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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206–AL55

Compensatory Time Off for Religious Observances and Other Miscellaneous Changes

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to amend its current regulations on compensatory time off for religious observances. The final rule addresses comments and clarifies provisions on employee coverage, employee and agency responsibilities, scheduling time to earn and use religious compensatory time off, accumulation and documentation, and employee separation or transfer. We are also implementing other miscellaneous changes in the pay and leave area.

DATES: Effective May 29, 2019.

FOR FURTHER INFORMATION CONTACT: Jennifer Melvin by telephone at (202) 606–2858 or by email at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On August 30, 2013, the Office of Personnel Management (OPM) published proposed regulations (78 FR 53695) regarding compensatory time off for religious observances under 5 U.S.C. 5550a and other miscellaneous changes.

The 60-day comment period for the proposed regulations ended on October 29, 2013. We received comments from 8 Federal agencies, 2 religious organizations (including one submission on behalf of 19 other religious and policy groups), and 4 individuals. This **Federal Register** document provides general information, addresses the comments received, and issues final regulations that reflect changes to the proposed regulations. OPM is amending

the regulations found in subpart J (Compensatory Time Off for Religious Observances) in part 550 (Pay Administration (General)) of title 5, Code of Federal Regulations. It is also revising two definitions used in other regulations in part 550.

Comments on Proposed Regulations

Modifying From a 26 Pay Period Limitation to a 13 Pay Period Limitation

Four agencies provided comments disagreeing with the establishment of a 26 pay period limitation, generally stating it was an excessively long period that could lead to potential abuse, could impact the mission of the agency, and would be administratively burdensome on managers, supervisors, and timekeepers. Three agencies recommended establishing a 13 pay period limitation before and a 13 pay period limitation after for religious compensatory time off, thus providing a 26 pay period total for earning religious compensatory time off.

One agency objected to the proposed 26 pay period limit for earning religious compensatory time following the use of advanced religious compensatory time off, and is seeking a two pay period limit following the use of religious compensatory time off for employees to repay the hours used. The agency was concerned that a 26 pay period limit is unreasonably long, and does not balance an agency's responsibility to carry out its mission with an employee's right to make up the time in 26 pay periods. The agency points to other available flexibilities, including earning religious compensatory time in advance of when it is needed, using annual leave or advanced annual leave, leave without pay, compensatory time off in lieu of overtime pay, compensatory time off for travel, and adjusting work schedules.

We have evaluated these comments and are revising the proposed 26 pay periods before and 26 pay periods after the religious observance in which to earn religious compensatory time off to be 13 pay periods before and 13 pay periods after a religious observance in which to earn religious compensatory time off. That would allow a total period of 26 pay periods (about 1 year) during which the religious compensatory time off could be earned in connection with a religious observance. An agency may not prescribe a lesser or narrower timeframe in which an employee may

earn religious compensatory time off before or after using it. This change will allow employees about a year to schedule and earn religious compensatory time off while making it more administratively feasible for agencies to administer.

An individual commenter was opposed to the 26 pay period limitation, citing that the limitation was too restrictive, and recommended the limitation be doubled. The commenter cites that some religious observances can be lengthy and questioned if adequate compensatory time off could be earned feasibly within the preceding 26 pay periods.

We are not adopting this recommendation in the final regulations.

Below we summarize and respond to other comments on the proposed regulations, organized by the affected regulatory section number.

§ 550.1001—Purpose

A religious organization requested clarification that religious compensatory time off is not the only method by which agencies may accommodate employees who need to abstain from work due to a personal religious observance. The commenter requested we clarify this point by adding language to the final regulation.

OPM previously addressed this concern in the Supplementary Information of the proposed rule (78 FR 53697), in which (as part of a discussion of § 550.1006) we remind agencies and employees of the availability of additional workforce flexibilities, including annual leave, advanced annual leave, regular compensatory time off, alternative work schedules, and leave without pay, all of which may play a part in accommodating an employee's need to abstain from work for religious purposes.

We encourage employees to work with their agencies to make use of all appropriate workforce flexibilities to meet their needs. However, this final rule addresses only religious compensatory time off procedures, not the various options that an employee may choose when taking time off for a religious observance. We are not adopting this recommendation in the final rule.

Two agencies raised issues related to how earning religious compensatory time off hours (via work) is in lieu of

receiving overtime pay. They pointed out that, contrary to the language in the proposed definition of *overtime work* in § 550.1003 stating that overtime pay would normally otherwise be payable for hours worked to earn religious compensatory time off, some employees do not normally receive overtime pay for work beyond their scheduled hours.

We agree that certain employees—e.g., members of the Senior Executive Service (SES), employees who reach the premium pay cap, employees who work during holiday hours, and part-time employees who perform nonovertime work beyond their scheduled tour—would not otherwise receive overtime pay for hours worked to earn religious compensatory time off. As further discussed later in this Supplementary Information, we are agreeing to delete language in the definition of *overtime work* in § 550.1003 stating that overtime pay would normally be received for the hours of work (but for crediting the hours as earned religious compensatory time off). However, as a matter of providing general clarification, we are adding language under § 550.1001 to make clear that hours worked to earn religious compensatory time off provide a time off credit in lieu of *any* pay that would otherwise be payable for that work.

We are also adding the word “personal” before “religious requirements” in two places in § 550.1001 in response to comments regarding the definition of *religious compensatory time off* in § 550.1003, as discussed below.

§ 550.1002—Coverage

Two agencies asked for clarification regarding employees covered by the religious compensatory time off regulations. One agency requested the final regulations clarify that members of the Senior Executive Service (SES), employees in senior-level (SL) and scientific or professional (ST) positions, and wage grade employees are eligible to earn religious compensatory time off. Another agency raised SES coverage issues in the context of recommending that we delete “for which overtime pay would normally be payable” from the *overtime work* definition within § 550.1003 in the final rule, since SES members may earn religious compensatory time off but are not eligible to be compensated for overtime hours worked. We agree with the comments received from the agencies and are modifying the final regulations to clarify which employees are eligible to earn and use religious compensatory time off.

These final regulations clarify that coverage applies to each employee (as defined in 5 U.S.C. 2105) in or under an Executive agency (as defined in 5 U.S.C. 105) who has a scheduled tour of duty, which would include members of the SES, SL/ST employees, and prevailing rate (blue collar wage) employees who have a scheduled tour of duty.

Religious compensatory time off is provided under section 5550a, subchapter V of chapter 55 (Premium Pay) of title 5, United States Code. Section 5541(2) of the premium pay statute provides a definition for the term “employee” to be used generally for the purpose of subchapter V. This definition excludes certain categories of employees, including SES members (who are excluded under section 5541(2)(xvi) and (xvii)) and prevailing rate employees (who are excluded under section 5541(2)(xi), except for the purpose of applying sections 5544 and 5550b). However, based on the intent of Congress and the language in section 5550a stating that “any employee” may use religious compensatory time off “notwithstanding any other provision of law,” it has been OPM’s longstanding position that the employee coverage exclusions provided within section 5541(2) do not apply in determining coverage under section 5550a. This means that members of the SES and prevailing rate employees are covered by section 5550a. OPM’s position on employee coverage dates back to the early implementation of section 5550a shortly after its enactment on September 29, 1978 (Public Law 95–390). Further, Comptroller General Decision B–209327 (July 26, 1983) stated that “the language and the legislative history of section 5550a show an intent on the part of Congress to provide all Federal employees” with religious compensatory time off. It also found that the religious compensatory time off law applies to members of the Senior Executive Service, who are generally not covered by the premium pay subchapter.

