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**U.S. OFFICE OF PERSONNEL MANAGEMENT  
OFFICE OF THE INSPECTOR GENERAL  
OFFICE OF LEGAL & LEGISLATIVE AFFAIRS**

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# Management Advisory

**Review of the U.S. Office of Personnel Management's  
Non-Public Decision to Prospectively and  
Retroactively Re-Appportion Annuity Supplements**

**Report Number L-2018-1  
February 5, 2018**

# EXECUTIVE SUMMARY

## *Review of the U.S. Office of Personnel Management's Non-Public Decision to Prospectively and Retroactively Re-Appportion Annuity Supplements*

Report No. L-2018-1

February 5, 2018

### **Why Did We Conduct the Review?**

On September 16, 2016, FLEOA wrote to then-Acting Director Beth Cobert raising concerns about an apparent change in OPM policy regarding the calculation of the Annuity Supplement received by certain LEOs who are subject to a state divorce decree. Specifically, FLEOA stated that OPM had recently concluded that if a former spouse is entitled to a portion of a retired LEO's Basic Annuity, that former spouse is also entitled to a portion of the former LEO's Annuity Supplement, even if the divorce decree is silent on the issue. FLEOA noted that this policy change was implemented without public notice. Further, OPM had applied this policy retroactively, resulting in the creation of a new debt that the retired LEOs now owed their former spouses. The Acting Inspector General was cc'd on this letter and subsequently contacted by FLEOA. We determined the issue warranted examination.

### **What Did We Review?**

We examined OPM's policy regarding the treatment of the division of an Annuity Supplement in the context of divorce decrees and recent changes in that policy.

  
**Robin M. Richardson**  
*Acting Assistant Inspector General  
for Legal & Legislative Affairs*

### **What Did We Find?**

This final Management Advisory details the findings, conclusions, and recommendations resulting from the U.S. Office of Personnel Management (OPM) Office of the Inspector General's (OIG) review of OPM's recent decision that reverses the way OPM apportions a retirement annuity based on a state court-ordered former spouse's marital share. The OIG initiated its review after receiving a complaint from the Federal Law Enforcement Officers Association (FLEOA). FLEOA raised concerns that OPM's non-public change was made without prior notice and is contrary to established law and practice.

For almost 30 years, OPM applied the state court-ordered marital share to the Basic Annuity (also known as the gross monthly annuity) only and not also to the Annuity Supplement. The Annuity Supplement is a supplemental annuity received by Law Enforcement Officers (LEOs) and certain other persons (such as Members of Congress) who retire earlier than when eligible for Social Security benefits. OPM previously considered the Annuity Supplement to be a Social Security-type benefit and thus not allocable as between former spouses. As a result, OPM did not include the Annuity Supplement in the calculation of annuity benefits to be paid to a former spouse, except under certain circumstances where the state court order expressly addressed the Annuity Supplement.

In July 2016, OPM started applying the state court-ordered marital share to both the Basic Annuity and the Annuity Supplement, even in cases where the state court order did not address the Annuity Supplement. However, OPM did not provide any public notice that it now considers the Annuity Supplement to be allocable and that, as a result, OPM will now apply the state court-ordered marital share to the Annuity Supplement, even when the state court order refers to the Basic Annuity only. Instead, retirees and the former spouses learned of OPM's decision only when their annuity amounts changed – many years after the parties had divorced, after a state court had ordered a former spouse's marital share, and after OPM had accepted the state court order for processing. In addition, OPM applied this new interpretation retroactively to the date when the retiree started receiving an Annuity Supplement, resulting in a debt due from the retiree to the former spouse. OPM's new policy has been causing immediate financial disruption to annuitants. Moreover, OPM's new policy improperly changes previously litigated final state court orders without notice to annuitants.

This report sets forth the specific findings and recommendations for the agency. We have considered the agency's response to these recommendations, which is included in the Appendix.

# ABBREVIATIONS

<b>FERS</b>	<b>Federal Employees Retirement System</b>
<b>FLEOA</b>	<b>Federal Law Enforcement Officers Association</b>
<b>LEO</b>	<b>Law Enforcement Officer</b>
<b>MSPB</b>	<b>Merit Systems Protection Board</b>
<b>OIG</b>	<b>Office of the Inspector General</b>
<b>OPM</b>	<b>U.S. Office of Personnel Management</b>
<b>RS</b>	<b>Retirement Services</b>

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# I. BACKGROUND

On September 16, 2016, the Federal Law Enforcement Officers Association (FLEOA) sent a letter to the U.S. Office of Personnel Management's (OPM) then-Acting Director Beth F. Cobert, objecting to OPM's recent decision to start applying state court-ordered marital shares to the Annuity Supplements of retired Law Enforcement Officers (LEOs), even though the underlying state court orders referred to the Basic Annuity only and did not refer to the Annuity Supplements.<sup>1</sup> FLEOA requested OPM rescind this new policy immediately.

In response, OPM asserted that "the law requires [OPM] to include any payable [Federal Employees Retirement System (FERS)] Annuity Supplement when dividing a FERS annuity under the terms of a state court order."<sup>2</sup> OPM conceded that "some FERS annuities subject to division under a court order were originally processed without consideration of the FERS Annuity Supplement," and that, "OPM's guidance has been updated to reflect that a FERS annuity includes the FERS Annuity Supplement."<sup>3</sup> OPM also stated, "[t]o date, OPM has identified 595 of our 2.6 million annuitants and survivors who are currently receiving the FERS Annuity Supplement and are subject to the terms of a state court order."<sup>4</sup>

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<sup>1</sup> Letter from Nathan R. Catura, National President, FLEOA, to Beth F. Cobert, Acting Director, OPM (Sept. 16, 2016). Mr. Catura also contacted OPM's Acting Inspector General, Norbert E. Vint.

<sup>2</sup> Letter from Kenneth J. Zawodny, Jr., Associate Director, OPM, to Nathan R. Catura, National President, FLEOA, (OPM Ltr.), at 1 (undated but emailed on or about Nov. 17, 2016).

<sup>3</sup> We are not aware of any publicly provided guidance. *See* OPM's Memorandum (Mar. 28, 2017) at 23 *infra* ("OPM does not believe it is obligated to post, as a matter of course, materials in the nature of work instructions to claims adjudicators when management observes a problem with consistent application of the law and the regulations").

<sup>4</sup> OPM Ltr. at 3. Thus it would appear that an increasing number of annuitants will be subject to this new non-public interpretation.

