

the employee with specific information as to how, when, and where the payments are to be submitted.

(d) **Coverage.** Employee payments are considered to be currently deposited if received by the agency before, during, or within 3 months after the end of the pay period covered by the deposit. If the contributions are not currently deposited, coverage terminates on the last day of the pay period for which the required contributions were currently deposited, subject to a 31-day extension of group life insurance and health benefits coverage as provided in parts 870 and 890 of this chapter and to the conversion benefits provided in parts 870 and 890 of this chapter. Coverage so terminated may not be re-established before the employee actually enters on duty, on the first day in a pay status in an agency. However, terminated retirement, health benefits, and group life insurance coverage must be reinstated retroactively when, in the judgment of OPM, the failure to make the required current deposit was due to circumstances beyond the employee's control and the required payments were deposited at the first opportunity. Coverage under a system other than the Civil Service Retirement System must be reinstated retroactively if the agency which administers the retirement system determines that the failure to make the required current deposit was due to circumstances beyond the control of the employee and the required payments were deposited at the first opportunity.

#### **§ 352.310 [Removed]**

- 8. Remove and reserve § 352.310.
- 9. Revise § 352.311 through § 352.314 to read as follows:

#### **§ 352.311 Reemployment.**

(a) An employee who transferred to an international organization with the consent of the employing agency is entitled to be reemployed in his or her former position, or one of like seniority, status, and pay, within 30 days of applying for reemployment if the employee:

(1) Is separated, either voluntarily or involuntarily, without cause, within the term of employment with an international organization; and

(2) Applies for reemployment with the employing agency or its successor no later than 90 days after separation from the international organization.

(b) Pay upon reemployment will be set at that to which the employee would have been entitled had the employee remained with the employing agency.

(c) When an employee's reemployment right is to a position in

the SES, reemployment may be to any position in the SES for which the employee is qualified. The employee must be returned at not less than the SES rate of basic pay as determined under 5 CFR part 534, subpart D, at which the employee was being paid immediately before transfer to the international organization, or if pay has been adjusted under § 352.314(c), at not less than the adjusted pay level.

(d) The period of separation caused by the employment of the employee with the international organization and the period necessary to effect reemployment are creditable service for all appropriate civil service employment purposes (e.g., tenure, service computation date, retirement, time in grade). Employees, upon return, are also entitled to restoration of any sick leave.

(e) An employee who elected to retain Federal retirement coverage while employed by the international organization and has made all deposits required for such coverage may make contributions to the TSP which he or she missed as a result of the service with the international organization, and receive make-up agency contributions and lost earnings on the agency contributions, consistent with applicable TSP requirements.

#### **§ 352.312 When to apply.**

An employee may apply for reemployment, in writing, either before or after separation from the international organization. If the employee applies before separation, the 30-day period prescribed in § 352.311 begins either with the date of the application or 30 days before the employee's date of separation from the international organization, whichever is later. If the employee applies for reemployment after separation, the application must be received by the employing agency no later than 90 days after separation from the international organization.

#### **§ 352.313 Failure to reemploy and right of appeal.**

(a) When an agency fails to reemploy an employee within 30 days of receiving the employee's application, it must notify the employee, in writing, of the reasons and of the employee's right to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations. The agency must comply with the provisions of § 1201.21 of this title.

(b) If the agency fails to reach and issue a decision to the employee within 30 days from the date of the application for reemployment, the employee is entitled to appeal the agency's failure to

issue a decision to the Merit Systems Protection Board under the provisions of the Board's regulations.

(c) An employee may submit an appeal, alleging that the agency has failed to comply with any of the other provisions of sections 3343 and 3581–3584 of title 5, United States Code, or of this part, to the Merit Systems Protection Board under the provisions of the Board's regulations.

#### **§ 352.314 Consideration for promotion and pay increases.**

(a) The employing agency must consider an employee who is detailed or transferred to an international organization for all promotions for which the employee would be considered if not absent. A promotion based on this consideration is effective on the date it would have been effective if the employee were not absent.

(b) When the position of an employee who is absent on detail or transfer to an international organization is upgraded during the employee's absence, the employing agency must place the employee in the upgraded position upon return.

(c) The employing agency must consider an employee who is detailed or transferred to an international organization from an ungraded pay system for all pay increases for which the employee would have been considered if not absent. An increase is effective on the date it would have been effective if the employee were not absent.

[FR Doc. E8–26009 Filed 10–30–08; 8:45 am]

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## **OFFICE OF PERSONNEL MANAGEMENT**

### **5 CFR Part 537**

**RIN 3206–AK51**

#### **Repayment of Student Loans**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management is issuing final regulations to revise the rules governing the authority to offer student loan repayment benefits to Federal job candidates or current Federal employees when necessary to recruit or retain highly qualified personnel. These revisions include certain policy changes and clarifications to assist agencies in the administration of the Federal student loan repayment program.

**DATES:** The regulations are effective December 1, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Mark Harrington by telephone at (202) 606-2858; by fax at (202) 606-0824; or by e-mail at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** On January 9, 2007, the U.S. Office of Personnel Management (OPM) published proposed regulations (72 FR 914) to revise the rules implementing 5 U.S.C. 5379, which authorizes agencies to offer student loan repayment benefits to candidates for Federal jobs or current Federal employees when necessary to recruit or retain highly qualified personnel. The primary purpose of the revision was to make part 537 more readable and usable. However, we have also made substantive changes that will improve the agencies' program administration and promote alignment between this authority and related authorities that support recruitment and retention efforts.