An OPM regulation in 5 CFR 534.408(b) that was promulgated in 1995 further clarifies that SES members are eligible to earn religious compensatory time off, even though they are not eligible for overtime pay or eligible to earn compensatory time off in lieu of overtime premium pay.

Employees in senior-level (SL) and scientific or professional (ST) positions who are paid under 5 U.S.C. 5376 are not excluded from the definition of “employee” in 5 U.S.C. 5541(2). Therefore, there has never been any question about their coverage under the religious compensatory time off

provision in section 5550a. SL/ST employees are also covered by the broad definition of “employee” OPM has always used (in lieu of the section 5541(2) definition) in determining coverage under section 5550a.

In these final regulations, we are modifying the regulations to clarify that the definition of “employee” in section 5541(2) does not apply in determining coverage under the religious compensatory time off provision.

§ 550.1003—Definitions

Overtime Work

Four commenters recommended the definition of *overtime work* be modified or deleted. Two agencies recommended modifying the definition by deleting “for which overtime pay would normally be payable”. One of the agencies recommended this language be deleted from the *overtime work* definition due to concerns that the language may be construed to prevent members of the Senior Executive Service (SES) from earning religious compensatory time off, since they are not eligible to earn overtime pay. The other agency noted that not all hours beyond an employee’s scheduled tour of duty may normally be paid as overtime work.

We agree that this language could be misconstrued and are removing the language from the definition of *overtime work*, as suggested, in these final regulations.

One religious organization and one agency commented that the term *overtime work* can cause confusion as it relates to religious compensatory time off. The religious organization also stated that applying the term *overtime work* to work performed by part-time employees that is below applicable overtime thresholds is confusing. Both commenters suggested replacing the term with language that is more descriptive.

The term *overtime work* is used in the section of law, 5 U.S.C. 5550a, that authorizes the use of religious compensatory time off. The regulations necessarily use the same term. However, a special definition of the term is used for purposes of subpart J in order to include certain hours that would not be considered overtime work under the normally used definition. For example, the regulatory definition of *overtime work* in § 550.1003 in both the proposed and final regulations states that it is deemed to include any work performed by a part-time employee outside of his or her established part-time tour of duty—even though the additional work by a part-time employee may not be in

excess of the daily/weekly overtime thresholds that are normally used to define “overtime work.” For these reasons, we are not adopting this recommendation, and the term *overtime work* continues to be used in the final rule.

An agency proposed adding language to the definition of *overtime work* to clarify that religious compensatory time off may be earned by working on a legal holiday “whether within or outside the employee’s holiday clock hours.”

Consistent with OPM’s longstanding guidance, the term *overtime work* is deemed to include work performed by an employee on a legal holiday when he or she is relieved from working on the holiday. In other words, the holiday hours in question are the hours within the scheduled tour of duty (*i.e.*, “holiday hours”) for which an employee normally receives either (1) holiday pay for hours during which the employee is excused from work or (2) holiday premium pay for working assigned hours. If an employee *elects* to work on a holiday in order to earn religious compensatory time off, the agency may authorize the employee to do so. This election can be made when an employee is not otherwise assigned to work the holiday hours. The employee is working even though he or she would ordinarily (but for the election to earn religious compensatory time off) be excused from duty. The employee will receive the regular holiday pay as if excused from duty. The work during holiday hours will be credited as religious compensatory time off and will not generate entitlement to holiday premium pay. The proposed regulations stated that *overtime work* includes “work performed by an employee on a legal holiday.” Based on the agency comment, we are modifying the definition of *overtime work* to clarify that we are referring to holiday hours within the employee’s scheduled tour of duty—hours during which the employee would be excused from duty but for the employee’s election (with agency approval) to perform work to earn religious compensatory time off. Any work on a holiday outside the designated holiday hours would be overtime work hours under the normally used definition; such work hours would generate overtime pay, not holiday premium pay. Thus, there is no need to “deem” such work to be *overtime work* for the purpose of converting overtime work to religious compensatory time off under subpart J.

Religious Compensatory Time off

Two commenters expressed concerns about the definition of *religious*

compensatory time off—specifically, the language stating that “an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to perform overtime work in order to make up for the time the employee takes off to meet those religious requirements.”

An agency stated that the reference to religious “requirements” in the proposed definition of *religious compensatory time off* is an overstatement of why an employee chooses to observe certain religious activities or ceremonies. A commenter representing the Department of Justice requested clarification of the term “require” used in the same definition, noting that the term “require” should be understood to include both religiously mandated and religiously motivated conduct. The commenter stated that the Department of Justice has taken the position in past litigation that the Free Exercise Clause of the First Amendment and Religious Freedom Restoration Act (42 U.S.C. 2000bb) protect not only actions that are religiously mandated but also actions that are religiously motivated. The commenter cited a court case, *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000)(en banc) to support its position that attempting to distinguish between religiously mandated and religiously motivated actions would improperly entangle agencies in deciding inherently religious questions, and limit the use of religious compensatory time off in a way that would be more narrow than intended. The commenter suggested language that could be added to the regulation to clarify that religiously motivated actions are a basis for using religious compensatory time off.

Section 5550a provides religious compensatory time off when an employee’s “personal religious beliefs require the abstention from work during certain periods of time” (emphasis added). Section 5550a also refers to “time lost for meeting those *religious requirements*” (emphasis added). OPM’s regulatory language uses the same terminology. By law, religious beliefs must require (or compel or impose an obligation on) the employee to be absent from work. However, it is significant that the referenced beliefs are not the official beliefs of an organized religion to which the employee may belong, but are the employee’s “personal” religious beliefs. In other words, it is sufficient that the employee’s personal religious beliefs cause the employee to feel an obligation that he or she should be absent from work for a religious purpose.

The *DeHart* decision dealt with the issue of whether Constitutional religious freedom protections applied only to the orthodox beliefs of an organized religion that imposed requirements (or commandments) on members of that religion or also to the non-orthodox beliefs of individual members of that religion. The court ruled that a claim for religious protection could not be dismissed solely because of the non-orthodox or non-mainstream character of the religious belief in question. It pointed to Supreme Court decisions stating that courts should not question the centrality of a particular religious belief or attempt to determine whether a belief is the correct interpretation of a religion’s creed. Rather, courts should look at only two threshold requirements that must be met before beliefs are accorded First Amendment protection by a court: (1) The belief is sincerely held, and (2) the belief is religious in nature. *Id.* at 51.