## II. CASE EXAMPLES

The Office of the Inspector General (OIG) obtained the following examples as to how OPM's new policy affects current retirees:

- In 2013, former LEO M.T. retired, and OPM applied the standard formula: court-ordered marital share (19.89% x Gross Monthly Annuity = Former Spouse's benefit \$495.85/month).<sup>5</sup> In 2016, OPM sent a letter stating, “[b]y court order, your former spouse’s marital share of your retirement benefit is [] 19.89% of your retirement benefit. By law, [your former spouse] is also due 19.89% of your FERS annuity supplement.” OPM included a new formula: “[marital share] x (Gross Monthly Annuity + Annuity Supplement) = Former Spouse’s benefit.”<sup>6</sup> The former spouse’s new monthly payment going forward would be \$712.85. OPM also retroactively apportioned the Annuity Supplement, stating M.T. now owed the former spouse a debt of \$7,269.54.
- In 2016, OPM sent a letter to E.S., who had retired in 2014, stating that “[b]y court order, your former spouse’s marital share of your retirement benefit is 14.16% of your retirement benefit [or \$336.44/month]. By law, [your former spouse] is also due 14.16% of your FERS annuity supplement.”<sup>7</sup> OPM included a new formula: “14.16% x (Gross Monthly Annuity + Annuity Supplement) = Former Spouse’s benefit.”<sup>8</sup> The former spouse’s new monthly payment going forward would be \$504.66. OPM also retroactively apportioned the Annuity Supplement, stating E.S. now owed the former spouse a debt of \$4,878.38. In contrast, E.S.’s state court order stated, the “[a]lternate payee is entitled to a pro-rata share of participant’s gross monthly annuity under [FERS].”<sup>9</sup> The state court order further provided, “[t]hi agreement does not require the payment of more than fifty percent (50.00%) of the participant’s gross annuity.”<sup>10</sup>
- Federal agent K.O. retired in 2013 and, per state court order, the former spouse received 21.08% of K.O.’s gross monthly annuity.<sup>11</sup> In 2016, OPM sent K.O. a letter stating that “the amount we are paying you has changed,” and that OPM is now multiplying the 21.08% marital share by the Annuity Supplement as well.<sup>12</sup> The former spouse’s new

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<sup>5</sup> Letter from OPM to M.T. (Nov. 16, 2013).

<sup>6</sup> Letter from OPM to M.T. (July 21, 2016) (emphasis added). (“[T]he amount that you receive under the FERS annuity supplement provisions must be included in the calculation of the benefit paid to your former spouse.”).

<sup>7</sup> Letter from OPM to E.S. (Aug. 6, 2016) (emphasis added).

<sup>8</sup> *Id.* “OPM is required to divide a FERS annuity supplement regardless of whether it is expressly provided for in a court order.” OPM Decision on Reconsideration to E.S. (Feb. 2, 2017).

<sup>9</sup> *S. v. S. [redacted], Court of Common Pleas, [redacted], Court Order Acceptable for Processing* (Feb. 28, 2013), ¶¶ E, H (emphasis added).

<sup>10</sup> *Id.* at ¶ H.

<sup>11</sup> Letter from OPM to K.O. (Aug. 1, 2013).

<sup>12</sup> Letter from OPM to K.O. (July 28, 2016).

monthly payment going forward would be \$1,311.17, up from \$1,052.94. Further, OPM retroactively apportioned the Annuity Supplement, stating K.O. now owed the former spouse a debt of \$10,329.20.

- In January 2017, OPM sent a letter entitled, “Explanation of Inclusion of the FERS Annuity Supplement,” to former LEO L.N., stating that per a court order, the former spouse received 37.19% of the gross monthly annuity, and that “[b]y Law, we must collect any amount of benefits [] retroactively” for the last eight years to December 1, 2008, the date on which L.N. started receiving annuity supplements.<sup>13</sup> As a result, OPM stated that L.N. owed the former spouse a debt of \$28,389.96.

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<sup>13</sup> Letter from OPM to L.N. (Jan. 9, 2017).

# III. STATUTORY AND REGULATORY FRAMEWORK

## A. Treatment of LEOs Under FERS

FERS generally covers Federal employees hired after 1983.<sup>14</sup> FERS is “a three-tiered plan consisting of Social Security, a basic FERS annuity, and the Thrift Savings Plan.”<sup>15</sup> Under FERS, Federal employees are entitled to a retirement annuity after reaching their minimum retirement age (ages 55–57) and completing 30 years of service, or at age 60 after completing 20 years of service.<sup>16</sup>

FERS treats LEOs differently from other Federal employees. FERS defines a LEO as “an employee, the duties of whose position are primarily--the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States or [] the protection of officials of the United States against threats to personal safety” and whose duties “are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the [OPM] Director considering the recommendations of the employing agency.”<sup>17</sup> As recognized by the Federal Circuit, “Congress passed the preferential retirement provisions to make the federal law enforcement corps a career service composed of young men and women capable of meeting the stringent physical requirements of law enforcement and performing at peak efficiency.”<sup>18</sup> As a result, LEOs are entitled to retire earlier than other Federal employees, at age 50 after completing 20 years of service or, at any age, after completing 25 years of service.<sup>19</sup> LEOs are also subject to mandatory retirement by age 57.<sup>20</sup>

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<sup>14</sup> Congress created FERS when it enacted the Federal Employees’ Retirement System Act of 1986 (FERSA), codified at chapter 84 of Title 5 of the U.S. Code.

<sup>15</sup> OPM, *Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS) Handbook for Personnel and Payroll Offices* (April 1998), Section 1A1.1-3 at 4 & Section 1A1.1-1 at 1 (“The Handbook contains the instructions agency personnel and payroll offices need to carry out their responsibilities for basic benefits under the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS). This Chapter also describes the responsibilities of the Office of Personnel Management (OPM) and employing agencies in retirement matters.”) <https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c001.pdf>.

<sup>16</sup> 5 U.S.C. § 8412(a), (b) & (h).

<sup>17</sup> 5 U.S.C. § 8401(17)(A).

<sup>18</sup> *Pitsker v. OPM*, 234 F.3d 1378, 1382 (Fed. Cir. 2000).

<sup>19</sup> 5 U.S.C. § 8412(d)(1)-(2).

<sup>20</sup> 5 U.S.C. § 8425(b)(1) provides, “A law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer who is otherwise eligible for immediate retirement under section 8412(d) shall be separated from the service on the last day of the month in which that law enforcement officer, firefighter, nuclear materials courier, or customs and border protection officer as the case may be, becomes 57 years of age or completes 20 years of service if then over that age.”

## **B. The FERS Annuity Supplement**

Because LEOs retire before they are eligible for Social Security benefits, they are entitled to receive an Annuity Supplement in addition to their Basic Annuity.<sup>21</sup> The Annuity Supplement is also payable to certain other individuals who retire early: Members of Congress; members of the Senior Executive Service retiring under 5 U.S.C. § 8414(a); involuntary retirees (except those removed for cause); and employees who separate voluntarily when their agency is undergoing a major reduction in force, reorganization, or transfer of function. However, non-LEO retirees may not begin to receive the Annuity Supplement until they attain the minimum retirement age.<sup>22</sup> The Annuity Supplement “approximates the value of FERS service in a Social Security benefit. The general purpose [ ] is to provide a level of income before age 62 similar to what the retiree will receive at age 62.”<sup>23</sup> The Annuity Supplement terminates when annuitants become entitled to Social Security old-age insurance benefits, but no later than age 62.<sup>24</sup>

## **C. State Court Orders**

As for court orders that may affect an employee annuity, FERS provides that:

[p]ayments under this chapter which would otherwise be made to an [ ] annuitant . . . based on service of that individual shall be paid (in whole or in part) . . . to another person if and to the extent expressly provided for in the terms of [ ] any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.<sup>25</sup>

## **D. OPM Implementing Regulations And Publicly Available Guidance**

In accordance with the statute, OPM promulgated regulations that implement the statutory standards under FERS.<sup>26</sup> On February 11, 1987, OPM issued an interim rule, stating that:

[t]hese rules implement a provision of FERS which requires payment of an annuity supplement to certain eligible retirees. Section 8421 of FERS provides for a supplement equal to a portion of a hypothetical social security retirement benefit based on the employee’s pay during FERS-covered civilian employment and

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<sup>21</sup> 5 U.S.C. § 8421(a).