The 60-day comment period for the proposed regulations ended on March 12, 2007. During the comment period, OPM received comments from four Federal agencies, one union, and two individuals.

**Definitions**

An agency recommended we clarify the definition of *student loan repayment benefit* in § 537.102 by adding a reference to § 537.106(b), which describes student loans that qualify for repayment. We agree and have added the reference.

We also have made two additional minor revisions in the definitions section. Specifically, we have added language clarifying that the definitions in § 537.102 apply only for purposes of part 537. We also have revised the definition of *time-limited appointment* to refer to a "non-permanent appointment" rather than an "appointment of temporary duration" to ensure there is no confusion with the use of the term "temporary" in other regulations (e.g., 5 CFR part 316, subpart D).

**Comment on Authorizing Student Loan Repayment Benefits To Retain an Employee Likely To Leave for a Different Position in the Federal Service**

One agency commented on proposed § 537.105(a)(2)(ii), which requires an agency to make a written determination that an employee would otherwise be likely to leave the agency for employment outside the Federal service and that it is essential to retain the employee based on the employee's high

or unique qualifications or a special need of the agency before authorizing student loan repayment benefits to retain a current agency employee. The agency recommended we remove the requirement that the employee be likely to leave for employment outside the Federal service to permit agencies to offer student loan repayment benefits to retain an employee likely to leave for a different position in the Federal service. The agency noted the authorizing statute does not prohibit agencies from offering student loan repayment benefits to current employees who are likely to leave for a different position in the Federal service.

**Comments on Authorizing Student Loan Repayment Benefits To Recruit an Employee From Another Federal Agency**

Two agencies, one union, and one individual submitted comments in opposition to proposed § 537.105(c), which provides that an agency may not authorize student loan repayment benefits to recruit an individual from outside the agency who is currently employed in the Federal service. One agency and the union commented that it is inequitable for a newly appointed employee to be eligible for student loan repayment benefits while an employee transferring from another Federal agency is not. The agency stated this provision will make it extremely difficult for agencies to recruit for mission-critical positions from other agencies. The agency also commented that all Federal agencies compete with each other for job candidates and each agency offers different benefits and opportunities based on various factors, including budget and certain flexibilities available solely to the particular agency. The union asserted the focus should be on filling the position with the best qualified individual, with all the benefit options open to an agency, regardless of the job candidate's current position.

**Response to Comments on Authorizing Student Loan Repayment Benefits To Retain an Employee Likely To Leave for a Different Position in the Federal Service or To Recruit an Employee From Another Federal Agency**

Ensuring agencies have an effective civilian workforce to achieve their goals is one of the primary objectives of strategic human capital management in the Government. To meet this objective, agencies must have the necessary human resources tools to recruit and retain essential employees to perform mission-critical work. The student loan repayment authority is one of several

tools providing agencies substantial flexibility to help recruit and retain key employees.

We carefully considered the comments recommending the regulations be amended to provide agencies with additional flexibility to authorize student loan repayment benefits to either retain a current employee likely to leave for a different position in the Federal service or to recruit an individual from outside the agency who is currently employed in the Federal service. In determining whether to provide additional flexibility, we must balance the workforce needs of a single agency with the workforce needs of other agencies. An employee providing valuable services to one agency also may possess the competencies that are valuable to another agency. We also need to be cautious when establishing new flexibilities that have the potential to result in costly and inefficient interagency competition.

We have not amended proposed § 537.105(a)(2)(ii) to permit agencies to authorize student loan repayment benefits to retain an employee likely to leave for a different position in the Federal service. We note that this policy was established at § 537.105(c) in OPM's original final regulations on the repayment of student loans, which were published on January 11, 2001 (66 FR 2790).

We also have not amended proposed § 537.105(c) to permit agencies to authorize student loan repayment benefits to recruit an employee from outside the agency who is currently employed in the Federal service. While not previously addressed in OPM's regulations, it has been OPM's longstanding guidance that agencies should not use the student loan repayment authority to recruit current Federal employees from other agencies.

The legislative history of 5 U.S.C. 5379 indicates Congress intended student loan repayment benefits to be a tool used to improve the Federal Government's ability to compete for top college graduates by allowing Federal agencies to repay the student loans of those individuals. (See House Report 101-402, February 7, 1990.) The student loan repayment authority is designed to be used at an agency's discretion as part of a set of flexibilities—including recruitment incentives under 5 CFR part 575, subpart A, and the superior qualifications and special needs pay-setting authority under 5 CFR 531.212—allowing agencies to tailor employment offers to the needs of individual job candidates to compete with non-Federal employers for the best and brightest

personnel. The authority is not intended to assist agencies in competing with other Federal agencies for current Federal employees.

We understand interagency competition already exists, and some agencies are disadvantaged because other agencies have the flexibility to pay higher salaries or provide other unique incentives. However, we must balance single agency needs against the Governmentwide interest of avoiding costly and inefficient interagency competition. If these regulations were to permit agencies to use student loan repayment benefits to retain current employees likely to leave for a different position in the Federal service and to recruit current employees from other agencies, they could result in student loan repayment bidding wars between the current and prospective agencies. We do not intend to discourage interagency movements, which provide certain benefits to both Federal agencies and employees. However, we do not think it is appropriate for Federal agencies to use student loan repayment benefits as a financial incentive to compete with each other for current Federal employees.

