomenclature specifically recognizes the parent-child relationship between the employee (annuitant)/parent and the child.

Although the comment that this regulation violates DOMA is no longer relevant in light of the Supreme Court's June 26, 2013 decision striking down Section 3 of DOMA as unconstitutional, it is important to emphasize that this regulation was not in violation of Section 3 of DOMA even while that provision was in force. Section 3 of DOMA limited the meaning of the terms ''marriage'' and ''spouse,'' when used in Federal laws. Through this regulation, OPM has expanded its definition of the term ''stepchild'' with respect to the provision of healthcare benefits for children. Consequently, Section 3 of DOMA simply had no bearing on this regulation, and these recommended changes were always within the purview of OPM's discretion. Finally, as explained in the proposed rule and as explained in greater detail below, the change is consistent with Executive Order 13563 and President Obama's memoranda of June 17, 2009, and June 2, 2010.

*Comment:* One commenter suggested that OPM only recognize same-sex domestic partnerships in states that do not recognize same-sex marriage or where a similar relationship, such as a civil union, is not permitted.

*Response:* At the time this rule was issued in proposed form, Section 3 of DOMA, 1 U.S.C. 7, prohibited OPM from recognizing same-sex marriages. Section 3 of DOMA provided that, when used in a Federal law, the term ''marriage'' meant only a legal union between one man and one woman as husband and wife, and that the term ''spouse'' referred only to a person of the opposite sex who is a husband or wife. Thus, the availability of same-sex marriage in a particular state was not relevant to our determination of coverage eligibility for the children of enrollees' same-sex domestic partners. As explained above, on June 26, 2013, the Supreme Court struck down Section 3 of DOMA as unconstitutional. Subsequent to the Supreme Court's ruling, OPM issued administrative guidance explaining that legally married same-sex spouses and any newly eligible (step)children of Federal employees and annuitants would be eligible to participate in the FEHB and FEDVIP, irrespective of the employees' or annuitants' state of residence.

Now that FEHB and FEDVIP coverage is available to the children of an employee's same-sex spouse, OPM has reconsidered the need and scope of the proposed rule to extend benefits to the children of same-sex domestic partners. Although there are arguments that could support a decision by OPM to move ahead with the uniform, national rule originally contemplated in the proposed regulation, OPM has decided to limit this regulation to those same-sex couples living in states where marriage is not available to them.

Only a minority of states currently permits same-sex marriage, and therefore, many same-sex couples do not have the same access to marriage that is available to opposite-sex couples. Until marriage is available to same-sex couples in all fifty states, the extension of benefits to same-sex domestic partners will continue to play an important role in bridging the gap in legal treatment between same-sex and opposite-sex couples.

For these reasons, this proposed regulation to provide FEHB and FEDVIP benefits to the stepchildren of same-sex domestic partners will not be withdrawn in whole, but instead will be tailored to those couples who are unable to marry under the laws of the state in which they reside.

Same-sex couples living in states that allow them to marry have access to many, if not all, of the protections that married opposite-sex couples enjoy. Therefore, for employees living in states where they are able to marry, there is less need to create a separate path by which stepchildren of Federal employees can be deemed eligible for coverage under FEHB and FEDVIP. For those employees unable to marry under the laws of the states in which they live, however, it is appropriate to extend FEHB and FEDVIP eligibility to stepchildren, albeit in a potentially non-tax preferred manner, in the form described in this regulation.

We recognize that the legal landscape is rapidly changing, and certain states that currently do not allow same-sex couples to marry may soon allow them to do so. Same-sex couples may also relocate from states where they cannot marry to states where they are permitted to marry. The possibility that the relevant state marriage laws may change mid-year has the potential to create significant administrative difficulties. For this reason, eligibility for FEHB and FEDVIP coverage will be determined once annually, and will depend on whether an enrollee seeking to cover the child of his or her same-sex domestic partner lives in a state that authorizes same-sex marriage as of the last day prior to Open Season for enrollment in benefits for the following year. An otherwise eligible stepchild whose parents lived in a state that did not permit them to marry prior to the commencement of Open Season will remain eligible to receive those benefits

for the entire calendar year, even if that state changes its marriage laws mid-year to authorize same-sex marriage or if the couple moves to a state that permits same-sex marriage.