<sup>22</sup> 5 U.S.C. § 8412(f) and 5 U.S.C. § 8414(a) and (b).

<sup>23</sup> OPM, *Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS) Handbook for Personnel and Payroll Offices*, Chapter 51 (“Retiree Annuity Supplement”), at p.1 (April 1998), <https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c051.pdf>.

<sup>24</sup> 5 U.S.C. § 8421(a)(3)(B).

<sup>25</sup> 5 U.S.C. § 8467(a).

<sup>26</sup> The statute authorizes OPM to prescribe regulations to carry out the provisions of chapter 84. 5 U.S.C. § 8461(g).

deemed earnings during years before FERS service. Payment of the supplement is subject to an earnings test similar to the test under the Social Security Act applicable to social security recipients.<sup>27</sup>

Under the regulations, the “Annuity Supplement” is specifically defined as “an amount equal to the old-age insurance benefit payable under title II of the Social Security Act, multiplied by a fraction . . . .”<sup>28</sup>

OPM has also promulgated regulations that address court orders affecting retirement benefits, such as divorce settlement agreements or court orders:

In executing court orders under this part, OPM must honor the clear instructions of the court. Instructions must be specific and unambiguous. OPM will not supply missing provisions, interpret ambiguous language, or clarify the court’s intent by researching individual State laws. In carrying out the court’s instructions, OPM performs purely ministerial actions in accordance with these regulations. Disagreement between the parties concerning the validity or the provisions of any court order must be resolved by the court.<sup>29</sup>

The regulations define the terms “Basic Annuity,” “Gross Annuity,” and “Net Annuity,”<sup>30</sup> and require, *inter alia*, that the court order must comply with the enumerated provisions to be processed, including specifying the type of annuity to be apportioned.<sup>31</sup> As to this latter requirement, the applicable regulation states:

The standard types of annuity to which OPM can apply the formula, percentage, or fraction are phased retirement annuity of a phased retiree, or net annuity, gross annuity, or self-only annuity of a retiree. Unless the court order otherwise directs, OPM will apply to gross annuity the formula, percentage, or fraction directed at annuity payable to either a retiree or a phased retiree.

The regulations further state, “[a]ll court orders that do not specify net annuity or self-only annuity apply *to gross annuity*.”<sup>32</sup>

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<sup>27</sup> Federal Employees Retirement System -- Basic Annuity; Annuity Supplement, 52 Fed. Reg. 4,478 (1987) (codified at 5 C.F.R. pt. 842, subpt. E). The annuity supplement of LEOs is exempt from the earnings test until the retiree reaches the minimum retirement age for regular FERS employees.

<sup>28</sup> 5 C.F.R. § 842.504.

<sup>29</sup> 5 C.F.R. § 838.101(a)(2).

<sup>30</sup> OPM uses the terms “basic annuity,” “gross monthly annuity,” and “gross annuity” interchangeably to refer to the amount of the monthly annuity computed under 5 U.S.C. § 8415, entitled, “Computation of basic annuity.” *See, e.g.*, 5 C.F.R. § 838.103 (“Gross annuity means the amount of monthly annuity payable to a retiree or phased retiree after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction.”).

<sup>31</sup> 5 C.F.R. § 838.306(b).

<sup>32</sup> 5 C.F.R. § 838.625(c) (emphasis added).

In addition to the implementing regulations, OPM has issued detailed guidance documents that address FERS, as well as the processing of state court orders on FERS retirement benefits.<sup>33</sup> OPM's guidance documents include a 1997 attorney handbook that provides step-by-step instructions for processing a court order.<sup>34</sup> *None* of these publications -- which have been available for almost two decades -- suggest that the Basic Annuity is to be considered synonymous with the Annuity Supplement or that the Annuity Supplement may be apportioned.

#### **E. OPM's Non-Public "Internal" Guidance**

During the course of our review, the OIG learned of the existence of the following two documents that squarely address this issue:

1. Memorandum, "OS Clearinghouse 359 and Unnumbered Request; Division of FERS Annuity Supplement" (undated but apparently October 23, 2014).
2. Retirement and Insurance Letter, RIL 2016-12, "Processing Court Ordered Benefits Affecting the Federal Employees Retirement System (FERS) Basic Annuity and the FERS Annuity Supplement" (June 28, 2016).

These two documents state that questions arose as to whether the Annuity Supplement may be apportioned by a state court order *in cases where the court order expressly identified the marital share* in addressing the Annuity Supplement. Neither OS Clearinghouse 359 nor RIL 2016-12 are available publicly, and these documents have not been provided to annuitants or to employees planning for retirement. As the Retirement and Insurance Letter acknowledged, "[s]ince the inception of FERS, OPM has not applied 5 U.S.C. § 8421(c) to include the FERS annuity supplement with the FERS basic annuity in the calculation of the benefits paid to a former spouse."<sup>35</sup> OPM also changed its computer system processing:

[b]efore modifications were made in our current programming, the system automatically applied the apportionment calculation only to the basic annuity (life rate/reduced rate). Now our system has been updated to account for the inclusion of the FERS annuity supplement as part of the amount used in the court order benefit calculation.<sup>36</sup>

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<sup>33</sup> OPM, *CSRS and FERS Handbook for Personnel and Payroll Offices*, <https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/> (April 1998).

<sup>34</sup> OPM, *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance Under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, Federal Employees Health Benefits, Federal Employees Group Life Insurance Program*, <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf> (rev. July 1997); *see also* OPM's FERS pamphlet, <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-1.pdf> (rev. April 1998).

<sup>35</sup> RIL 2016-12 at 1.

<sup>36</sup> Email from ██████████, Legal Admin Specialist, OPM to R.M. (Aug. 24, 2016); *see also* RIL 2016-12 at 2.

## IV. ANALYSIS

### **A. OPM Has Long Interpreted The Annuity Supplement To Be Non-Allocable By State Court Order**

The Annuity Supplement is specifically addressed in 5 U.S.C. § 8421(c), which provides:

[a]n amount under this section shall, for purposes of section 8467 [court orders], be treated in the same way as an amount computed under section 8415 [Basic Annuity].

For approximately 30 years, OPM viewed this provision as one dealing with a Social Security benefit and thus presumptively *not* allocable as between an employee and a former spouse.<sup>37</sup> Previously, OPM had advised employees and annuitants that “the apportionment to a former spouse does not include the FERS Supplement.”<sup>38</sup> OPM’s regulations and longstanding guidance documents referencing court orders do not contain any references to the Annuity Supplement. In certain circumstances, however, where an underlying state court order had expressly addressed the allocation of the Annuity Supplement, OPM’s Retirement Services would consider apportioning it.<sup>39</sup> However, Retirement Services did not do so uniformly and this was the basis of OPM’s recently issued, but not publicly available, internal guidance memoranda.