#### **Request for Clarification Regarding Advertising a Student Loan Repayment Program and the Eligibility of Employees Who Previously Transferred From Another Federal Agency**

One agency asked for clarification concerning what constitutes recruitment for the purpose of § 537.105(c). The agency would like to retain its ability to advertise its student loan repayment program and be assured that simply advertising the program will not be prohibited. In addition, the agency is concerned the new provision would adversely impact the eligibility of an employee with prior Federal work experience if he or she otherwise would be eligible to participate in the agency's student loan repayment program.

Although these final regulations prohibit agencies from authorizing student loan repayment benefits expressly to recruit an individual from outside the agency who is currently employed in the Federal service, there is no restriction prohibiting an agency from advertising its student loan repayment program as part of a general recruitment effort. In addition, the regulations do not prohibit an agency from offering student loan repayment benefits to an employee who previously transferred from another agency. In other words, an agency may not include student loan repayment benefits as part of a job offer in an effort to recruit a current Federal employee from another

agency. However, if at some point after entering the new position the individual meets the agency's requirements for participation in its student loan repayment program, the agency may provide student loan repayment benefits to the employee.

#### **Movement to a Position in a Different Geographic Location Within the Same Agency**

An agency recommended we revise the regulations to address a situation in which an employee receiving student loan repayment benefits moves to a position in a different geographic location within the same agency. Specifically, the agency suggested allowing agencies to make a determination regarding whether to terminate or continue providing student loan repayment benefits when an employee moves to a position in a different geographic location within the same agency. The agency stated the agency component in the new geographic location may not have the funds to continue providing student loan repayment benefits to the employee and also may not have the same circumstances to justify providing the incentive. As provided by § 537.107(a), a written service agreement may specify any employment conditions the agency considers to be appropriate, including the individual's position and the duties he or she is expected to perform, his or her work schedule, and his or her level of performance. Also, § 537.107(f) provides that an agency may include in a service agreement specific conditions (in addition to those required by law) that trigger the loss of eligibility for student loan repayment benefits and/or a requirement that the employee reimburse the agency for student loan repayment benefits already received. (Also see §§ 537.108(a)(3) and 537.109(a)(2).) Therefore, the regulations already provide agencies with the authority to make student loan repayment benefits contingent on an employee working in a position at a certain geographic location. However, to address the agency's comment, we have amended § 537.107(a) to clarify that an agency may add language to the service agreement to make the geographic location of an employee's position a condition of receiving student loan repayment benefits.

#### **Suitability Determinations**

An agency recommended we expand on § 537.109(b)(1) to add suitability determinations and failure to complete a probationary period to the types of involuntary separations that trigger a requirement for an employee to

reimburse his or her agency for student loan repayment benefits received. We agree in part. As provided by §§ 537.107(f)(2) and 537.109(b)(1), a service agreement may not require reimbursement based on an involuntary separation for reasons other than misconduct or unacceptable performance. We have revised §§ 537.107(f)(2) and 537.109(b)(1) to also require reimbursement when an employee is separated involuntarily prior to the completion of a service agreement as a result of a negative suitability determination under 5 CFR part 731. However, we are not adding language requiring reimbursement based on an involuntary separation due to a failure to complete a probationary period because we believe such an action would be considered an involuntary separation for misconduct or unacceptable performance, which are already covered by the regulations.

#### **Comment on Reimbursement Requirements**

One agency questioned whether the provisions allowing agencies to require reimbursement for employees who are removed for poor performance or for non-suitability exceed the statutory authority granted to OPM under 5 U.S.C. 5379. We disagree, and for the reasons explained below, we are not changing our regulations in §§ 537.107(f)(2) and 537.109(b)(1).

Section 5379 provides discretionary authority for agencies to set up programs for student loan reimbursement for eligible employees. ("The head of an agency *may*, in order to recruit or retain highly qualified personnel, establish a program under which the agency *may* agree to repay" (emphasis added). See 5 U.S.C. 5379(b)(1).) Agencies are not required to set up such programs, and employees are not entitled to benefits under the authority. Entitlement begins only after a written agreement between the agency and the employee is signed, and the student loan reimbursement is subject to "such terms, limitations, or conditions, as may be mutually agreed to by the agency and employee concerned." See 5 U.S.C. 5379(b)(2). If agencies decide to offer the program, there are only three statutory limitations. First, an agency may not pay more than \$10,000 per calendar year or \$60,000 total in student loan repayments for an individual employee (5 U.S.C. 5379(b)(2)). Second, an agency may not reimburse an employee for repayments made by the employee before entering into an agreement with the agency (5 U.S.C. 5379(b)(3)). Third, an agency must require reimbursement if the employee

is involuntarily separated for misconduct or is voluntarily separated before the completion of the term of the agreement, (5 U.S.C. 5379(c)). In addition, agencies must follow regulations implemented by OPM under the authority of 5 U.S.C. 5379(g).