Nothing in this regulation changes the rules that otherwise apply when an enrollee experiences a qualifying life event, including marriage. See OPM Benefits Administration Letter 13–203 (clarifying that same-sex couples who marry after June 26, 2013, have 60 days after the marriage to change their FEHB enrollment). OPM will issue guidance to clarify, among other things, how enrollees should inform their employing agency if a child they were covering under a FEHB Self and Family enrollment or a FEDVIP Self Plus One or Self and Family enrollment pursuant to this regulation, and for whom the value of the benefit was not tax preferred, becomes a stepchild who is the child of the enrollee's spouse, thus eliminating the need to impute the value of the benefit to their income.

Finally, with respect to the suggestion regarding civil unions, domestic partnership or other non-marital relationship, the fact that an employee may be in a state-created relationship with the child's other parent other than a marriage will not render the child eligible for coverage as a stepchild under the FEHB or FEDVIP. Therefore, requiring employees to enter into one of these other relationship statuses where available is not appropriate.

*Comment:* Several commenters requested that OPM extend coverage under the FEHB Program to same-sex spouses and/or domestic partners.

*Response:* As a result of the Supreme Court's decision striking down Section 3 of DOMA as unconstitutional, same-sex spouses of Federal employees and annuitants are now able to access benefits that are provided to spouses, including FEHB benefits. 5 U.S.C. 8901(5) defines ''member of family'' to mean the employee's ''spouse'' and certain children. Same-sex domestic partners are not encompassed within the statutory definition of member of family. OPM is therefore without authority to extend coverage to domestic partners.

*Comment:* One commenter argued that extending coverage to children of same-sex domestic partners is inequitable because it does not include coverage for children of opposite-sex domestic partners.

*Response:* Children of opposite-sex domestic partners were not included because opposite-sex partners may obtain coverage for their children through marriage, an option that is not yet universally available to same-sex domestic partners. Same-sex domestic partners do currently have the option to marry in some states, and as discussed above, we have decided that where same-sex couples live in states that grant them equal marriage rights, they will not be eligible for the domestic partner benefits made available through this regulation. Finally, any enrollee seeking to cover a child of his or her same-sex domestic partner pursuant to this regulation must certify that he or she would marry his or her same-sex domestic partner were that option available in his or her state of residence.

*Comment:* One commenter argued that this regulation creates a legal anomaly and injustice by not providing health coverage for other children in non-marital households. The commenter gives the example of Federal employees who have assumed responsibility for the care of a grandchild or a niece where the child's natural parents are no longer living and able to care for these children as ineligible for coverage under the FEHB Program.

*Response:* OPM disagrees with the contention of the commenter that the children in the examples given are ineligible for coverage under the FEHB Program and therefore are treated unfairly by this rule. OPM has broadly defined the term ''foster child'' and allows Federal employees who have a relationship with a ''foster child'' to cover such a child under a Self and Family enrollment. The definition is designed to ensure that children who have parent-child relationships with Federal employees and annuitants, including non-traditional relationships, are eligible for coverage under the FEHB Program.

*Comment:* One commenter requested that OPM make changes impacting dependent eligibility so that FEHB Program insurance carriers may consider the cost of any such expansion during benefit and rate negotiations for the following year.

*Response:* We believe the addition of these family members will only have a negligible impact on costs for participating FEHB plans.

*Comment:* Multiple commenters recommended that OPM explicitly state that there are two interpretations under IRS regulations and guidance where coverage for a child of a same-sex domestic partner may be treated favorably for tax purposes: (1) If the employee is considered the child's stepparent under state law and (2) if the child is an employee's qualifying relative. In addition, several commenters requested that OPM provide clear and detailed guidance to enrollees concerning the tax consequences of covering children of domestic partners. One commenter suggested that the process for an employee to establish favorable tax treatment for a child should not be more onerous than submitting an IRS W–4 form.