As noted above, the law establishing religious compensatory time off for Federal employees makes clear that “personal” religious beliefs are a legitimate basis for claiming the right to use compensatory time off. The OPM regulations include the statutory language describing the condition that “personal religious beliefs require the abstention from work.” Given the concerns of commenters, however, we are adding language in the definition of *religious compensatory time off* to further clarify that the beliefs do not have to be in line with the official mandates of a religious organization to which the employee belongs and can spring from a sense of personal obligation. We are also inserting the word “personal” before “religious requirements” and before “religious obligations” in the definition of *religious compensatory time off*. Also, as noted earlier, we are inserting the word “personal” before “religious requirements” in two places in § 550.1001 (Purpose).

§ 550.1004—Employee Responsibilities

An agency recommended that the term “in advance” in § 550.1004(a) (dealing with employee requests to use religious compensatory time off) should be clarified in the final regulations to mean “with enough time to allow the agency to consider the request.” Each agency is responsible for establishing procedures under §§ 550.1005 and 550.1006. Under both the proposed and final § 550.1005(a), those procedures may include a requirement that an employee submit a request to use religious compensatory time off “sufficiently in advance to

accommodate necessary scheduling changes without interfering with the agency's ability to efficiently carry out its mission." We believe this gives agencies sufficient flexibility to handle employee requests; therefore, we are not making changes based on this recommendation.

We received one comment from an individual supporting the proposed requirement that an employee provide the agency with the name and/or description of the religious observance in his or her request, but an agency expressed concerns that an employee must submit this information. The agency noted that many Native American tribes participate in religious ceremonies that cannot be named or described.

An agency decision to allow an employee to earn and use religious compensatory time off is made on a case-by-case basis. Agencies need appropriate information in the employee's request in order to verify that the request meets all applicable requirements and to make determinations that will balance the religious needs of the employee with the agency's ability to accomplish its mission. The exact nature of the observance does not need to be described if there are religious prohibitions on doing so, as long as the request provides enough information for the agency to verify that it meets the requisite requirements.

Similarly, an individual commented that employees may practice a wide variety of religious practices, some of which may not be widely recognized. The commenter asked OPM to issue guidelines for defining religion.

OPM will not attempt to issue such guidelines. The law authorizing religious compensatory time off is based on an individual's "personal religious beliefs," and OPM believes that case law sufficiently defines religious belief. (See also our earlier discussion in this Supplementary Information regarding the definition of *religious compensatory time off*.)

A commenter representing the Department of Justice also sought clarification on the meaning of "required" as used in § 550.1004(b)(1). As discussed in connection with the Department of Justice comments on the definition of *religious compensatory time off* in § 550.1003, the word "require" is used in the law authorizing religious compensatory time off (5 U.S.C. 5550a). The language in § 550.1004(b)(1) parallels the language in the law. Our changes to the definition of "religious compensatory time off" in § 550.1003 make clear that it is the

employee's "personal" religious beliefs that create the requirement or obligation to be absent from work. We are making no additional changes in § 550.1004(b)(1).

A religious organization proposed adjustments be made for the make-up dates and times in an employee's original request due to unforeseen circumstances. They suggested that, in the event an adjustment to the dates and times of overtime work is required, an employee will submit to the supervisor for approval a revised schedule that reflects those changes.

We concur with this comment and are adding a new paragraph (d) in § 550.1004 to address submission of a revised schedule.

§ 550.1005—Agency Responsibilities

A religious organization expressed concern that many employees and managers may lack knowledge regarding religious compensatory time off and recommended adding regulations that address an employing agency's responsibility to inform employees regarding their right to use religious compensatory time off. The religious organization recommended establishing procedures patterned after those found in regulations implementing the Family and Medical Leave Act (FMLA) in 29 CFR part 825. Specifically, it recommended adding regulatory provisions that would require an agency (1) to notify an employee of the right to use religious compensatory time off "when the agency acquires knowledge that an employee's expected absence may be for a religious reason;" (2) to "responsively answer questions" about religious compensatory time off; and (3) to provide a notice to the employee when his or her request for religious compensatory time off is denied that states the reasons for the denial.

We are not making changes in the regulations based on the first two recommendations identified above. While we agree there is a need to ensure that agency managers and employees are informed regarding religious compensatory time off, we do not believe it is necessary to incorporate a formal notice requirement in regulations. Rather, consistent with its administration of other programs related to leave and other time off, OPM will take steps to educate agency managers and employees regarding the religious compensatory time off program—in particular, the changes made in these final regulations. We expect managers to responsibly answer employee questions about all personnel matters and do not believe it is necessary to impose a regulatory requirement under

each personnel program. With respect to the personnel programs it administers, OPM is in a position to adjust its guidance and educational efforts as necessary.

Ultimately, it is the responsibility of the employee to notify the supervisor of his or her intent to use religious compensatory time off as provided under § 550.1004. We cannot expect supervisors to be generally aware that a requested absence is due to an employee's personal religious obligation. The employee must choose whether to request religious compensatory time off and disclose information about his or her personal religious obligation. We note that OPM's FMLA regulations (5 CFR part 630, subpart L), which apply to most Federal employees, also do not place a regulatory requirement on agency managers to discern when FMLA leave may be implicated. (The FMLA regulations cited by the commenter are the Department of Labor's title 29 FMLA regulations, which are generally not applicable to Federal employees covered by title 5.)

We agree with the religious organization's third recommendation—that, if the employee is not granted religious compensatory time off, the agency should provide an explanation for denying the request. We are incorporating language within § 550.1005(b) of the final regulations to address this recommendation.

Two agencies commented on the ability of an employee to provide an oral request to use religious compensatory time off. The first agency recommended that the first sentence in § 550.1005(a) be changed to require all employees to submit a request in writing. The second agency also recommended modifying paragraph (a) of this section by replacing "the supervisor" with "the agency" to allow an agency that accepts an oral request to determine how best to document an oral request instead of the supervisor. The second agency stated that the agency, not the supervisor, is in the best position to determine how to document an oral request.

We do not concur with the first agency's recommendation to mandate that a request to use religious compensatory time off must be in writing. In extenuating circumstances, an employee may not be able to make a request in writing. However, we do agree that a written request should be the standard procedure. Accordingly, we are revising the proposed regulations to provide that a written request is required to the maximum extent practicable. Also, we are requiring the employee to provide required

information as soon as practicable after an oral request is approved, instead of relying solely on the supervisor's documentation of the request. We do agree with the second agency's recommendation to change "the supervisor" to "the agency" in § 550.1005(a) to enable an agency to make a determination through its internal policy.

An agency also recommended changing the third sentence of § 550.1005(a) to require all employees to submit their requests to use religious compensatory time off sufficiently in advance to accommodate necessary scheduling changes, but we are not adopting this recommendation. Section 550.1004(a) requires employees to submit requests in advance of the religious observance. The third sentence in § 550.1005(a) gives agencies some discretion in determining how far in advance is necessary to avoid interfering with the agency's ability to efficiently carry out its mission. Whether a request has been made "sufficiently in advance" would depend on the exact fact situation, and thus OPM seeks to preserve agency discretion in this regard.