Agencies may not expand a program to provide for more benefits to employees than are authorized by statute. However, where a benefit is discretionary, agencies may set conditions, limitations, or terms on the employee's eligibility for payment of the benefit. This is explicitly stated in the statute. The phrase "terms, limitations, or conditions as may be mutually agreed to by the agency and employee concerned" refers to aspects of the administration of the program relating to individual payments. OPM may properly use its regulatory authority to mandate that agencies uniformly include certain terms, limitations, and conditions in service agreements. (See 5 U.S.C. 5379(g), which allows OPM to establish "standards and requirements" by regulation to ensure uniformity in appropriate areas.) We believe that requiring agencies to condition payment of the student loan repayment benefit on the employee's acceptance of reimbursement when involuntarily separated for performance or for non-suitability is within the letter and the spirit of the authority given under 5 U.S.C. 5379(b)(2). It is good policy to require that agencies seek reimbursement when an employee has been found unsuitable, engaged in misconduct, or failed to perform adequately. In summary, the statute does not provide entitlement, and employees are required to sign agreements with conditions only if they wish to participate in their agencies' discretionary programs.

#### **Commissioned Corps Officers of the Public Health Service**

One agency requested that OPM delegate it the authority to offer student loan repayment benefits to Commissioned Corps Officers of the Public Health Service. However, officers of the Commissioned Corps are not covered by the authorizing statute, and OPM cannot extend eligibility to Commissioned Corps officers by regulation. The statute authorizing student loan repayment benefits, 5 U.S.C. 5379, does not define "employee." Therefore, the general title 5 definition of employee at 5 U.S.C. 2105 applies to the student loan repayment authority. As such, proposed § 537.102 defines *employee* as "an employee of an agency who satisfies the definition of the term in 5 U.S.C. 2105."

Under 5 U.S.C. 2105(a), the term "employee" includes officers and individuals appointed in the "civil service." Section 2101(1) of title 5, United States Code, states that "the 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." Under 5 U.S.C. 2101(3), the term "uniformed services" includes the Commissioned Corps of the Public Health Service. Officers of the Commissioned Corps are not employees under 5 U.S.C. 2105 and thus are not covered by the student loan repayment authority in 5 U.S.C. 5379. OPM may not extend an authority by regulation to employees who are not covered by the authorizing statute.

#### **Other Comments**

An individual provided a comment generally opposing the authority for Federal agencies to repay student loans. We disagree. One of the biggest challenges for Federal agencies is attracting and retaining well-qualified, high-performing employees. We believe the student loan repayment authority is a valuable human capital management tool that enables agencies to recruit highly qualified candidates into Federal service and keep talented employees in the Federal workforce.

A union recommended the sections pertaining to benefit caps and employee eligibility be looked at with an eye towards increasing the maximum total student loan repayment benefit. The union noted student loan debt burdens are continuously increasing and requested that wherever possible, efforts be made to give agencies the option of offering greater benefits to recruit and retain excellent employees. Under 5 U.S.C. 5379(b)(2), an agency may provide student loan repayment benefits of up to \$10,000 for an employee in any calendar year up to an aggregate total of \$60,000 for any one employee. An increase in the annual or aggregate limits on student loan repayment benefits would require a statutory amendment. We note that the Federal Employee Student Loan Assistance Act (Pub. L. 108–123, November 11, 2003) increased the maximum amounts Federal agencies are authorized to repay under the Federal student loan repayment program from \$6,000 to \$10,000 per employee in any calendar year and from \$40,000 to a total of \$60,000 for any one employee. On April 20, 2004, OPM published a final rule (69 FR 21039) to revise § 537.106(c) in accordance with the statutory amendment.

An agency recommended expanding on § 537.106(a)(4) to emphasize that an agency should not begin making loan payments prior to the time the employee starts work under any circumstances. We have not made this recommended change because we believe the paragraph is sufficiently clear that although an agency and a job candidate may sign a service agreement before the job candidate begins serving in the position, the agency may not begin making loan payments until the job candidate actually begins serving in the position. However, we are adding a reference to § 537.107, which contains the regulations regarding service agreements.

An agency suggested that in order to differentiate between paragraphs (1) and (2) of 5 CFR 537.107(d), paragraph (1) should be revised to read as follows: "Earlier than the date the service agreement is signed, *for individuals who are current employees*" (emphasis added). We do not believe this change is necessary. Because we have written the phrase in the negative and use the conjunction "or" between paragraphs (1) and (2), both conditions must be met.

An agency suggested that even though 5 U.S.C. 5379(c)(2) allows agencies to waive the reimbursement of student loan repayments already made by an agency if the employee enters into the service of another agency, OPM should consider making such reimbursement a requirement. We disagree and are not changing 5 CFR 537.107(e). We believe that agencies should be allowed to make their own decisions regarding the granting of a waiver of recovery of already paid benefits.

Finally, an agency points out that under 5 CFR 537.110(a), records kept under the Program may be destroyed when 3 years have elapsed since the end of the service period, but that a longer record retention period may be necessary where potential litigation is involved (*i.e.*, if there has been a default of the service agreement and the agency engages in debt collection). We agree and are making the necessary changes to that section.

#### **E.O. 12866, Regulatory Review**

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

#### **Regulatory Flexibility Act**

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

**List of Subjects in 5 CFR Part 537**

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

Office of Personnel Management.