*Response:* OPM cannot provide individualized tax advice to enrollees, as we do not administer the Tax Code. However, OPM plans to issue general guidance on our Web site and to employing agencies and payroll offices informing enrollees of the documentation and information that the enrollee will be required to submit to the employing office in order to establish whether their child's coverage is eligible for favorable tax treatment, such as an annual certification. It will be incumbent on the enrollee to consult with appropriate professionals to determine whether, taking into account the enrollee's unique situation, FEHB and/or FEDVIP coverage provided to his or her stepchild meets applicable requirements for favorable tax treatment. If the enrollee does not establish that the stepchild qualifies for favorable tax treatment, then the fair market value of coverage provided to the child will be imputed to the enrollee and subject to applicable taxes. OPM guidance will also include the annual fair market value calculations for each FEHB and FEDVIP plan to aid enrollees in understanding the financial implications of covering a stepchild for whom preferential tax treatment has not been established. OPM believes that the specifics of the tax treatment of this coverage will be best communicated through annual guidance to employing agencies and enrollees as opposed to regulatory language because IRS guidance and policies may change from year to year. OPM plans to create a process that is minimally onerous for enrollees, while ensuring that agencies receive required information that is accurate.

*Comment:* A commenter expressed concern about the equity of imputing income for these benefits to Federal employees in accordance with current IRS regulations and guidance.

*Response:* OPM does not have the authority to make changes to current IRS regulations and guidance concerning the tax treatment of health insurance benefits; therefore this comment is outside the scope of these proposed regulations. FEHB and FEDVIP enrollees will be subject to the same State and Federal taxation rules as other employees receiving employer-sponsored benefits in the United States.

In the proposed rule, OPM also requested comments on how, in the case of the provision of FEHB coverage to the child of a same-sex domestic partner who does not qualify for favorable tax treatment under the Internal Revenue Code, the fair market value (FMV) of that coverage might be calculated for different types of plan coverage. Several commenters suggested methods for calculating the FMV.

Two commenters suggested using the methodology in Private Letter Ruling 9603011, where the FMV is the difference between the Self and Family premium and the Self Only premium for the selected plan, net of employee contributions. One commenter suggested that this is a preferable method because it is calculated from information that is publicly available and does not require complicated actuarial calculations on the part of the FEHB Program carrier. One commenter suggested that OPM may calculate FMV using the difference between the actuarial value of insurance for a single person and that of insurance for a couple or family. One commenter suggested that OPM use the actual premium cost the Federal Government would have paid if the child was not included in the policy, despite this method being opposed by the IRS in some private letter rulings. Several commenters suggested that OPM consider actuarial studies and data to ensure that an accurate FMV is determined.

OPM appreciates the input from commenters on how to determine FMV for coverage of children of domestic partners. OPM plans to provide, in the form of guidance to agencies, the FMV calculation for each FEHB plan for those who wish to cover children of domestic partners in a Self and Family enrollment (and for FEDVIP plans for those covering such children under a Self Plus One or Self and Family enrollment) where the children are not eligible for favorable tax treatment as a dependent. This calculation will be available to Federal agencies, payroll offices and enrollees annually, beginning for plan year 2014.

**Regulatory Impact Analysis**

OPM has examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects of $100 million or more in any one year. I certify that this regulation will not have a significant economic impact because the regulation only adds a small additional group of children to the list of groups eligible for coverage under FEHB and FEDVIP.

**List of Subjects**

*5 CFR Part 890*

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

*5 CFR Part 892*

Administrative practice and procedure, Government employees, Health insurance, Taxes, Wages.

*5 CFR Part 894*

Administrative practice and procedure, Government employees, Health insurance, Taxes, Wages

U.S. Office of Personnel Management.

**Elaine Kaplan,**

*Acting Director.*

Accordingly, OPM is amending 5 CFR chapter I as follows:

## PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for Part 890 continues to read as follows:

**Authority:** 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–03, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; 5 U.S.C. 8913; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246 (b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061.

■ 2. Section 890.302 is revised to read as follows:

**§ 890.302 Coverage of family members.**

(a)(1) An enrollment for self and family includes all family members who are eligible to be covered by the enrollment. Except as provided in paragraph (a)(2) of this section, no employee, former employee, annuitant, child, or former spouse may enroll or be covered as a family member if he or she is already covered under another person's self and family enrollment in the FEHB Program.