In any event, this Management Advisory addresses OPM’s new policy whereby the Annuity Supplement is included in the apportionment payment to a former spouse in those instances *where the state court order is silent as to the Annuity Supplement*.<sup>40</sup>

### **B. Section 8421 Does Not Mandate OPM’s Reinterpretation**

In its internal guidance, OPM reversed its interpretation of Section 8421(c), concluding that “[u]nder this provision, OPM is not only required to divide a FERS Annuity Supplement when a court order provides a separate and express provision dividing this specific benefit, OPM *is also required to include a division of a FERS Annuity Supplement* in cases where the court order *merely* expressly divides a FERS benefit.”<sup>41</sup> As more fully discussed below, OPM’s acknowledged change in policy or re-interpretation effectively constitutes a new rule as OPM has resolved the meaning of Section 8421(c) in a new and significantly different way.

OPM’s assertion that it is required “by law” to effect this change is incorrect. The language of the statute simply does not mandate the conclusion that the Basic Annuity and the Annuity

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<sup>37</sup> See OS Clearinghouse 359 Mem. at 2-3; *accord* RIL 2016-12.

<sup>38</sup> See, e.g., Email from ██████████, Legal Admin Specialist, OPM, to C.K. (May 21, 2013).

<sup>39</sup> OS Clearinghouse 359 Mem. at 2 (“some of the experienced paralegals [] stat[ed] that as long as we can honor the provisions of the court order, including a provisions to divide the Social Security supplement, we should honor it.”).

<sup>40</sup> Email from ██████████, Legal Admin Specialist, OPM to R.M. (July 30, 2016).

<sup>41</sup> OS Clearinghouse 359 Mem. at 3 (emphasis added).

Supplement should be deemed to be one and the same. While this is one possible interpretation of the statute, the language of the statute also supports another interpretation. Section 8421(c) states that the “amount” of the Annuity Supplement is to be “treated” the same way as the “amount” calculated for the Basic Annuity. The term “treated” is not defined. Therefore, this term may be reasonably construed to mean that the Annuity Supplement is subject to division by a state court order in divorce proceedings “in the same way” that the Basic Annuity may be subject to division by a state court order in those proceedings. In other words, a state court may order allocations of each annuity.

The latter interpretation comports with basic principles of family law, under which parties are generally free to divide marital assets by agreement, and state court order incorporates the final division of marital assets allocated in any such agreement. The parties are thus free, by agreement, to allocate respective shares of the Basic Annuity, the Annuity Supplement, or any other marital asset subject to the divorce court’s jurisdiction. A spouse may thus bargain away his or her share of an Annuity Supplement or the Basic Annuity in exchange for other valuable consideration. As further discussed below, this interpretation is consistent with OPM’s new internal guidance that the Annuity Supplement may be separately allocated if the court order does so expressly.

### **C. OPM’s Regulations Require That the Agency Perform Ministerial Actions Only**

It is undisputed that OPM, by statute, regulation and practice, is bound to follow the terms of a court order and not allocate retirement benefits except in strict accordance with the express terms of a court order. The regulations provide that “[i]n executing court orders under this part, OPM must honor the clear instructions of the court” and “[i]n carrying out the court’s instructions, OPM performs purely ministerial actions . . . .”<sup>42</sup> As the Federal Circuit has stated, “OPM is neither qualified nor obligated to resolve disputes about the import of state divorce decrees . . . . OPM’s task is ‘purely ministerial’ with respect to court-ordered property settlements.”<sup>43</sup>

Importantly, “neither we nor the [Merit Systems Protection Board (MSPB)] is permitted by the terms of 5 U.S.C. § 8341(h) to rewrite or equitably reform state court divorce decrees or settlement agreements that do not unambiguously provide for a[n] annuity.”<sup>44</sup> Thus, “the intent to award a [] survivor annuity must be clear.”<sup>45</sup>

As recognized by the MSPB, OPM is not free to disregard its own published guidance regarding retirement matters, over which it has statutory and regulatory responsibility.<sup>46</sup> If OPM believes

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<sup>42</sup> 5 C.F.R. § 838.101(a)(2).

<sup>43</sup> *Perry v. OPM*, 243 F.3d 1337, 1341 (Fed. Cir. 2001) (quoting *Snyder v. OPM*, 136 F.3d 1474, 1477 (Fed. Cir. 1998)).

<sup>44</sup> *Fox v. OPM*, 100 F.3d 141, 145 (Fed. Cir. 1996).

<sup>45</sup> *Hayward v. OPM*, 578 F.3d 1337, 1345 (Fed. Cir. 2009).

<sup>46</sup> *De Laet v. OPM*, 70 M.S.P.R. 390, 394 (1996) (“OPM is not free to disregard the provisions of the [Federal Personnel Manual] and the Handbook, which constitute its own interpretation of statutes and regulations, and which

that the order is vague, OPM's responsibility is to return the order to the parties so that the state court may address the vague aspect.<sup>47</sup> Therefore, at most, the omission of any reference to the Annuity Supplement creates an ambiguity as to whether the court intended to address the Annuity Supplement. OPM is neither equipped nor empowered to resolve any such ambiguity.

Since the relevant court order may, or may not, provide for division of the Annuity Supplement, it is not a "ministerial" function to create a division of payment that the court order does not expressly contain. Rather, in effect, OPM is creating a new rule that allocates the Annuity Supplement regardless of whether the court has elected to omit any such allocation. That is a rulemaking function, and that function must be carried out in accordance with the provisions of the Administrative Procedure Act.

#### **D. OPM's New Interpretation Requires Notice and Comment Rulemaking**

OPM's acknowledged change in practice effectively constitutes a new rule within the meaning of the Administrative Procedures Act as it resolves the meaning of Section 8421(c) in a new way. As explained below, the OIG concludes that OPM may not adopt or apply this change without undergoing notice and comment rulemaking.

A rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ."<sup>48</sup> "Interpretive rules do not require notice and comment" but "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."<sup>49</sup> A legislative rule has the force and effect of law but must be authorized by Congress and promulgated using notice and comment rulemaking.<sup>50</sup>

The Eighth Circuit has stated that the critical distinction between legislative and interpretative rules is that whereas interpretative rules "simply state what the administrative agency thinks the

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are entitled to deference, particularly where, as here, OPM has statutory and regulatory responsibility over retirement matters"); accord *Nichol v. OPM*, 2007 M.S.P.B. 82 (2007).

<sup>47</sup> See 5 C.F.R. pt. 838.

<sup>48</sup> 5 U.S.C. § 551(4).

<sup>49</sup> *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). See 5 U.S.C. § 553(b)(3)(A).