**Michael W. Hager,**  
*Acting Director.*

■ Accordingly, OPM is revising 5 CFR part 537 to read as follows:

**PART 537—REPAYMENT OF STUDENT LOANS**

Sec.	
537.101	Purpose.
537.102	Definitions.
537.103	Agency student loan repayment plans.
537.104	Employee eligibility.
537.105	Criteria for payment.
537.106	Conditions and procedures for providing student loan repayment benefits.
537.107	Service agreements.
537.108	Loss of eligibility for student loan repayment benefits.
537.109	Employee reimbursements to the Government.
537.110	Records and reports.

**Authority:** 5 U.S.C. 5379(g).

**§ 537.101 Purpose.**

This part implements 5 U.S.C. 5379, which authorizes agencies to establish a student loan repayment program for the purpose of recruiting or retaining highly qualified personnel. Under such a program, an agency may agree to repay (by direct payment to the loan holder on behalf of the employee) all or part of any outstanding qualifying student loan or loans previously taken out by a job candidate to whom an offer of employment has been made, or by a current employee of the agency.

**§ 537.102 Definitions.**

The definitions in this section apply only to part 537. In this part:

*Agency* has the meaning given that term in subparagraphs (A) through (E) of 5 U.S.C. 4101(1).

*Authorized agency official* means the head of an Executive agency or an official who is authorized to act for the head of the agency in the matter concerned.

*Employee* means an employee of an agency who satisfies the definition of the term in 5 U.S.C. 2105.

*Loan payment* means the net payment made by an agency to the holder of a student loan (after deducting any tax withholdings that may be made from the gross student loan repayment benefit credited to the employee).

*Service agreement* means a written agreement between an agency and an employee (or job candidate) under which the employee (or job candidate)

agrees to a specified period of service in exchange for student loan repayment benefits, subject to the conditions set forth under this part.

*Student loan means—*

(1) A loan made, insured, or guaranteed under parts B, D or E of title IV of the Higher Education Act of 1965; or

(2) A health education assistance loan made or insured under part A of title VII of the Public Health Service Act or under part E of title VIII of that Act.

*Student loan repayment benefit* means the benefit provided to an employee under this part in which an agency repays (by a direct payment on behalf of the employee) a qualifying student loan as described in § 537.106(b) previously taken out by such employee. The dollar value of this benefit is the gross amount credited to the employee at the time of a loan payment to the holder of the student loan, before deducting any employee tax withholdings from that gross amount as described in § 537.106(a)(6)(iii). A student loan repayment benefit is not considered basic pay for any purpose.

*Time-limited appointment* means a non-permanent appointment including—

(1) A temporary appointment under 5 CFR part 316, subpart D, or similar authority;

(2) A term appointment under 5 CFR part 316, subpart C, or similar authority;

(3) An overseas limited appointment with a time limitation under 5 CFR part 301, subpart B;

(4) A limited term or limited emergency appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a), or an equivalent appointment made for similar purposes;

(5) A Veterans Recruitment Appointment under 5 CFR part 307;

(6) A Presidential Management Fellow appointment under 5 CFR 213.3102(ii) and 5 CFR 213.3102(jj);

(7) A Federal Career Intern appointment under 5 CFR 213.3202(o); and

(8) An appointment under the fellowship and similar programs authority at 5 CFR 213.3102(r).

**§ 537.103 Agency student loan repayment plans.**

Before providing student loan repayment benefits under this part, an agency must establish a student loan repayment plan. This plan must include the following elements:

(a) The designation of officials with authority to review and approve offering student loan repayment benefits (which may parallel the approval delegations used for other recruitment, relocation, and retention incentives);

(b) The situations in which the student loan repayment authority may be used;

(c) The criteria to meet or consider in authorizing student loan repayment benefits, including criteria for determining the size and timing of the loan payment(s);

(d) A system for selecting employees (or job candidates) to receive student loan repayment benefits that ensures fair and equitable treatment;

(e) The requirements associated with service agreements (including a basis for determining the length of service to be required if it is greater than the statutory minimum);

(f) The procedures for making loan payments;

(g) The provisions for recovering any amount outstanding from an employee who fails to satisfy a service agreement and conditions for waiving an employee's obligation to reimburse the agency for payments made under this part; and

(h) Documentation and recordkeeping requirements sufficient to allow reconstruction of each action to approve a student loan repayment benefit.

**§ 537.104 Employee eligibility.**

(a) Subject to the conditions in 5 U.S.C. 5379 and this part, an authorized agency official may approve student loan repayment benefits to recruit a highly qualified job candidate or retain a highly qualified employee who, during the service period established under a service agreement (consistent with § 537.107), will be serving under—

(1) An appointment other than a time-limited appointment; or

(2) A time-limited appointment if—  
(i) The employee (or job candidate) will have at least 3 years remaining under the appointment after the beginning of the service period established under a service agreement; or

(ii) The time-limited appointment authority leads to conversion to another appointment of sufficient duration so that his or her employment with the agency is projected to last for at least 3 additional years after the beginning of the service period established under a service agreement.

(b) An employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character is ineligible for student loan repayment benefits.

(c) An employee becomes ineligible for student loan repayment benefits under the conditions described in § 537.108.