(2) *Dual enrollment.* (i) A dual enrollment exists when an individual is covered under more than one FEHB Program enrollment. Dual enrollments are prohibited except when an eligible individual would otherwise not have access to coverage and the dual enrollment has been authorized by the employing office.

(ii) *Exception.* An individual described in paragraph (a)(2)(i) of this section may enroll if he or she or his or her eligible family members would otherwise not have access to coverage, in which case the individual may enroll in his or her own right for self only or self and family coverage, as appropriate. However, an eligible individual is entitled to receive benefits under only one enrollment regardless of whether he or she qualifies as a family member under a spouse's or parent's enrollment. To ensure that no person receives benefits under more than one enrollment, each enrollee must promptly notify the insurance carrier as to which persons will be covered under his or her enrollment. These individuals are not covered under the other enrollment. Examples include but are not limited to:

(A) To protect the interests of married or legally separated Federal employees, annuitants and their children, an employee or annuitant may enroll in his or her own right in a self only or self and family enrollment, as appropriate, even though his or her spouse also has a self and family enrollment if the employee, annuitant or his or her children live apart from the spouse and would otherwise not have access to coverage due to a service area restriction and the spouse refuses to change health plans.

(B) When an employee who is under age 26 and covered under a parent's self and family enrollment acquires an eligible family member, the employee may elect to enroll for self and family coverage.

(iii) Children are entitled to receive benefits under only one enrollment regardless of whether the children qualify as family members under the enrollment of both parents or of a parent and a stepparent and regardless of whether the parents are married, unmarried, divorced, legally separated, or in a domestic partnership. To ensure that no person receives benefits under more than one enrollment, each enrollee must promptly notify the insurance carrier as to which family members will be covered under his or her enrollment. These individuals are not covered under the other enrollment.

(b)(1) A child under the age of 26, or a child of any age who is incapable of self-support because of a mental or physical disability which existed before age 26, is considered to be a family member eligible to be covered by the enrollment of an enrolled employee or annuitant or a former employee or child enrolled under § 890.1103 of this part if he or she is—

(i) A child born within marriage;

(ii) A recognized natural child;

(iii) An adopted child;

(iv) A stepchild; or

(v) A foster child.

(2) *Meaning of stepchild.* Except as provided in paragraph (b)(5) of this section, for purposes of this part, the term ''stepchild'' refers to the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship.

(3) *Meaning of domestic partner.* For purposes of this part, the term ''domestic partner'' is a person in a domestic partnership with an employee, annuitant, former employee or child enrolled under § 890.1103.

(4) *Meaning of domestic partnership.* For purposes of this part, the term ''domestic partnership'' is defined as a committed relationship between two adults of the same sex, in which the partners—

(i) Are each other's sole domestic partner and intend to remain so indefinitely;

(ii) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(iii) Are at least 18 years of age and mentally competent to consent to a contract;

(iv) Share responsibility for a significant measure of each other's financial obligations;

(v) Are not married or joined in a civil union to anyone else;

(vi) Are not a domestic partner of anyone else;

(vii) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(viii) Provide documentation demonstrating fulfillment of the requirements of paragraphs (b)(4)(i) through (vii) of this section as prescribed by OPM; and

(ix) Certify that they understand that willful falsification of the documentation described in paragraph (b)(4)(viii) of this section may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

(x) Certify that they would marry but for the failure of their state of residence to permit same-sex marriage.

(5) Notwithstanding the provisions of paragraph (b)(2) of this section, the child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (b)(4)(i) through (viii) of this section but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for the following plan year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For mid-year enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire to cover the child.

(6) *Termination of domestic partnership.* An enrollee or his or her domestic partner must notify the employing office within thirty calendar days in the event that any of the conditions listed in paragraphs (b)(4)((i) through (vii) of this section are no longer met, in which case a domestic partnership will be deemed terminated.

(7) *Tax issues.* The fair market value of coverage provided to a stepchild who is the child of a domestic partner will be taxed in accordance with applicable tax laws unless the enrollee establishes that the stepchild qualifies for favorable tax treatment.