<sup>50</sup> "[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (citation omitted). On the other hand, a legislative rule, authorized by Congress and issued through notice and comment, has the "force and effect of law." *Perez*, 135 S. Ct. at 1203, quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–303 (1979). Such a rule generally receives full *Chevron* deference. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). An interpretative rule does not. *Christensen*, 529 U.S. at 587. *Perez* squarely holds that an agency need not engage in notice and comment rulemaking in order to issue or change an interpretative rule or practice. *Perez*, 135 S. Ct. at 1206. A change in a legislative rule would require the same procedural proceedings as the original rule, viz., notice and comment. *Id.*

statute means, and only ‘remind’ affected parties of existing duties,” a legislative rule “imposes new rights or duties.”<sup>51</sup> Similarly, the D.C. Circuit stated recently in *National Mining Ass’n v. McCarthy*:

An agency action that purports to impose legally binding obligations or prohibitions on regulated parties -- and that would be the basis for an enforcement action for violations of those obligations or requirements -- is a legislative rule . . . . (As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.) An agency action that merely explains how the agency will enforce a statute or regulation -- in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule -- is a general statement of policy.<sup>52</sup>

As the D.C. Circuit stated in *McCarthy*, the “most important factor” is the “actual legal effect (or lack thereof) of the agency action in question on regulated parties.”<sup>53</sup> Here, the agency’s change goes beyond merely advising the public of the agency’s interpretation of Section 8421(c). It not only creates a new rule or practice, it also imposes real financial consequences, *viz.*, a prospective and retroactive change in how the retiree’s Annuity Supplement amount is allocated between the retiree and the ex-spouse. By any measure, that change imposes “new duties or rights.”<sup>54</sup>

Another factor, according to *McCarthy*, is the agency’s characterization of the rule, *viz.*, whether it is intended to impose a legally binding requirement. That factor also suggests that the rule is legislative, as the agency is stating that its new position is a binding interpretation of Section 8421(c) that controls the amount paid in Annuity Supplement benefits. The agency is then applying its interpretation to reduce the amount paid to the retiree. It is simply not just guidance to future conduct, as it changes the effect of an *existing* court order in a way that is legally binding on the retiree.<sup>55</sup> In sum, if OPM wishes to reinterpret the meaning of Section 8421(c), the OIG concludes that OPM must do so in formal rulemaking, using notice and comment procedures.

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<sup>51</sup> *Nw. Nat’l Bank v. U.S. Dep’t of the Treasury*, 917 F.2d 1111, 1117 (8th Cir. 1990) (quoting *Jerri’s Ceramic Arts, Inc. v. Consumer Prod. Safety Comm’n*, 874 F.2d 205, 207 (4th Cir. 1989)).

<sup>52</sup> 758 F.3d 243, 251-52 (D.C. Cir. 2014).

<sup>53</sup> 758 F.3d at 252.

<sup>54</sup> See *Nw. Nat’l Bank*, 917 F.2d at 1117. Under these principles, it is highly likely that OPM’s change in its interpretation of Section 8421(c) would be deemed to be a legislative rule that requires notice and comment rulemaking.

<sup>55</sup> See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (holding that a guidance document was a legislative rule where it contained mandatory language and commands and was applied as if it were binding on regulated parties).

### **E. OPM May Not Give Its New Interpretation Retroactive Effect**

Even assuming *arguendo* that OPM’s new interpretation is merely an interpretative policy, OPM may not apply such a policy retroactively by re-apportioning prior payments of Annuity Supplement benefits or applying the new interpretation to court orders that preexisted the adoption of the new interpretation.

The rule against retroactive rulemaking was stated by the Supreme Court in *Bowen v. Georgetown University Hospital*, where the Court held that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”<sup>56</sup> As the Court explained, “an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress” and “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>57</sup>

Here, OPM’s decision to apply its new interpretation to pre-existing court orders creates a prohibited retroactive effect. We are aware of no statutory authorization for such retroactive rulemaking.<sup>58</sup> Applying OPM’s new rule to prior court orders necessarily affects the substantive rights, liabilities and duties of the parties to that prior court order as it would change how OPM reads and applies the court’s order in a way that alters the allocation of Annuity Supplement benefits under that court order. As such, OPM’s re-interpretation affects the “substantive rights” and “liabilities” of the parties set forth in that pre-existing court order.<sup>59</sup>

In summary, OPM may not apply its re-interpretation of Section 8421(c) to prior court orders, much less retroactively change the apportionment of benefits for those prior years. If OPM wishes to apply this new interpretation of Section 8421(c) to future court orders, then the Administrative Procedures Act and simple fairness to all concerned demand that OPM publish its new interpretation, so that the parties are on notice in negotiating post-marital property allocation agreements that are expressly reflected in the court orders.<sup>60</sup> As outlined above, that publication must take the form of full notice and comment rulemaking, just as the existing rules and

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<sup>56</sup> 488 U.S. 204, 208 (1988).

<sup>57</sup> *Id.* “Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.” *Id.* at 208-09.

<sup>58</sup> As the Court explained in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006), in assessing whether a rule has retroactive effect “we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of ‘affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.’” *Id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 278 (1994)).

<sup>59</sup> See also *Travenol Laboratories, Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997) (“The determination of whether a statute’s application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute’s application occurs before or after the law’s effective date.”) (quoting *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993)).

<sup>60</sup> Courts likewise must be put on notice in allocating marital property.

regulations were published in notice and comment rulemaking. OPM lacks the authority to apply its new interpretation retroactively, either to reallocate the years of benefits as seen in the examples provided above or to apply its new interpretation to court orders that were entered before the adoption of this new interpretation.

## V. RECOMMENDATIONS

**Recommendation 1:** We recommend that OPM cease implementing the RIL 2016-12 and OS Clearinghouse 359 memoranda to apply the state court-ordered marital share to Annuity Supplements unless those court orders expressly and unequivocally identify the Annuity Supplement to be apportioned.

OPM Response:

OPM does not concur with this recommendation. OPM adheres to its conclusion that the language of section 8421(c) requires OPM to treat the supplemental annuity in the same fashion that it treats the basic annuity for the purposes of court orders dividing employee annuities. Section 8421(c) of title 5 of the United States Code, the section addressing annuity supplements, states that “[a]n amount under this section,” *i.e.*, an amount reflecting an annuity supplement, “shall, for the purposes of section 8467,” a section expressly addressed to court orders, “be treated in the same way as an amount computed under section 8415” (emphasis added). This language leaves no room for alternative interpretations. It requires OPM to treat annuity supplements in the same fashion that it treats the basic annuity “for the purposes of court orders. “If the intent of Congress is clear, that is the end of the matter; for . . . the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

But even if there is room for interpretation, OPM’s duly promulgated regulations in 5 C.F.R. part 838 also make clear that, unless the court specifies otherwise, a court order divides the monthly “recurring payments” of “[e]mployee annuity,” 5 C.F.R. § 838.103, not sums of money within those payments attributable to various provisions of chapter 84. Significantly, Congress has entrusted the great responsibility of interpreting chapter 84 to the Director of OPM. *See* 5 U.S.C. § 1103(a)(5)(A) (“executing, administering, and enforcing. . . the laws governing the civil service” is “vested in the Director”); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55-56 (2011) (“[t]he power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress” (emphasis supplied; internal quotations omitted)).

OIG Comment:

The OIG disagrees with OPM’s position. OPM’s response is contradicted by its nearly three decades of acknowledged practice of interpreting the Basic Annuity to *not* include the Annuity Supplement.

Likewise problematic is OPM’s stated reliance on *Chevron* deference for its new interpretation. *Chevron* deference refers to an important principle of administrative law that the Supreme Court established in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*<sup>61</sup> In *Chevron*, the Supreme

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<sup>61</sup> 467 U.S. 837 (1984).