**§ 537.105 Criteria for payment.**

(a) *General criteria.* Before authorizing student loan repayment benefits for an employee (or job candidate), an agency must make a written determination that—

(1) The employee (or job candidate) is highly qualified and otherwise eligible (as described in § 537.104); and

(2)(i) In a case where the authorization is granted to recruit a job candidate to fill an agency position, the agency otherwise would encounter difficulty in filling a position with a highly qualified individual; or

(ii) In a case where the authorization is granted to retain a current employee of the agency, the employee otherwise is likely to leave the agency for employment outside the Federal service and it is essential to retain the employee based on the employee's high or unique qualifications or a special need of the agency.

(b) *Retention considerations.* In making a determination under paragraph (a)(2)(ii) of this section, an agency must consider the extent to which the employee's departure would affect the agency's ability to carry out an activity or perform a function that is deemed essential to its mission.

(c) *Current Federal employees.* An agency may not authorize student loan repayment benefits to recruit an individual from outside the agency who is currently employed in the Federal service.

(d) *Selecting employees.* When selecting employees (or job candidates) to receive student loan repayment benefits, agencies must ensure that benefits are awarded without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition.

**§ 537.106 Conditions and procedures for providing student loan repayment benefits.**

(a) *General conditions.* (1) Student loan repayment benefits may be provided at the discretion of the agency and are subject to such terms, limitations, or conditions as may be mutually agreed to in writing by the agency and the employee (or job candidate) as part of a service agreement under § 537.107.

(2) The student loan to be repaid must be a qualifying student loan as set forth in paragraph (b) of this section.

(3) The agency must document in writing each approval of student loan repayment benefits. An authorized agency official must review and approve each written determination. The written determination must show the employee (or job candidate) meets the criteria specified in § 537.105.

(4) An authorized agency official must approve student loan repayment benefits in connection with a recruitment action before the job candidate actually enters on duty in the position for which he or she was recruited. The agency and the job candidate may sign the service agreement consistent with § 537.107 before the job candidate begins serving in the position, but the agency may not begin making loan payments until the job candidate begins serving in the position.

(5) Student loan repayment benefits are in addition to basic pay and any other form of compensation otherwise payable to the employee involved.

(6) Appropriate tax withholdings must be deducted or applied at the time any payment is made. Since these tax implications could create a financial hardship for the recipient of the student loan repayment benefit, agencies may lessen the impact of tax withholdings on an employee's paycheck in one of the following ways:

(i) Make smaller payments at periodic intervals throughout the year, rather than issue payments under this part in one lump sum;

(ii) Allow the employee to write a check to the agency to cover his or her tax liability, rather than have the tax liability withheld from the employee's paycheck;

(iii) Deduct the amount of taxes to be withheld from the student loan repayment benefit before the balance is issued as a loan payment to the holder of the loan.

**Note to § 537.106(a)(6):** Contact the Internal Revenue Service for further details concerning these options, as well as the tax withholding implications of payments under this part.

(b) *Qualifying student loans.* (1) The agency may make loan payments only for student loan debts that are outstanding at the time the agency and the employee (or job candidate) enter into a service agreement. Before authorizing loan payments, an agency must verify with the holder of the loan that the employee (or job candidate) has an outstanding student loan that qualifies for repayment under this part. The agency must verify remaining balances to ensure that loans are not overpaid.

(2) The agency may repay more than one loan if the employee's student loan repayment benefit does not exceed the limits set forth in paragraph (c) of this section.

(3) These regulations do not impose a limit on the age of a student loan for qualification purposes. The agency may,

however, specify in its agency plan that only student loans made within a certain timeframe are eligible for repayment.

(c) *Benefit amount.* (1) In determining the amount of student loan repayment benefits to approve, an agency must consider the employee's (or job candidate's) value to the agency and how far in advance the agency is permitted to commit funds. If an agency decides to make additional student loan repayment benefits contingent on budget levels or other factors, it must address these contingent benefits in the written service agreement as described in § 537.107(a).

(2) The amount of student loan repayment benefits provided by an agency is subject to both of the following limits:

(i) \$10,000 per employee per calendar year; and

(ii) A total of \$60,000 per employee.

(3) In applying the limits in paragraph (c)(2) of this section, the agency must count the full student loan repayment benefit (*i.e.*, before deducting any tax withholdings as described in paragraph (a)(6)(iii) of this section).

(d) *Employee responsibility.* Loan payments made by an agency under this part do not exempt an employee from his or her responsibility and/or liability for any loan(s) the individual has taken out. The employee also is responsible for any income tax obligations resulting from the student loan repayment benefit.

**§ 537.107 Service agreements.**

(a) Before an employing agency makes any loan payments for an employee, the employee (or job candidate) must sign a written service agreement to complete a specified period of service with the agency and to reimburse the agency for the student loan repayment benefit when required by § 537.109. The service agreement also may specify any other employment conditions the agency considers to be appropriate, including the employee's (or job candidate's) position and the duties he or she is expected to perform, his or her work schedule, his or her level of performance, and the geographic location of his or her position. (See §§ 537.108 and 537.109.) The service agreement may address the possibility that, during the period the agreement is in effect, the agency may modify the agreement to provide student loan repayment benefits in addition to those fixed in the agreement based on contingencies or conditions specified in the agreement.