(c) *Child incapable of self-support.* When an individual's enrollment for self and family includes a child who has become 26 years of age and is incapable of self-support, the employing office must require such enrollee to submit a physician's certificate verifying the child's disability. The certificate must—

(1) State that the child is incapable of self-support because of a physical or mental disability that existed before the child became 26 years of age and that can be expected to continue for more than 1 year;

(2) Include a statement of the name of the child, the nature of the disability, the period of time it has existed, and its probable future course and duration; and,

(3) Be signed by the physician and show the physician's office address. The employing office must require the enrollee to submit the certificate on or before the date the child becomes 26 years of age. However, the employing office may accept otherwise satisfactory evidence of incapacity that is not timely filed.

(d) *Renewal of certificates of incapacity.* The employing office must require an enrollee who has submitted a certificate of incapacity to renew that certificate on the expiration of the minimum period of disability certified.

(e) *Determination of incapacity.* (1) Except as provided in paragraph (e)(2) of this section, the employing office shall make determinations of incapacity.

(2) Either the employing office or the carrier may make a determination of incapacity if a medical condition, as specified by OPM, exists that would cause a child to be incapable of self-support during adulthood.

■ 3. Section 890.804 is revised to read as follows:

**§ 890.804 Coverage.**

(a) *Type of enrollment.* A former spouse who meets the requirements of § 890.803 may elect coverage for self only or for self and family. A family enrollment covers only the former spouse and any child of both the former spouse and the employee, former employee or employee annuitant, provided such child is not otherwise covered by a health plan under this part. A child must be under age 26 or incapable of self-support because of a mental or physical disability existing before age 26. No person may be covered by two enrollments.

(b) A child is considered to be the child of the former spouse or the employee, former employee, or employee annuitant if he or she is—

(1) A natural child; or

(2) An adopted child.

(c) *Child incapable of self-support.* When a former spouse enrolls for a family enrollment which includes a child who has become 26 years of age and is incapable of self-support, the employing office shall determine such child's eligibility in accordance with § 890.302(c), (d), and (e).

■ 4. In § 890.1102, revise the definition of ''Qualifying event'' to read as follows:

**§ 890.1102 Definitions.**

* * * * *

*Qualifying event* means any of the following events that qualify an individual for temporary continuation of coverage under subpart K of this part:

(1) A separation from Government service.

(2) A divorce or annulment.

(3) A change in circumstances that causes an individual to become ineligible to be considered a child who is a covered family member under this part.

■ 5. In § 890.1103, revise paragraphs (a) introductory text and (a)(2) to read as follows:

**§ 890.1103 Eligibility.**

(a) Except as provided by paragraph (b) of this section, individuals described by this section are eligible to elect temporary continuation of coverage under this subpart. Eligible individuals are as follows:

* * * * *

(2) Individuals whose coverage as children under the family enrollment of an employee, former employee, or annuitant ends because they cease meeting the requirements for being considered covered family members. For the purpose of this section, children who are enrolled under this part as survivors of deceased employees or annuitants are considered to be children under a family enrollment of an employee or annuitant at the time of the qualifying event.

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■ 6. In § 890.1104, revise paragraphs (b)(2) and (3) to read as follows:

**§ 890.1104 Notification by agency.**

* * * * *

(b) * * *

(2) If the notice described in paragraph (b)(1) of this section is received by the employing office within 60 days after the date on which the child ceased meeting the requirements for being considered a covered family member, the employing office must notify the child of his or her rights under this subpart within 14 days after receiving the notice.

(3) This paragraph does not preclude the employing office from notifying the child of his or her rights based on oral or written notification by the child, another family member, or any other source that the child no longer meets the requirements for being considered a covered family member.

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■ 7. In § 890.1107, revise paragraph (b) to read as follows:

**§ 890.1107 Length of temporary continuation of coverage.**

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, in the case of individuals who are eligible for continued coverage under § 890.1103(a)(2), the temporary continuation of coverage ends on the date that is 36 months after the date the individual first ceases to meet the requirements for being considered a child who is a covered family member, unless it is terminated earlier under the provisions of § 890.1110.