Court held that courts should defer to agency interpretations of such statutes where Congress has expressly delegated formal rulemaking authority to the agency and the interpretation is embodied in the resulting rule. Any such interpretation cannot override express language of the statute (“step one”) and, if the statute is silent or ambiguous, the interpretation must be otherwise a permissible or reasonable construction of the statutory language (“step two”).<sup>62</sup> We note that with few exceptions,<sup>63</sup> such deference is generally accorded only where an agency has employed full notice and comment rulemaking procedures.<sup>64</sup> OPM has not employed such procedures here in adopting its new policy.

Given the significance of the issue, and the far-reaching consequences of this new policy on retirees and their ex-spouses, it is difficult to see how *Chevron* deference would be appropriate in the absence of formal procedures.<sup>65</sup> OPM’s response is likewise contradicted by OPM’s new policy that recognized that if the order expressly divides the Annuity Supplement, then OPM will follow those terms, regardless of how the Basic Annuity is divided. OPM thus recognized that the Annuity Supplement is not the same as the Basic Annuity and may be subject to a different marital allocation.

OPM’s response failed to address the retroactive aspect of the agency’s new policy change. OPM’s policy is causing significant and immediate financial hardship for annuitants and is disturbing previously litigated state court orders that effected a division of marital property.

**Recommendation 2:** We recommend that OPM take all appropriate steps to make whole those retired LEOs and any other annuitants affected by this re-interpretation. This would include reversing any annuities that were decreased either prospectively or retroactively that involved a state court order that did not expressly address the Annuity Supplement.

OPM Response:

OPM does not concur with this recommendation insofar as it characterizes OPM as having reinterpreted the statutory and regulatory provisions governing annuity supplements.

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<sup>62</sup> *Id.* at 842-43.

<sup>63</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) (“we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded”); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (“whether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue”).

<sup>64</sup> See *Mead*, 533 U.S. 218, 230-31 (2001).

<sup>65</sup> *Id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

OIG Comment:

The OIG disagrees with OPM's response that appears to deny that OPM has "reinterpreted the statutory and regulatory provisions governing annuity supplements." As discussed above, OPM has changed its interpretation after almost three decades of interpreting the Basic Annuity to *not* include the Annuity Supplement.

**Recommendation 3:** We recommend that OPM determine whether it has a legal requirement to make its updated guidance, including Retirement and Insurance Letters, publicly available.

OPM Response:

OPM does not concur with this recommendation insofar as the recommendation applies to the documents in question here. OPM does not believe it is obligated to post, as a matter of course, materials in the nature of work instructions issued to claims adjudicators when management observes a problem with consistent application of the law and the regulations. Should the question arise, [Retirement Services] will consult with the Office of the General Counsel as to the circumstances under which such claims processing guidance should be made available for public inspection and copying under the Freedom of Information Act (FOIA), as described in 5 U.S.C. § 552(a)(2), subject to applicable FOIA exemptions under 5 U.S.C. § 552(b).

OIG Comment:

The OIG disagrees. As discussed above, OPM has a legal obligation to provide public notice of a new policy that significantly affects how OPM processes state court orders – and that has resulted in the imposition of new and wholly unexpected substantive obligations. Although OPM has not so construed the Basic Annuity to be congruent with the Annuity Supplement for the past 30 years, OPM has decided to issue a new policy that now equates the Basic Annuity with the Annuity Supplement in the absence of any court order provision that addresses the Annuity Supplement separately. Employees, annuitants, spouses, and courts rely heavily on OPM's guidance and are entitled to notice of OPM policies that directly affect them. In this context, OPM's continuing failure to provide public notice of this new policy is troubling.

Finally, OPM formally requested that the OIG keep this memorandum non-public, stating in relevant part:

OPM requests that the Inspector General forego such publication here, where the very essence of the alert is legal argument. As noted below, litigation before the MSPB concerning the subject matter of the alert has now commenced, and court order appeals call for special sensitivity because they affect two private parties whose interests are in conflict with one another. The Inspector General's alert essentially lays out arguments that could be used by annuitants in appeals from the agency's decisions, but these annuitants' interests are in conflict with other private individuals, i.e., the annuitants' spouses. At this point, it would be prudent to let

the MSPB, and, as appropriate, its reviewing courts, sort out the legal issues as Congress contemplated in the Civil Service Reform Act; otherwise, the Inspector General might place itself in the position of tipping the scales in favor of one group of affected individuals over another.

OIG Comment:

The OIG declines to accept OPM's request that the OIG forego publication, as it would be inconsistent with the Inspector General Act of 1978, as amended (IG Act).<sup>66</sup> Congress established the OIG "to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action."<sup>67</sup> OPM's unpublished decision that re-interpreted Section 8421(c) is a highly significant change pertaining to OPM's administration of the Retirement Services Program, a program that has particular significance for thousands of Federal law enforcement personnel.

OPM's concern that "these annuitants' interests are in conflict with other private individuals" is not an appropriate reason for the OIG to decline to publicly post these recommendations in the usual manner. Section 4(e)(1)(A) of the IG Act requires that the OIG post documents making recommendations for corrective action to the OIG's website within three days of submitting the document to the Director.<sup>68</sup> In any event, we are advised that the previously pending MSPB appeals have been dismissed as a result of OPM's issuing of a "rescindment" of OPM's decisions on reconsideration.<sup>69</sup>

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<sup>66</sup> 5 U.S.C. app.

<sup>67</sup> *Id.* § 2(3). "An IG works as the agency's watchdog. The amount IGs can save the taxpayer in identifying and recovering improper payments, ferreting out abusive or wasteful practices, and identifying troubled programs is well-documented." S. Rep. No. 114-36, at 2 (2015).

<sup>68</sup> *See* 5 U.S.C. app. § 4(e).

<sup>69</sup> In at least one of these prior appeals, the affected annuitant continues to have his monthly annuity decreased based on OPM's new policy notwithstanding the "rescindment." Accordingly, it is difficult to understand how that final agency action was completely rescinded.

# APPENDIX

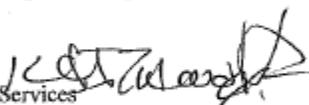


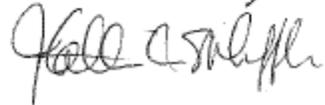
Retirement Services

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT  
Washington, DC 20415

MAR 28 2017

FOR: J. DAVID COPE  
Assistant Inspector General for Legal and Legislative  
Affairs

FROM: KENNETH J. ZAWODNY, JR.   
Associate Director, Retirement Services

KATHIE ANN WHIPPLE   
Acting General Counsel

SUBJECT: MANAGEMENT ADVISORY, OPM's Non-Public  
Decision to Prospectively and Retroactively Re-Apportion  
Annuity Supplements Notwithstanding Silence of the State  
Court Orders

Thank you for providing us the opportunity to respond to the Office of the Inspector General (OIG) draft management advisory, "OPM's Non-Public Decision to Prospectively and Retroactively Re-Apportion Annuity Supplements Notwithstanding Silence of the State Court Orders." Our responses to your recommendations are provided below.