Two commenters requested clarification on the process for disapproving a request. One agency requested additional guidance on an agency's responsibility for denying a request. A second agency asked for clarification on several factors that may be relevant when considering an employee's request. It asked if a request could be denied if the employee has not fulfilled his or her responsibilities (such as providing the name of observance, dates and times, etc.) within his or her request; or if the request may be denied if the description provided is unclear, inadequate, or unreasonable. It also asked what the order would be for approving multiple time off requests of different types (from different employees) for a given day. The agency asked whether religious compensatory time off must be approved before other requests for time off from other employees for the same time period if an agency cannot approve all of the requests.

In considering agencies' ability to disapprove an employee's request related to religious compensatory time, a distinction must be made between a request to "use" religious compensatory time off (*i.e.*, take time off to engage in a religious observance) and a request to "earn" religious compensatory time off (*i.e.*, perform extra work that will be credited as religious compensatory time off hours to be applied against a past or future use of time off). Paragraphs (a)

and (b) of § 550.1005 pertain to a request to "use" religious compensatory time off—in other words, the scheduling of time off to engage in a religious observance. Paragraph (c) of § 550.1005 pertains to the earning of religious compensatory time off hours. As further explained below, an agency can deny a request to "use" religious compensatory time off (as defined in § 550.1003) only if it would interfere with the agency's ability to efficiently carry out its mission. However, an agency has more flexibility in approving or denying the timing of overtime work to "earn" religious compensatory time off hours. When the regulations refer to a request for "religious compensatory time off" without making a distinction between "earning" versus "using" religious compensatory time off (*e.g.*, § 550.1004(a)), the regulation in question should be understood as referring to a request to "use" religious compensatory time off, which necessarily includes plans to "earn" the necessary hours through overtime work.

We are not providing additional guidance in the regulations on an agency's responsibilities for approving a request to use religious compensatory time off. As explained in § 550.1005(b), an agency must approve an employee's request based on personal religious requirements unless the agency determines that approving the request would interfere with the agency's ability to efficiently carry out its mission. That is to say, an agency may deny a request to use religious compensatory time off for a religious observance requiring absence from work at specific times based on the requester's sincerely held religious beliefs only if approving the request would interfere with the agency's ability to efficiently carry out its mission. If the information provided by the employee regarding the religious observance is not sufficient to determine whether the request is to use religious compensatory time off for a religious observance requiring absence from work at specific times based on the requester's sincerely held religious beliefs, an agency may request more information before acting on the request. The requirement that a denial under § 550.1005(b) must be based on an agency determination that the employee's absence would interfere with the accomplishment of the agency's mission is a reflection of the statutory standard for determining whether a request to use religious compensatory time off must be approved. In making determinations on approving multiple time off requests from different employees for the same

day, agencies should use appropriate judgment. For example, an agency may not be able to approve an employee's request to use religious compensatory time off if the office has several employees who are ill and are using sick leave, and the employee who is requesting religious compensatory time off is needed in the interim to achieve the agency's mission. We note that employees have a statutory right to use sick leave.

A religious organization recommended an affirmative statement be included in the final regulations that a supervisor should not make any judgment about the employee's religious beliefs or his or her affiliation with a religious organization—a statement that has been included in OPM guidance, as documented on page 5 of the U.S. Government Accountability Office's report on religious compensatory time off (GAO-13-96, October 12, 2012).

OPM declines to make this change.

Section 550.1005(b) states that an agency must approve an employee's request to use religious compensatory time off unless the agency determines that approving the request would interfere with the agency's ability to efficiently carry out its mission. OPM defines the term *religious compensatory time off* in § 550.1003 based on the statutory language. As we are clarifying in the final regulations, if an employee feels a personal obligation to be absent from work based on the employee's personal religious beliefs, the employee's request to use "religious compensatory time off" must be approved, absent a finding that an employee's absence would interfere with the agency mission. Since the employee's *personal* religious beliefs are at issue, the orthodox views of any religious organization with which the employee may be affiliated (in any degree) are not relevant. As Federal courts have ruled, neither courts nor Government officials should be making judgments about the validity or correctness of a person's sincerely held beliefs that are religious in nature. We have concluded that our clarification of the definition of religious compensatory time off in the final regulations sufficiently addresses the concerns expressed by the commenter.

An agency commented that § 550.1005(c) should be revised to clarify that agencies may authorize "up to" 26 pay periods prior to and after a religious observance for an employee to earn religious compensatory time off. While we are revising the timeframe to be 13 pay periods before or after a religious observance in these final regulations, the issue raised by the

commenter is still relevant. The agency presumed that § 550.1005(c) allows agencies to set narrower (shorter) timeframes at their discretion.

The agency's presumption is incorrect, as this provision was intended to place an obligation on the agency to allow an employee to earn religious compensatory time off within the regulatory timeframe established in § 550.1006(c). Proposed § 550.1005(c) was not intended to permit agencies to establish a narrower timeframe in which an employee may earn religious compensatory time off. Proposed § 550.1005(c) must be read in conjunction with § 550.1006(b) and (c)(1), which allow an employee to earn religious compensatory time off within the regulatory timeframe. Agencies do not have the discretion to establish a narrower timeframe for earning religious compensatory time off hours. Within the regulatory timeframe, agencies do have some discretion in approving the specific occasions when an employee will be allowed to perform overtime work and earn religious compensatory time off hours based on mission requirements; however, that discretion does not extend to establishing a blanket policy that narrows the timeframe for earning hours set forth in § 550.1006. In response to the agency's comments, we are revising § 550.1005(c) to refer to the deadline in § 550.1006(c).

§ 550.1006—Scheduling Time To Earn and Use Religious Compensatory Time Off

An agency asked whether, for a targeted religious observance, employees could earn religious compensatory time off in advance of the observance as well as after the observance to repay the time.

As provided under § 550.1006(a), the scheduling of time to earn and use religious compensatory time off by an employee is subject to the agency's approval as provided under § 550.1005. These regulations provide rules allowing an employee to earn religious compensatory time off (by working) before the religious observance, after the religious observance, or through a combination of time worked both before and after the religious observance. The employee may earn the hours in advance of using religious compensatory time off or earn the hours to repay the hours already used as religious compensatory time off. Agencies must approve an employee's request to earn religious compensatory time off as provided under § 550.1005(c) and monitor the employee's accumulation of such hours. The specific timing of when an employee

will be allowed to earn religious compensatory time off by performing overtime work is a matter of agency discretion based on the needs of the agency. In other words, agencies can consider the specific work requirements of the individual employee's organization in deciding the specific times when the employee will be allowed to perform overtime work to earn religious compensatory time off hours.