(2) The temporary continuation of coverage ends on the date that is 36 months after the date of the separation from service on which the former employee's continuation of coverage is based, unless it is terminated earlier under the provisions of § 890.1110, in the case of individuals who—

(i) Are eligible for continued coverage under § 890.1103(a)(2); and

(ii) As of the day before ceasing to meet the requirements for being considered children who are covered family members, were covered family members of a former employee receiving continued coverage under this subpart; and

(iii) Cease meeting the requirements for being considered children who are covered family members before the end of the 18-month period specified in paragraph (a) of this section.

* * * * *

**§ 890.1202 [Amended]**

■ 8. In § 890.1202, remove the words ''unmarried dependent'' from the definition of ''covered family members.''

**§ 890.1203 [Amended]**

■ 9. In § 890.1203, in paragraph (b), remove the word ''dependent'' each time it appears.

## PART 892—FEDERAL FLEXIBLE BENEFITS PLAN: PRE-TAX PAYMENTS OF HEALTH BENEFITS PREMIUMS PROGRAM

■ 10. The authority citation for part 892 continues to read as follows:

**Authority:** 5 U.S.C. 8913; 5 U.S.C. 1103(a)(7); 26 U.S.C. 125; Sec. 892.101 also issued under sec. 311 of Pub. L. 111–3, 123 Stat. 64.

■ 11. In § 892.101, the definition of ''Dependent'' and the introductory text and paragraph (1)(iii) of the definition of ''Qualifying life event'' are revised to read as follows:

**§ 892.101 Definitions.**

* * * * *

*Dependent* means a family member who is both eligible for coverage under the FEHB Program and either a dependent as defined in section 152 of the Internal Revenue Code or a child as defined in section 152(f)(1) of the Internal Revenue Code who is under age 27 as of the end of the employee's taxable year.

* * * * *

*Qualifying life event* means an event that may permit changes to your FEHB enrollment as well as changes to your premium conversion election as described in Treasury regulations at 26 CFR 1.125–4. For purposes of determining whether a qualifying life event has occurred under this part, a stepchild who is the child of an employee's domestic partner as defined in part 890 of this chapter shall be treated as though the child were a dependent within the meaning of 26 CFR 1.125–4 even if the child does not so qualify under such Treasury regulations. Such events include the following:

(1) * * *

(iii) Last dependent child loses coverage, for example, the child reaches age 26, disabled child becomes capable of self support, child acquires other coverage by court order; and * * *

■ 12. In § 892.102, add two sentences to the end of the section to read as follows:

**§ 892.102 What is premium conversion and how does it work?**

* * * There is one exception, however. If your FEHB enrollment covers a stepchild who is the child of a domestic partner as defined in part 890 of this chapter, and that stepchild does not qualify for favorable tax treatment under applicable tax laws, then the portion of the allotted amount described above that represents the employee's contribution toward the fair market value of FEHB coverage provided to the child will be separately imputed to the employee as income and subject to applicable taxes.

**§ 892.208 [Amended]**

■ 13. In § 892.208(b), the number ''22'' is removed and the number ''26'' is added in its place.

## PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

■ 14. The authority citation for part 894 continues to read as follows:

**Authority:** *5 U.S.C. 8962; 5 U.S.C. 8992;* subpart C also issued under sec. 1 of *Pub. L. 110–279, 122 Stat. 2604.*

■ 15. In § 894.101, the definition of ''Acquiring an eligible child'' is revised and definitions for ''Domestic partner,'' ''Domestic partnership'' and ''Stepchild'' are added in alphabetical order to read as follows:

**§ 894.101 Definitions.**

* * * * *

*Acquiring an eligible child* means one of the following:

(1) Birth of a child;

(2) Adoption of a child;

(3) Acquisition of a foster child as described in § 890.101(a)(8) of this chapter;

(4) Acquisition of a stepchild who lives with the enrollee in a regular parent-child relationship;

(5) Establishment of a recognized natural child;

(6) Residence change of the enrollee's stepchild or recognized natural child who moves in with the enrollee; and

(7) An otherwise eligible child becoming unmarried due to divorce or annulment of marriage, or death.