OPM understands that the Office of Inspector General usually publishes management alerts such as the one to which OPM now responds. OPM requests that the Inspector General forego such publication here, where the very essence of the alert is legal argument. As noted below, litigation before the MSPB concerning the subject matter of the alert has now commenced, and court order appeals call for special sensitivity because they affect two private parties whose interests are in conflict with one another. The Inspector General's alert essentially lays out arguments that could be used by annuitants in appeals from the agency's decisions, but these annuitants' interests are in conflict with other private individuals, i.e., the annuitants' spouses. At this point, it would be prudent to let the MSPB, and, as appropriate, its reviewing courts, sort out the legal issues as Congress contemplated in the Civil Service Reform Act; otherwise, the Inspector General might place itself in the position of tipping the scales in favor of one group of affected individuals over another.

Background:

Section 8421 of title 5 of the U.S. Code provides for an "annuity supplement" for certain individuals whose annuities commence prior to age 62, in addition to the basic annuity payable under 5 U.S.C. § 8415. The annuity supplement is analogous to insurance benefits payable under title II of the Social Security Act. Section 8467(a) of title 5, addressing court-ordered

benefits for the former spouses of annuitants, further provides that “[p]ayments under this chapter [*i.e.*, chapter 84, the Federal Employees Retirement System (“FERS”)] which would otherwise be made to an . . . annuitant . . . based on the service of that individual shall be paid (in whole or in part) by the Office . . . to another person if and to the extent expressly provided for in the terms of . . . any court decree of divorce, annulment, or legal separation;” and under a corresponding provision in 5 U.S.C. § 8421(c), “[a]n amount under this section [related to annuity supplements] shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415 [related to the basic annuity].”

OPM has issued implementing regulations in 5 C.F.R. part 838, which cover both FERS and the Civil Service Retirement System (“CSRS”). OPM’s regulations govern the effect of a qualifying court order on the “Employee annuity,” defined as those “recurring payments . . . made to a retiree” that “are payable on the first business day of the month following the month in which the benefit accrues.” 5 C.F.R. §§ 838.103, 838.132(a); *see also id.* § 838.211(a)(1). Thus the regulation speaks in terms of the effect of court orders on recurring monthly annuity payments. Consistent with the statute, the regulation does not distinguish between the sources of money making up the monthly annuity payments under applicable provisions of chapter 84.

The regulations provide that “OPM *must comply* with qualifying court orders, decrees, or court-approved property settlements in connection with divorces, annulments of marriages, or legal separations . . . that award *a portion of an employee annuity* [*i.e.*, a portion of the recurring monthly payments] to a former spouse.” 5 C.F.R. 838.201(a) (emphasis supplied). The regulations then focus on when a court order is “acceptable for processing,” *i.e.*, when it “expressly divides the employee annuity,” “provides for OPM to pay the former spouse a portion of the employee annuity,” and “provides sufficient instructions and information that OPM can compute the amount of the former spouse’s monthly benefit using only the express language of the court order” as well as OPM’s own regulations and records. 5 C.F.R. §§ 838.303(a), 838.304(a), 838.305(a).

On October 23, 2014, the Retirement Policy group in Retirement Services (“RS”) issued a memorandum to the Operations Support group (“OS Clearinghouse 359”), addressing questions on how to divide a FERS annuity pursuant to court order when the monthly employee annuity payments include both basic annuity monies and supplemental annuity monies. Operations Support noted, in its request, that there had been inconsistencies among the staff processing such court orders. *Id.* at 2.

Retirement Policy concluded that under the express and unambiguous language of 5 U.S.C. § 8421(c) -- and consistent with OPM’s regulation in 5 C.F.R. § 838.103, which requires division of the “employee annuity” without any words of limitation permitting only certain components thereof are to be divided -- both the basic and supplemental components are to be divided, when a court orders the division of the employee annuity. *Id.* at 3-4.

Operations Support then issued Retirement and Insurance Letter (“RIL”) 2016-12 on June 28, 2016. The RIL detailed corrections that had been made to OPM rate computation software and set forth some procedures for calculating and correcting overpayments. It concluded that “[i]f an annuitant is entitled to a FERS annuity supplement under 5 U.S.C. § 8421, OPM must include

the FERS annuity supplement in the calculation of a former spouse's benefit unless the court order expressly excludes it." *Id.* at 4.

The Federal Law Enforcement Officers' Association objected to these conclusions in a September 16, 2016 letter, and OPM Retirement Services responded that "[b]ecause . . . the FERS Annuity Supplement [is] considered part of the annuity divisible by court order under the authority of 5 U.S.C. § 8467, OPM's claims processing guidance to Retirement Services' staff has been updated to reflect that a FERS annuity includes the FERS Annuity Supplement. . . . when the FERS annuity is divided under the terms of a court order." Letter at 2.

After a period of consultation with OPM management, OIG's review and draft Management Advisory and Recommendations followed on March 9, 2017. OPM management submits the following response to the draft recommendations.

*Recommendation #1: We recommend that OPM cease implementing RIL 2016-12 and OS Clearinghouse 359 Memorandum to apply the state court-ordered marital share to the Annuity Supplement unless those court orders expressly and unequivocally identify the Annuity Supplement to be so apportioned.*

Management Response:

OPM does not concur with this recommendation. OPM adheres to its conclusion that the language of section 8421(c) requires OPM to treat the supplemental annuity in the same fashion that it treats the basic annuity for the purposes of court orders dividing employee annuities. Section 8421(c) of title 5 of the United States Code, the section addressing annuity supplements, states that "[a]n amount under this section," *i.e.*, an amount reflecting an annuity supplement, "shall, for the purposes of section 8467," a section expressly addressed to court orders, "be treated in the same way as an amount computed under section 8415" (emphasis added). This language leaves no room for alternative interpretations. It requires OPM to treat annuity supplements in the same fashion that it treats the basic annuity "for the purposes of" court orders. "If the intent of Congress is clear, that is the end of the matter; for . . . the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

But even if there is room for interpretation, OPM's duly promulgated regulations in 5 C.F.R. part 838 also make clear that, unless the court specifies otherwise, a court order divides the monthly "recurring payments" of "[e]mployee annuity," 5 C.F.R. § 838.103, not sums of money within those payments attributable to various provisions of chapter 84. Significantly, Congress has entrusted the great responsibility of interpreting chapter 84 to the Director of OPM. *See* 5 U.S.C. § 1103(a)(5)(A) ("executing, administering, and enforcing . . . the laws governing the civil service" is "vested in the Director"); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55-56 (2011) ("[t]he power of an administrative agency to *administer* a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (emphasis supplied; internal quotations omitted)).

*Recommendation #2 (first part): We recommend that OPM immediately take appropriate steps to make whole those retired LEOs and any other annuitants affected by this re-interpretation. This includes reversing any annuities that were decreased either prospectively or retroactively that involved a state court order that did not expressly address the Annuity Supplement.*

Management Response:

OPM does not concur with this recommendation. As an initial matter, OPM does not accept the premise that there was any "re-interpretation" of the statutory or regulatory provisions governing annuity supplements, as Congress has left no interpretive gap for OPM to fill, and accordingly, OPM's regulation merely conforms to the statute. Even if there is room for interpretation, however, as noted above, OPM has done nothing more than to correct inconsistencies to bring the practices in line with OPM's duly promulgated regulations in 5 C.F.R. part 838.