An agency recommended the final rule require employees "to normally earn religious compensatory time off in advance of the religious observance." Alternatively, if OPM chooses to retain the provision allowing an employee to earn religious compensatory time off *after* the given religious observance, the agency recommended that the final rule allow an agency to temporarily require an employee to earn religious compensatory time off in advance for any future religious observances if the employee did not perform the required overtime work to make up for the religious compensatory time off used previously (e.g., where the agency had to retroactively charge the employee annual leave or leave without pay to recover the debt of hours, as provided in § 550.1006(c)(3)). The agency proposed that, if this retroactive charging occurred, the employee would be required to earn religious compensatory time off in advance for a 1-year period beginning on the date the action to make a retroactive correction was taken.

We disagree, and are not adopting these recommendations. We see no compelling reason to revise the longstanding policy that allows an employee to earn religious compensatory hours *after* using the hours for a religious observance. Nor do we, at this time, support limiting an employee's future options based on a past failure to repay hours within the regulatory timeframe. Any such failure results in an appropriate negative consequence—a retroactive application of annual leave (or other appropriate paid time off) or leave without pay. Any debt resulting from retroactive application of leave without pay is subject to debt collection.

An agency recommended changing the term "may" to "must" in § 550.1006(c)(3) (and similarly under § 550.1008(b)) with regard to agencies taking corrective action to eliminate or reduce the negative balance of religious compensatory time off by making a corresponding reduction in the employee's annual leave balance.

We believe the agency perceives there to be a discretionary authority for the

elimination or reduction of the debt. The charge to annual leave is provided in the regulation as a "may" authority, but there still remains a mandatory requirement to recoup any debt owed with a "must" charge to leave without pay, thus creating a debt that must be repaid. While we agree it would be a reasonable agency policy to first charge annual leave to liquidate the debt, we use the term "may" to recognize that agencies may choose not to establish that policy or may fail to take this corrective action first before charging leave without pay. Allowing agencies the discretion to make an annual leave correction is consistent with longstanding OPM guidance. Accordingly, we are not adopting this suggestion.

An agency also recommended allowing employees to cover negative balances through credit hours earned, compensatory time off in lieu of overtime pay earned, compensatory time off for travel earned, or substitution of other paid time.

We agree with this recommendation and are making changes in the final regulations to allow for the substitution of credit hours, compensatory time off in lieu of overtime pay, compensatory time off for travel, and time-off awards to liquidate an employee's debt of hours. We are revising § 550.1006(c)(3) to provide that any positive balance of annual leave, credit hours, compensatory time off for overtime, compensatory time off for travel, or time-off awards may be applied to reduce the debt of hours before it is converted to a monetary debt. An agency may determine the order in which to apply these forms of paid time off to offset the negative religious compensatory time off balance. We are including only types of accrued paid time off that can be used for *any* purpose. Thus, we did not include sick leave or military leave, as these types of leave have certain parameters and conditions on their use.

§ 550.1007—Accumulation and Documentation

Two agencies recommended establishing a limitation on the number of religious compensatory time off hours that may be accumulated. An individual commenter recommended placing a limitation on the amount of religious compensatory time off hours an employee may earn per pay period out of concerns that an employee could be tempted to work extreme hours per day or per week in order to earn enough compensatory time off for a religious observance.

We disagree, as there is no authority for a limitation on the number of hours that may be earned or used. In general, an agency must approve an employee's request to use religious compensatory time off, unless the agency determines that approving the request would interfere with the agency's ability to carry out its mission (see § 550.1005(b)). Further, as explained in the Supplementary Information regarding § 550.1007 in the proposed rule (78 FR 53698), agencies must monitor any accumulation to ensure that the employee is earning the religious compensatory time off for a specific religious observance and is not stockpiling the religious compensatory time off for unidentified purposes.

One agency recommended deleting the term "appropriate" for the type of records that must be kept under § 550.1007(a), which includes the name and/or description of the religious observance, the dates and times, and the amount of religious compensatory time off each employee earns and uses. The same agency also requested clarification on whether records may be paper-based or electronic.

We agree that the term "appropriate" is ambiguous and unnecessary, and we are deleting it in the final regulations. Each agency has the discretion to determine if records should be kept electronically or paper-based.

An agency recommended revising § 550.1007(b) from "an employee may accumulate only the amount needed to cover an approved absence for a religious observance that has already occurred" to read, "an employee may accumulate only the amount needed to fund a previously approved absence from work for a religious observance that has already occurred."

We disagree in applying the term "fund" to these regulations. Employees accumulate hours to use for religious purposes. An employee may earn religious compensatory time off in advance or after it is used. Instead of becoming indebted, the employee is choosing to work overtime hours to cover periods of absences for religious observances.

An agency asked if earned religious compensatory time off that is not used as planned would be forfeited or paid out as compensatory time off in lieu of overtime pay, or any other form of time off.

As provided within § 550.1008, upon the employee's separation from Federal service or transfer to another Federal agency, the losing agency must compensate the employee for any positive balance to his or her credit. The agency must pay the employee for the

hours of religious compensatory time off earned at the hourly rate of basic pay in effect at the time the religious compensatory time off was earned. Religious compensatory time off cannot be forfeited, paid as overtime premium pay, provided as compensatory time off in lieu of overtime pay, or converted to any other forms of time off.

An agency requested that § 550.1007(c)(1) be removed from the final regulations. This section provides that if the employee does not use his or her religious compensatory time off as planned, the positive balance may be redirected toward a future religious observance that has been approved, even if that future observance is beyond the normally applicable regulatory timeframe (notwithstanding § 550.1006(b)). The agency recommended removing this section because including it could leave room for error in its administration.

We are not adopting this recommendation to remove § 550.1007(c)(1) from the final regulations. It is appropriate to allow earned religious compensatory time off that has not been used as planned to be applied toward a future religious observance that has been properly requested and approved.

Two agencies provided additional comments on allowing the unused positive balance of religious compensatory time off to be redirected to a future religious observance when the employee was unable to use the hours earned as originally planned and approved. One agency agreed with allowing employees to redirect earned hours to a different religious observance, but objected to not having some kind of deadline for using the hours. It recommended establishing a 13 pay period deadline for using religious compensatory time off that has been previously earned, whether used as originally planned or for a different religious observance in the future. We understand this agency to be proposing that there be a strict rule that earned hours of religious compensatory time off must be used within 13 pay periods of when earned. Any different religious observance to which hours are redirected would have to occur within that 13 pay period window. The agency did not specify a proposed consequence for failure to meet that deadline.

Another agency commented that there should be a cutoff period established for purposes of determining what happens to the religious compensatory time off if not used by a certain pay period.

We disagree with these comments. We do not support a cutoff date for eliminating a positive balance of unused

religious compensatory time off via either forfeiture or cash payment. Earned religious compensatory time off hours are intended to be used for a religious observance. Under the regulations, the cashing out of unused religious compensatory time off hours occurs only when an employee leaves the agency (via separation or transfer), which maximizes the possibility that the hours will be used for the intended purpose and prevents abuse that might occur if employees were allowed to repeatedly cancel planned uses of religious compensatory time off and convert the hours to a cash payment after a certain amount of time has elapsed.