(b) The minimum period of service to be established under a service

agreement is 3 years, regardless of the amount of student loan repayment benefits authorized. The agency and the employee may mutually agree to modify an existing service agreement, subject to the limitations at § 537.106(c)(2), to provide additional student loan repayment benefits for additional service without the need for an entirely new service agreement (which would require a new 3-year minimum service period). Periods of leave without pay, or other periods during which the employee is not in a pay status, do not count toward completion of the required service period. Thus, the service completion date must be extended by the total amount of time spent in non-pay status. However, as provided by 5 CFR 353.107, absence because of uniformed service or compensable injury is considered creditable toward the required service period upon reemployment.

(c) A service agreement made under this part in no way constitutes a promise of, or right or entitlement to, appointment, continued employment, or noncompetitive conversion to the competitive service. This condition should be stated in the service agreement.

(d) The service period begins on the date specified in the service agreement. That beginning date may not be—

(1) Earlier than the date the service agreement is signed; or

(2) Earlier than the date the individual begins serving in the position for which he or she was recruited (when student loan repayment benefits are approved to recruit a job candidate to fill an agency position).

(e) The service agreement must contain a provision addressing whether the individual would be required to reimburse the paying agency for student loan repayment benefits if he or she voluntarily separates from the paying agency to work for another agency before the end of the service period. (See § 537.109(b)(2).)

(f) The agency may include in a service agreement specific conditions (in addition to those required by law) that trigger the loss of eligibility for student loan repayment benefits and/or a requirement that the employee reimburse the agency for student loan repayment benefits already received. (See § 537.108(a)(3) and 537.109(a)(2).) However, a service agreement may not require reimbursement based on—

(1) An employee's failure to maintain performance at a particular level (unless the employee is separated based on unacceptable performance); or

(2) An involuntary separation for reasons other than misconduct,

unacceptable performance, or a negative suitability determination under 5 CFR part 731 (e.g., an involuntary separation resulting from a reduction in force or medical reasons).

#### **§ 537.108 Loss of eligibility for student loan repayment benefits.**

(a) An employee receiving student loan repayment benefits from an agency is ineligible for continued benefits from that agency if the employee—

(1) Separates from the agency;

(2) Does not maintain an acceptable level of performance, as determined under standards and procedures prescribed by the agency; or

(3) Violates a condition in the service agreement, if the agreement specifically provides that eligibility is lost when the condition is violated.

(b) For the purpose of applying paragraph (a)(2) of this section, an acceptable level of performance is one that is equivalent to level 3 ("Fully Successful" or equivalent) or higher, as described in 5 CFR 430.208(d). An employee loses eligibility for student loan repayment benefits if his or her most recent official performance evaluation does not meet this requirement.

#### **§ 537.109 Employee reimbursements to the Government.**

(a) An employee is indebted to the Federal Government and must reimburse the paying agency for the amount of any student loan repayment benefits received under a service agreement if he or she—

(1) Fails to complete the period of service required in the applicable service agreement (except as provided by paragraph (b) of this section); or

(2) Violates any other condition that specifically triggers a reimbursement requirement under the agreement.

(b) An agency may not apply paragraph (a) of this section based on an employee's failure to complete the required period of service established under a service agreement if—

(1) The employee is involuntarily separated for reasons other than misconduct, unacceptable performance, or a negative suitability determination under 5 CFR part 731; or

(2) The employee leaves the paying agency voluntarily to enter into the service of any other agency, unless reimbursement to the agency is otherwise required in the service agreement, as provided by § 537.107(e).

(c) If an agency and an employee mutually agree to modify an existing service agreement to provide additional student loan repayment benefits for additional service (as provided by

§ 537.107(b)), the modified service agreement may stipulate that, if the employee completes the initial service period but fails to complete the additional service period, he or she is required to reimburse the paying agency only for the amount of any student loan repayment benefits received during the additional service period.

(d) If an employee fails to reimburse the paying agency for the amount owed under paragraph (a) of this section, a sum equal to the amount outstanding is recoverable from the employee under the agency's regulations for collection by offset from an indebted Government employee under 5 U.S.C. 5514 and 5 CFR part 550, subpart K, or through the appropriate provisions governing Federal debt collection if the individual is no longer a Federal employee.

(e) An authorized agency official may waive, in whole or in part, a right of recovery of an employee's debt if he or she determines that recovery would be against equity and good conscience or against the public interest. (See 5 U.S.C. 5379(c)(3).)

(f) Any amount reimbursed by, or recovered from, an employee under this section must be credited to the appropriation account from which the amount involved was originally paid. Any amount so credited must be merged with other sums in such account and must be available for the same purposes and time period, and subject to the same limitations (if any), as the sums with which merged. (See 5 U.S.C. 5379(c)(4).)

#### **§ 537.110 Records and reports.**

(a) Each agency must keep a record of each determination to provide student loan repayment benefits under this part and make such records available for review upon request by OPM. Such a record may be destroyed when 3 years have elapsed since the end of the service period specified in the employee's service agreement unless any dispute has arisen regarding the agreement. If the service agreement has not been fulfilled, there are other disputes regarding the agreement or the loan payouts, or the agreement has become the subject of litigation, the records should be kept until the agency is notified by agency counsel that all pending claims have been resolved, all litigation concluded, and any applicable periods for seeking further review has elapsed and, in any event, for a minimum of 6 years from the date the facts giving rise to the dispute occurred. If debt collection is pursued against the employee for repayments made by the agency, the agency must keep the records until the agency is notified by agency counsel that the debt is fully



collected, compromised, or settled finally and that any applicable period for seeking further review has elapsed.