With respect to the OIG's specific "make whole" recommendation, however, OPM cannot pay higher amounts to annuitants than the statute allows -- or correspondingly reduce the amounts to which annuitants' former spouses are statutorily entitled -- based on "individual favor" toward particular claimants. See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424-28 (1990). Nevertheless, under 5 U.S.C. § 8470(b), OPM shall waive collection of an individual's annuity overpayment "when, in the judgment of the Office, the individual is without fault and recovery would be against equity and good conscience." OPM's implementing regulations in 5 C.F.R. part 845, set forth the applicable standard for individual adjudications, and explain each annuitant's right to advanced notice and opportunity to seek reconsideration, waiver, or compromise. If an individual is dissatisfied with OPM's decision, he or she has a right to appeal the decisions to the Merit Systems Protection Board ("MSPB" or "Board") under 5 U.S.C. § 8461(e)(1).

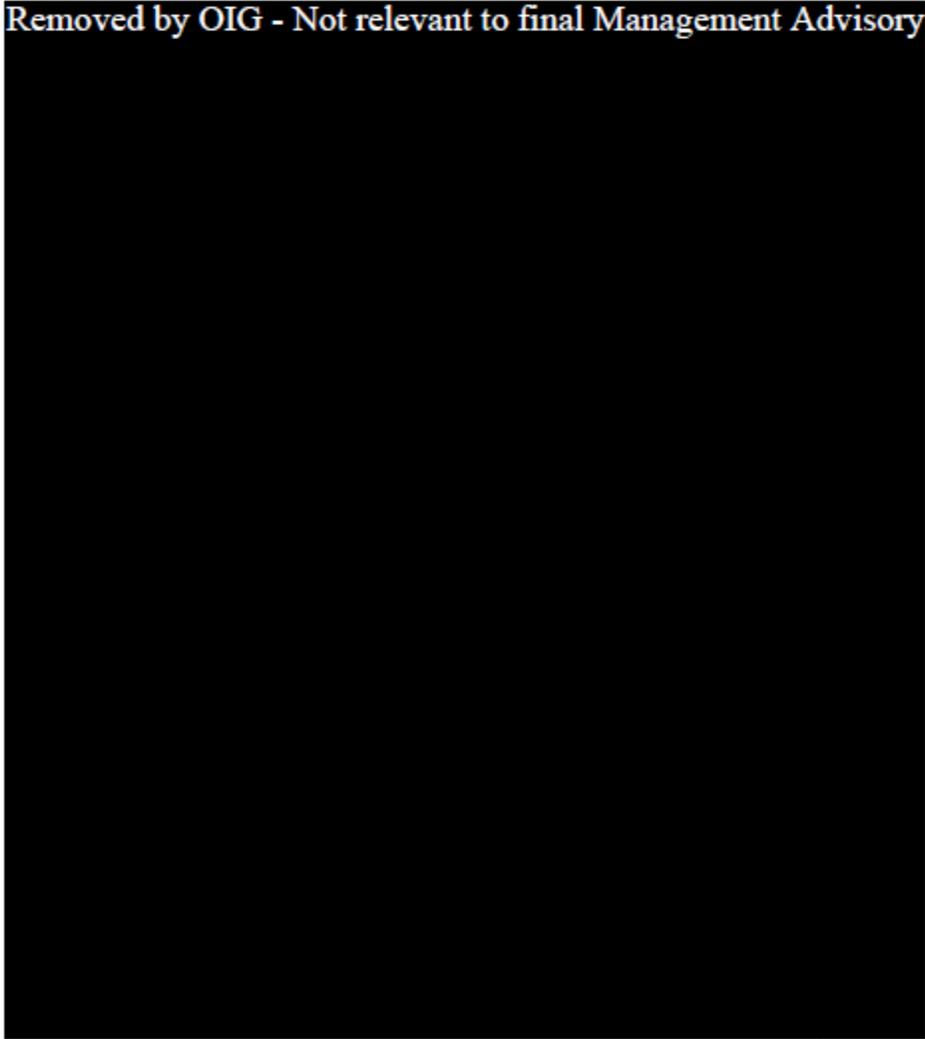
Each annuitant whose former spouse's annuity was adjusted received a Retirement & Insurance ("RI") form 38-47, "Information and Instructions on Your Reconsideration Rights" notice. This gave each affected annuitant the opportunity to challenge the existence and amount of the overpayment, with a right of appeal to the MSPB. Following the transmissions of those forms, OPM also issued each of the affected annuitants an RI form 34-3, "Notice of Amount Due Because of Annuity Overpayment," with a new 30-day period to request reconsideration, and with collection of the overpayment suspended, pending a final decision. This gave each affected annuitant the opportunity to request reconsideration, waiver, or compromise of OPM's collection of the overpayment, with additional MSPB appeal rights. Accordingly, OPM has furnished the procedural redress that the law requires.

Further, OPM has met with representatives of the Federal Law Enforcement Officers Association ("FLEOA") to directly explain its position and to invite a continued dialogue with FLEOA and its members; OPM has also met with staff from the House Oversight and Government Reform Committee about this matter. But, litigation before the MSPB has now commenced and it would be imprudent to comment, in this forum, on the Agency's litigation position. Court order appeals call for special sensitivity because they are in essence a form of private party litigation, even though they are litigated in an administrative tribunal; the former spouses may (and frequently do) intervene to litigate against the annuitants, either in favor of or against OPM's position. See 5 C.F.R. § 1201.34(a). Although OPM will defend its legal position before the MSPB, as it

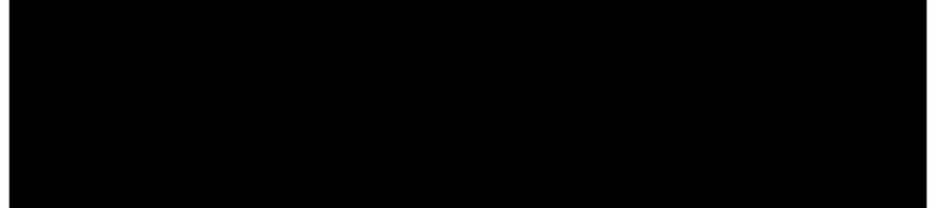
must, OPM -- including its Inspector General -- must scrupulously avoid any appearance that it favors one category of private claimant over the other. The MSPB and its reviewing courts are now the best place in which to achieve a resolution of the legal questions at hand.

In the event the Board disagrees with OPM's actions -- and the Board's decision, or the decision of the appellate courts in any appeal from the Board's decision becomes final -- OPM will of course take any necessary steps to comply with an appropriate order.

**Removed by OIG - Not relevant to final Management Advisory**



**Removed by OIG - Not relevant to final Management Advisory**



*Recommendation #4: We recommend that OPM determine whether it has a legal requirement to make its updated guidance, including Retirement and Insurance Letters, publicly available.*

Management Response:

OPM does not concur with this recommendation insofar as the recommendation applies to the documents in question here. OPM does not believe it is obligated to post, as a matter of course, materials in the nature of work instructions issued to claims adjudicators when management observes a problem with consistent application of the law and the regulations. Should the question arise, RS will consult with the Office of the General Counsel as to the circumstances under which such claims processing guidance should be made available for public inspection and copying under the Freedom of Information Act (FOIA), as described in 5 U.S.C. § 552(a)(2), subject to applicable FOIA exemptions under 5 U.S.C. § 552(b).



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