Under paragraph (c), if an employee does not use earned religious compensatory time off as planned, the employee may redirect the hours towards a future religious observance without regard to the normal bar on earning hours outside the regulatory timeframe. This is the preferred approach, since it ensures that the hours are used to meet religious obligations, as intended by the law. If an employee does not redirect the hours to another religious observance, the positive balance remains to the employee's credit until transfer or separation from the agency. An employee with a positive balance of hours will be barred from earning any additional religious compensatory time off until the hours have been used or the employee establishes the need for additional hours, as provided in the regulations. This approach prevents employees from stockpiling religious compensatory time off for undesignated purposes.

Given the comments received about a possible cutoff date for eliminating a positive balance of unused religious compensatory time off via either forfeiture or cash payment, we are adding a new paragraph (d) in § 550.1007 to make clear that there are no time limits on using accumulated religious compensatory time off—that unused religious compensatory time off hours remain to the employee's credit until used, or until the employee's separation or transfer.

§ 550.1008—Employee Separation or Transfer

An agency commented that when an employee separates or transfers, he or she should only be compensated for unused religious compensatory time off when, at the time the employee earned it, he or she did not expect to separate or transfer prior to the deadline for using it. The agency wanted to ensure that an employee does not stockpile religious compensatory time off hours

when the employee does not expect to use those hours before separating or transferring and thus would receive payment for the unused hours.

Another agency submitted a similar comment concerning the stockpiling of hours. The agency recommended that agencies be provided the flexibility to liquidate via a cash payment unused religious compensatory time off. While the agency appreciates the opportunity employees have to retain unused time for future observances, it is concerned about the indefinite carryover of hours. Currently, the proposed regulations would only allow an agency to pay an employee for the unused hours upon separation or transfer to another agency. Instead of tracking the time annually or waiting for the employee to separate or transfer, the agency recommended the regulations allow agencies to determine if and when they would pay out the hours in situations other than separation or transfer. The agency asserted this flexibility would assist agencies in balancing timekeeping records if an agency has determined the unused timeframe to be excessive, since the hours cannot be forfeited.

We disagree. If an employee works the hours but does not use the hours (*i.e.*, has a positive balance), the employee should be compensated for the hours worked at the time of separation or transfer, as provided in § 550.1008(a). As for an employee potentially stockpiling hours, § 550.1007(c)(2) provides that an employee may accumulate additional religious compensatory time off hours only if needed to cover an approved period of absence for a future religious observance based on the specific dates and times that the employee has identified. This provision is meant to prevent the stockpiling of hours.

An agency also recommended revisions to § 550.1008(b) by replacing the term “may” to “must” when taking corrective action to eliminate or reduce a negative balance of religious compensatory time off by reducing the employee’s annual leave balance upon separation or transfer.

The same agency made a similar recommendation for § 550.1006(c)(3), which we have already addressed. The charge to annual leave is provided in the regulation as an optional authority (using the language “may”), but there remains a mandatory requirement (using the language “must”) for an agency to recoup the debt owed with a charge to leave without pay, thus creating a debt that must be repaid.

It also recommended that the substitution of other forms of paid time off—such as earned credit hours, regular

compensatory time off earned in lieu of overtime, or compensatory time off earned for travel—be allowed to repay a negative balance in addition to the use of annual leave.

We agree that the substitution of other forms of paid time off should be allowed. Consistent with the change we made in § 550.1006(c)(3), we are revising § 550.1008(b) to allow for the substitution of credit hours, compensatory time off in lieu of overtime pay, compensatory time off for travel, or time-off awards to liquidate the negative debt. However, the use of sick leave or military leave would not be appropriate, as there are parameters on the appropriate uses of these specific leave categories.

General Comments

An individual commenter recommended that the final rule include dispute resolution or appeal procedures if an employee’s request is denied under 5 CFR 550.1005(b). The commenter wanted to ensure a common knowledge of the appeals processes within agencies. We are not adopting this recommendation in the final regulations. Each agency has established appeal procedures that an employee must follow if he or she seeks to grieve an agency’s denial of a request for religious compensatory time off. We have added language to § 550.1005(b) to provide that an agency must explain its reasoning for a denial of a request to use and/or earn religious compensatory time off.

An individual commenter was opposed to the establishment of religious compensatory time off, observing that some employees may not identify with a religious group. The commenter recommended a general compensatory personal time off bank be established instead. The commenter specifically cited the time off needed by working parents for various family commitments. The commenter stated that parents often have to opt out of school events and activities because of a lack of compensatory time available or having to use other leave, such as annual leave or sick leave. The commenter also expressed that the proposal could face appeals from employees who do not identify with a religious group or practice but routinely participate in humanitarian efforts as a moral or ethical belief. The commenter recommended that those individuals should be allowed to earn compensatory time off without needing to qualify their efforts as “religious”.

We cannot adopt this recommendation because there is no statutory authority to establish a

compensatory personal time off bank as described by the commenter, and Congress has mandated that agencies permit religious compensatory time off in the circumstances described by these regulations, unless doing so, in a particular instance, would interfere with the agency’s mission. We note that employees may use certain leave or time off for general purposes, including the purposes cited by the commenter. For example, annual leave may be used for any purpose. While annual leave must normally be earned or accrued before it is used, it is possible for an agency to approve advanced annual leave. (See <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/advanced-annual-leave>.) Also, while regular compensatory time off in lieu of overtime under 5 U.S.C. 5543 must be earned in advance, it may also be used for any purpose.

Transitional Provisions

An agency commented that the proposed regulations did not address the treatment of employees who owe religious compensatory time at the time the final regulations become effective. The agency noted that some employees may have used religious compensatory time off more than 26 pay periods prior to the effective date of the final regulations and still not have worked the time to make it up. It asked whether such employees would have an additional 26 pay periods to repay the debt of hours or if the employing agency would have the authority to establish an alternative deadline. The agency stated that it favored giving such employees a reasonable period to repay the hours owed (by performing work).

We agree that clarification is needed regarding the treatment of the employees described by the agency who have a negative balance of religious compensatory time off when the final regulations take effect—whether the period of time since the religious compensatory time off was used exceeds the regulatory timeframe (originally proposed as 26 pay periods, but established as 13 pay periods in these regulations) or is some lesser period of time. This comment also brought to light that the proposed regulations did not specifically address employees who have a positive balance of religious compensatory time off when the final regulations take effect. Therefore, we are adding a new § 550.1010 to provide transitional rules for employees who have either a negative or positive balance of religious compensatory time off as of the effective date of the final regulations.

Paragraph (b) of § 550.1010 states that, for an employee who has a negative balance (*i.e.*, debt) of used but not-yet-earned religious compensatory time off hours as of the effective date of the final regulations, the 13 pay period limitation in § 550.1006(c) is applied as if the effective date were the date on which all the hours of religious compensatory time off (represented in the negative balance) were used. Thus, employees will have a full 13 pay periods to earn the needed number of religious compensatory time off hours. Since these regulations are changing the rules midstream for these employees, we believe it is appropriate to start the clock when the new regulations take effect.