* * * * *

*Domestic partner* means a person in a domestic partnership with an employee or annuitant.

*Domestic partnership* means a committed relationship between two adults of the same sex, in which the partners—

(1) Are each other's sole domestic partner and intend to remain so indefinitely;

(2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);

(3) Are at least 18 years of age and mentally competent to consent to a contract;

(4) Share responsibility for a significant measure of each other's financial obligations;

(5) Are not married or joined in a civil union to anyone else;

(6) Are not a domestic partner of anyone else;

(7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;

(8) Provide documentation demonstrating fulfillment of the requirements of paragraphs (1) through (7) of this definition as prescribed by OPM; and

(9) Certify that they understand that willful falsification of the documentation described in paragraph (8) of this definition may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. 1001.

(10) Certify that they would marry but for the failure of their state of residence to permit same-sex marriage.

(11) Termination of Domestic Partnership. An enrollee or his or her domestic partner must notify the employing office within thirty calendar days in the event that any of the conditions listed in paragraphs (1) through (7) of this definition are no longer met, in which case a domestic partnership will be deemed terminated.

* * * * *

*Stepchild* means:

(1) Except as provided in paragraph (2) of this definition, the child of an enrollee's spouse or domestic partner and shall continue to refer to such child after the enrollee's divorce from the spouse, termination of the domestic partnership, or death of the spouse or domestic partner, so long as the child continues to live with the enrollee in a regular parent-child relationship.

(2) The child of an enrollee and a domestic partner who otherwise meet the requirements of paragraphs (1) through (8), set forth in the definition of Domestic Partnership, but live in a state that has authorized marriage by same-sex couples prior to the first day of Open Season, shall not be considered a stepchild who is the child of a domestic partner in the following plan year. The determination of whether a state's marriage laws render a child ineligible for coverage as a stepchild who is the child of a domestic partner shall be made once annually, based on the law of the state where the same-sex couple lives on the last day before Open Season begins for enrollment for the following year. A child's eligibility for coverage as a stepchild who is the child of a domestic partner in a particular plan year shall not be affected by a mid-year change to a state's marriage law or by the couple's relocation to a different state. For midyear enrollment changes involving the addition of a new stepchild, as defined by this regulation, outside of Open Season, the determination of whether a state's marriage laws render the child ineligible for coverage shall be made at the time the employee notifies the employing office of his or her desire to cover the child.

* * * * *

■ 16. Add § 894.308 to subpart C to read as follows:

**§ 894.308 How do I establish the dependency of my recognized natural child?**

(a) Dependency is established for a recognized natural child who lives with the enrollee in a regular parent-child relationship, a recognized natural child for whom a judicial determination of support has been obtained, or a recognized natural child to whose support the enrollee makes regular and substantial contributions.

(b) The following are examples of proof of regular and substantial support. More than one of the following proofs may be required to show support of a recognized natural child who does not live with the enrollee in a regular parent-child relationship and for whom a judicial determination of support has not been obtained:

(1) Evidence of eligibility as a dependent child for benefits under other State or Federal programs;

(2) Proof of inclusion of the child as a dependent on the enrollee's income tax returns;

(3) Canceled checks, money orders, or receipts for periodic payments from the enrollee for or on behalf of the child.

(4) Evidence of goods or services which show regular and substantial contributions of considerable value;

(5) Any other evidence which OPM shall find to be sufficient proof of support or of paternity or maternity.

■ 17. In § 894.403, add a sentence to the end of paragraph (a) to read as follows:

**§ 894.403 Are FEDVIP premiums paid on a pre-tax basis?**

(a) * * * However, if your enrollment covers a stepchild who is the child of a domestic partner as defined in § 894.101, and that stepchild does not qualify for favorable tax treatment under applicable tax laws, the allotted amount of premium that represents the fair market value of the FEDVIP coverage provided to the stepchild will be separately imputed to the employee as income and subject to applicable taxes.

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## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 741

**RIN 3133–AD96**

### Liquidity and Contingency Funding Plans

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final rule.