(b) By March 31st of each year, each agency must submit a written report to OPM containing information about student loan repayment benefits it provided to employees during the previous calendar year. Each report must include the following information:

(1) The number of employees who received student loan repayment benefits;

(2) The job classifications of the employees who received student loan repayment benefits; and

(3) The cost to the Federal Government of providing student loan repayment benefits.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1140 and 1145

[Docket No. AMS-DA-08-0031; DA-08-05]

RIN 0581-AC86

#### Dairy Forward Pricing Program

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes a program for producers and cooperative associations of producers to voluntarily enter into forward price contracts with handlers for milk used for Class II, III, or IV purposes under the Agricultural Marketing Agreement Act of 1937 (AMAA). The program allows handlers regulated under the Federal milk marketing order program to pay producers and cooperative associations in accordance with the terms of a forward contract and not have to pay the minimum Federal order blend price for milk. This program is established in accordance with section 1502 of the Food, Conservation and Energy Act of 2008 (2008 Farm Bill).

**DATES:** *Effective Date:* November 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** John R. Mengel, Chief Economist, USDA/AMS/Dairy Programs, Office of the Chief Economist, STOP 0229-Room 2753, 1400 Independence Ave., SW., Washington, DC 20250-0229, (202) 720-4664, e-mail address: [john.mengel@usda.gov](mailto:john.mengel@usda.gov).

**SUPPLEMENTARY INFORMATION:** This rule implements a program for producers

and cooperative associations of producers to enter into forward price contracts with handlers for Class II, III, or IV milk under the AMAA. This program is required to be established by the 2008 Farm Bill. The program authorizes that under the AMAA, milk handlers pay producers or cooperative associations of producers a negotiated price, rather than the Federal order minimum blend price for producer milk if subject to conditions and terms of a forward contract, provided the volume of such milk does not exceed the handler's Class II, III, and IV utilization for the month on the order that regulates the milk. The program applies to producer milk regulated under Federal milk marketing orders that is not classified as Class I milk or milk otherwise intended for fluid use and that is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce of Federally regulated milk. The Federal milk marketing order program consists of 10 Federal milk marketing orders (7 CFR 1001-1135). In accordance with the 2008 Farm Bill, the program prohibits forward contracts under the program from being entered into after September 30, 2012, and no forward contracts entered into under the program may extend beyond September 30, 2015.

#### Background

The Consolidated Appropriations Act of 2000 amended the Agricultural Marketing Agreement Act of 1937<sup>1</sup> to mandate the implementation of a Dairy Forward Pricing Pilot Program (DFPPP) through December 31, 2004. The law allowed proprietary handlers, and cooperative associations acting as milk handlers with respect to non-member milk, regulated under the Federal milk marketing order program to forward contract for deliveries of milk from producers or cooperative associations of producers at prices exempt from minimum Federal milk marketing order blend prices.<sup>2</sup> The 2000 Act required that the Department conduct a study on the DFPPP to be submitted to Congress concerning impacts on milk prices paid to producers.<sup>3</sup> The study, covering the

period from September 2000 to March 2002, indicated that participation in the DFPPP was relatively small in terms of numbers of producers, handlers, and milk quantities. On a monthly average basis, 3.9 percent of eligible producers, 5.7 percent of proprietary manufacturing plants, and 5.3 percent of pooled milk received from eligible producers participated. The study concluded the DFPPP to be effective in reducing price volatility. The average monthly price received for contract milk was \$14.02, ranging from a low of \$13.23 to a high of \$14.86. The average monthly price of the same milk, had it not been under contract, was \$14.51, ranging from a low of \$12.04 to a high of \$17.75. Thus, the study concluded that price volatility was substantially reduced for producers and handlers that participated in the Program. Subsequent reports published by the Department, covering the entire period of the Program from September 2000 through December 2004, indicated results that were consistent with conclusions of the report submitted to Congress. The study and the final report on the DFPPP can be found at <http://www.ams.usda.gov/dairy>.

This Final Rule removes the regulations covering the DFPPP that appeared in 7 CFR Part 1140, (7 U.S.C. 601 *et seq.*; as amended by section 1001(a)(8) of Public Law 106-113) and establishes a new 7 CFR Part 1145, as mandated by the 2008 Farm Bill.

The program does not invalidate, supersede, or otherwise change any existing contractual agreements between handlers and producers. Contracts eligible under this program are those contracts beginning no earlier than the effective date of this final rule.

#### Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget.

#### Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. The adopted amendments do not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to judicial challenge to the provisions of this rule.

and the House Committee on Agriculture; <http://www.ams.usda.gov/dairy>.

<sup>1</sup> Section 23 of the Agricultural Adjustment Act (7 U.S.C. 601 *et seq.*), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, as enacted by Public Law 106-113 (113 Stat. 1501A-519).

<sup>2</sup> See Final Rule for Dairy Forward Pricing Pilot Program, July 18, 2000; 65 FR 44408; 7 CFR Part 1140.

<sup>3</sup> See *A Study of the Dairy Forward Pricing Pilot Program and Its Effect on Prices Paid to Producers for Milk*, October 31, 2002. Prepared for the Senate Committee on Agriculture, Nutrition and Forestry