Paragraph (c) of § 550.1010 addresses employees who have a positive balance of earned but unused religious compensatory time off hours as of the effective date of the final regulations. It provides that the employing agency must confirm and document that the hours are connected to one or more specific religious observances requiring the employee's absence from work in order to meet the employee's personal religious requirements. The agency must give the employee an opportunity to direct all unused hours to such a future religious observance. If the employee does not direct all of those unused hours, the employee may not earn any additional religious compensatory time off hours until the employee establishes a need to earn such time off hours, consistent with § 550.1007(c)(2).

Miscellaneous Changes

In addition to the proposed revision of subpart J of part 550 of title 5 of the Code of Federal Regulations, we also proposed to modify the definitions of *rate of basic pay* in § 550.103 and *firefighter* in § 550.1302. We did not receive any comments on those proposed revisions. Therefore, these final regulations are making final the additional miscellaneous proposed changes.

Executive Order Requirements

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule

has been designated a "significant regulatory action," under Executive Order 12866 and has been reviewed by the Office of Management and Budget.

Executive Order 13771

This final rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because the rule is related to agency organization, management, or personnel.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

Paperwork Reduction Act Requirements

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 550

Government employees.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

For reasons stated in the preamble, OPM is amending part 550 of title 5 of the Code of Federal Regulations as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

- 1. The authority citation for subpart A of part 550 continues to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5504(d), 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105–277, 112 Stat. 2681–101 and 2681–828 (5 U.S.C. 5545a); section 2(h), Pub. L. 113–277, 128 Stat. 3005; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

- 2. In § 550.103, the definition of "rate of basic pay" is revised to read as follows:

§ 550.103 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; retained rate under 5 CFR part 536; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind.

* * * * *

- 3. Revise subpart J to read as follows:

Subpart J—Compensatory Time Off for Religious Observances

Sec.

- 550.1001 Purpose.
- 550.1002 Coverage.
- 550.1003 Definitions.
- 550.1004 Employee responsibilities.
- 550.1005 Agency responsibilities.
- 550.1006 Scheduling time to earn and use religious compensatory time off.
- 550.1007 Accumulation and documentation.
- 550.1008 Employee separation or transfer.
- 550.1009 Relationship to premium pay and overtime work.
- 550.1010 Transitional provisions.

Authority: 5 U.S.C. 5550a.

Subpart J—Compensatory Time Off for Religious Observances

§ 550.1001 Purpose.

This subpart implements 5 U.S.C. 5550a, which permits an employee whose personal religious beliefs require the abstention from work during certain periods of time to elect to engage in overtime work and earn a special form of compensatory time off to make up for the time lost in meeting those personal religious requirements. Religious compensatory time off differs from other forms of compensatory time off in that the sole purpose is to adjust an employee's work schedule to accommodate a religious observance. The employee earns religious compensatory time off by spending an equal amount of time in overtime work before and/or after taking time from the employee's scheduled tour of duty to meet personal religious requirements. Hours worked to earn religious compensatory time off provide a time off credit in lieu of any pay that would otherwise be payable for that work.

§ 550.1002 Coverage.

This subpart applies to each employee (as defined in 5 U.S.C. 2105) in or under an Executive agency (as defined in 5 U.S.C. 105) who has a scheduled tour of duty. The definition of "employee" in section 5541(2) does not apply to this subpart.

§ 550.1003 Definitions.

In this subpart:

Overtime work means work performed by an employee outside his or her scheduled tour of duty for the purpose of making up time lost for meeting personal religious requirements, as such term is explained in the definition of "religious compensatory time off" in this section. It is also deemed to include work performed by a part-time employee outside of his or her

scheduled tour of duty, even if that work is below applicable overtime thresholds (e.g., below 40 hours in a week), and work an employee performs during holiday hours (within the employee's scheduled tour of duty) during which the employee would otherwise be excused from duty.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including any special rate under 5 CFR part 530, subpart C; locality rate under 5 CFR part 531, subpart F; retained rate under 5 CFR part 536; or similar rate under other legal authority, before any deductions and excluding additional pay of any other kind. For example, a *rate of basic pay* does not include additional pay such as night shift differentials under 5 U.S.C. 5343(f) or environmental differentials under 5 U.S.C. 5343(c)(4).

Religious compensatory time off means compensatory time off, as authorized by 5 U.S.C. 5550a, under which an employee whose personal religious beliefs require the abstention from work during certain periods of time may elect to perform overtime work in order to make up for time the employee takes off to meet those personal religious requirements. Those requirements need not be officially mandated by a religious organization to which the employee belongs. It is sufficient that the employee's personal religious beliefs cause the employee to feel an obligation that he or she should be absent from work for a religious purpose. An employee approved to perform overtime work under this subpart will be granted an equal amount of compensatory time off from his or her scheduled tour of duty (in lieu of overtime pay or other pay otherwise payable) to meet his or her personal religious obligations.

Scheduled tour of duty means the regular work hours in an established full-time or part-time work schedule during which the employee is charged leave or time off when absent.

§ 550.1004 Employee responsibilities.

(a) An employee is required to provide his or her supervisor with a request for religious compensatory time off in advance of the religious observance by following the agency's procedures established in accordance with §§ 550.1005 and 550.1006.

(b) At the time the religious compensatory time off is requested, the employee must provide the agency with the following information:

(1) The name and/or description of the religious observance that is the basis of the employee's request to be absent

from work in order to meet the employee's personal religious requirements;

(2) The date(s) and time(s) the employee plans to be absent to participate in the religious observances identified in paragraph (b)(1) of this section; and

(3) The date(s) and time(s) the employee plans to perform overtime work to earn religious compensatory time off to make up for the absence.

(c) An employee must comply with the agency's procedures for requesting religious compensatory time off, including any time limitations prescribed under § 550.1006.

(d) In the event that an adjustment to the dates and times of planned overtime work is required due to unforeseen circumstances, the employee must submit for approval a revised schedule to reflect those changes.

§ 550.1005 Agency responsibilities.

(a) An agency may require an employee to submit his or her request to use religious compensatory time off with all the information specified in § 550.1004(b) in a manner that is administratively acceptable to the agency. To the maximum extent practicable, the agency must require that the request be in writing (including electronic communications). If the agency accepts an oral request, the agency must document all the information specified in § 550.1004(b) and must require the employee to submit a written document containing all the information as soon as practicable. An agency may require an employee to submit a request to use religious compensatory time off sufficiently in advance to accommodate necessary scheduling changes without interfering with the agency's ability to efficiently carry out its mission.

(b) An agency must approve an employee's request to use religious compensatory time off unless the agency determines that approving the request would interfere with the agency's ability to efficiently carry out its mission. If the employee's request to use religious compensatory time off is denied, the agency must provide a written explanation as to the reason the request has been denied, regardless of whether the employee's request was written or oral.

(c) The agency must provide the employee with an opportunity to earn religious compensatory time off before the deadline established in § 550.1006(c), although the specific timing of when an employee will be allowed to earn religious compensatory time off by performing overtime work is

a matter of agency discretion based on the needs of the agency.

§ 550.1006 Scheduling time to earn and use religious compensatory time off.

(a) The scheduling of time to earn and use religious compensatory time off by an employee is subject to the agency's approval as provided in § 550.1005.

(b) For an employee who earns religious compensatory time off prior to using it, religious compensatory time off may be earned up to 13 pay periods in advance of the pay period in which the targeted religious observance commences and must be linked to specific dates and times for future use, as compatible with agency mission requirements.

(c)(1) An employee who uses religious compensatory time off prior to earning it must fulfill his or her obligation to perform overtime work in exchange for the advanced religious compensatory time off within 13 pay periods after the pay period in which he or she used religious compensatory time off, or the agency must take action as provided in paragraph (c)(3) of this section.

(2) The 13 pay periods described in paragraph (c)(1) of this section are calculated beginning with the first pay period beginning after the date on which the religious compensatory time off was used.

(3) If the employee fails to earn religious compensatory time off within 13 pay periods after taking religious compensatory time off, the agency may take corrective action to eliminate or reduce the negative balance by making a corresponding reduction in the employee's balance of annual leave, credit hours, compensatory time off in lieu of regular overtime pay, compensatory time off for travel, or time-off awards. An agency may determine the order of precedence for applying the various types of paid time off to offset the negative balance. Any negative balance of religious compensatory time off remaining after any charging of these types of paid time off must be resolved by charging the employee leave without pay, which would result in an indebtedness that is subject to the agency's internal debt collection procedures.

§ 550.1007 Accumulation and documentation.

(a) Agencies must keep records of the name and/or description of the religious observance, and the dates, times, and amount of religious compensatory time off each employee earns and uses. An agency must credit religious compensatory time off for work performed on a time-for-time basis,

under its time and attendance procedures.

(b) Except as provided in paragraph (c) of this section, an employee may accumulate only the amount of religious compensatory time off needed to cover an approved absence for a religious observance that has already occurred or to cover an approved absence for a future religious observance. An employee may only accumulate the amount of religious compensatory time off needed to cover the specific dates and times for which the employee has submitted a request for religious compensatory time off under § 550.1004.

(c) If the employee does not use his or her earned religious compensatory time off as planned—

(1) The positive balance of unused compensatory time off may be redirected toward a future religious observance that has been approved, even if that future observance is more than 13 pay periods after the compensatory time off was originally earned (notwithstanding § 550.1006(b)); and

(2) The employee may not earn any additional religious compensatory time off until the retained amount of religious compensatory time off has been used or the need to earn additional religious compensatory time off has been properly established and documented.

(d) Accumulated religious compensatory time off that is not used as planned is not subject to time limits for usage. Unused religious compensatory time off hours remain to the employee's credit until used (subject to the agency's approval under § 550.1005), or the employee's separation or transfer (subject to § 550.1008), as applicable.

§ 550.1008 Employee separation or transfer.

(a) Upon an employee's separation from Federal service or transfer to another Federal agency, the losing agency must compensate the employee for any positive balance of earned religious compensatory time off to his or her credit. The agency must pay the employee for hours of earned religious compensatory time off at the hourly rate of basic pay in effect at the time religious compensatory time off was earned.

(b) For an employee who has a negative balance of religious compensatory time off upon an employee's separation from Federal service or transfer to another Federal agency, the losing agency may take corrective action to eliminate or reduce

the negative balance by making a corresponding reduction in the employee's balance of annual leave, earned credit hours, compensatory time off in lieu of regular overtime pay, compensatory time off for travel, or time-off awards. An agency may determine the order of precedence for applying the various types of paid time off to offset the negative balance. Any negative balance of religious compensatory time off remaining after any charging of these types of paid time off must be resolved by charging the employee leave without pay, which would result in an indebtedness that is subject to the agency's internal debt collection procedures.

(c) For purposes of applying paragraphs (a) and (b) of this section, an hourly rate of basic pay is computed by dividing the annual rate of basic pay by 2,087 hours (or 2,756 hours for firefighter hours subject to that divisor under subpart F of this part).

§ 550.1009 Relationship to premium pay and overtime work.

The premium pay provisions for overtime work in subpart A of this part and section 7 of the Fair Labor Standards Act of 1938, as amended (FLSA), do not apply to overtime work performed by an employee that is used to earn religious compensatory time off under this subpart. The overtime hours worked to earn religious compensatory time off under this subpart do not create an entitlement to premium pay (including overtime pay) under subpart A of this part or FLSA overtime pay under 5 CFR part 551. Religious compensatory time off is not considered in applying the premium pay limitations described in §§ 550.105, 550.106, and 550.107.

§ 550.1010 Transitional provisions.

(a) This section applies only with respect to employees who as of May 29, 2019 had a positive balance of earned but unused religious compensatory time off hours or a negative balance (*i.e.*, a debt) of used religious compensatory time off hours not yet repaid by earned hours.

(b) If an employee described in paragraph (a) of this section has a negative balance (*i.e.*, a debt) of used but not-yet-earned religious compensatory time off hours as of the date specified in paragraph (a) of this section, the 13 pay period limitation in § 550.1006(c) is applied as if such date were the date on which the hours of religious compensatory time off were used.

(c) If an employee described in paragraph (a) of this section has a positive balance of earned but unused

religious compensatory time off hours as of the date specified in paragraph (a) of this section, the agency must confirm and document that the hours are connected to one or more specific religious observances requiring the employee's absence from work in order to meet the employee's personal religious requirements. The agency must give the employee an opportunity to direct all unused hours to such a future religious observance. If the employee does not so direct all of those unused hours, the employee may not earn any additional religious compensatory time off hours until the employee establishes a need to earn such time off hours.

Subpart M—Firefighter Pay

■ 4. The authority citation for subpart M of part 550 continues to read as follows:

Authority: 5 U.S.C. 5545b, 5548, and 5553.

■ 5. In § 550.1302, paragraph (2)(iii) of the definition of “firefighter” is revised to read as follows:

§ 550.1302 Definitions.

* * * * *

Firefighter * * *

(2) * * *

(iii) Covered by the General Schedule and classified in the GS-0099, General Student Trainee Series (as required by § 362.203(f) of this chapter), if the position otherwise would be classified in the GS-0081 series.

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DEPARTMENT OF HOMELAND SECURITY

6 CFR Part 5

[Docket No. DHS-2019-0006]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL-018 Administrative Grievance Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is giving concurrent notice of an updated reissued system of records pursuant to the Privacy Act of 1974 for the “Department of Homeland Security/ALL-018 Administrative Grievance Records” System of Records and this final rule. This system of records covers all current and former DHS employees, except for employees of the Office of the Inspector General