

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 294, 359, 362, 451, 530, 531, 532, 534, 536, 550, 591, 630, 831, and 842

RIN 3206-AK88

Changes in Pay Administration Rules for General Schedule Employees

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement section 301 of the Federal Workforce Flexibility Act of 2004, which amends the rules governing pay setting for employees covered by the General Schedule. In particular, we are revising provisions related to special rates, locality rates, and retained rates. The statutory and regulatory changes are designed to correct a variety of pay administration anomalies that resulted in unfair pay reductions or unwarranted pay increases, to allow locality rates and special rates to be treated in similar ways, and to improve the operation of the special rates program.

DATES: Effective Date: The interim regulations are effective on May 1, 2005.

Comment Date: Comments must be received on or before August 1, 2005.

ADDRESSES: Send or deliver written comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Division for Strategic Human Resources Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200, by FAX at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing interim regulations to revise the rules that govern pay setting for Federal employees covered by the General Schedule (GS) pay system. The interim regulations implement the amendments made by section 301 of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108-411, October 30, 2004), hereafter referred to as "the Act." Section 301 amended provisions in 5 U.S.C. chapter 53 relating to the administration of special rates, locality rates, and retained rates. These amendments become effective on the first day of the first pay

period beginning on or after April 28, 2005—*i.e.*, May 1, 2005. Since the regulations are necessary to implement the statutory changes, these regulations are issued as interim regulations that take effect on May 1, 2005.

The changes made by the Act and these implementing regulations are designed to correct a variety of pay administration anomalies that have produced unfair pay reductions or unwarranted pay increases for employees in certain situations. These anomalies resulted largely from the introduction of locality pay into the General Schedule pay system in 1994. Many of the basic pay administration rules treated special rates under 5 U.S.C. 5305 as rates of basic pay, but ignored locality rates under 5 U.S.C. 5304. A key objective of the Act and these regulations is to treat locality rates and special rates in similar ways—*i.e.*, to put them on the same footing. This will result in pay rules that are more rational, consistent, and equitable. (See the legislative history of section 301 of Pub. L. 108-411, as documented in pages 17 through 22 of House Report 108-733, October 5, 2004.)

The Act requires that, when an employee's official worksite is changed to a new location where different pay schedules apply, the employee's pay must be converted to the new pay schedules in the new location before processing any simultaneous pay action (other than a general pay adjustment). This geographic conversion requirement is found in 5 U.S.C. 5305(i), 5334(g), and 5363(c), as added or amended by the Act, and is incorporated in these interim regulations. Geographic conversion ensures that an employee whose official worksite is moved to a new location receives the same rate of pay as an employee at the same grade and step who was already stationed at the new location and who undergoes the same pay actions.

The Act also is intended to improve the operation and effectiveness of the special rates program by allowing special rate determinations to be driven by staffing considerations rather than pay administration issues and by clarifying OPM's authority to review and adjust special rates as it determines necessary. The Act also revises the special rates authority in other respects. For example, the Act raises the pay limitation on special rates from the rate for level V of the Executive Schedule to the rate for level IV of the Executive Schedule. The Act also allows agencies to "opt out" of special rate schedules.

The Act makes significant changes related to pay retention under 5 U.S.C. 5363. Through an amendment to 5

U.S.C. 5302, locality payments under 5 U.S.C. 5304 will no longer be paid on top of a retained rate. Rather, an employee's pay retention entitlement will be derived from an employee's payable (highest) rate of basic pay (including any locality rate or special rate) before the action triggering pay retention, and that entitlement will be compared to the highest applicable rate range (including a locality rate range or a special rate range) for the employee's current position. If the pay retention entitlement results in a retained rate above the maximum rate of the highest applicable rate range for an employee's position, that retained rate generally will be increased by an amount equal to 50 percent of any increase in that maximum rate. A reduction in an employee's payable rate of basic pay resulting from conversion to a lower pay schedule in a different geographic area (*i.e.*, geographic conversion) does not trigger entitlement to pay retention. Consistent with uncodified section 301(d)(2) of the Act, we are issuing regulations governing the conversion of any existing locality-adjusted retained rate to a new retained rate that is equal in amount. Also, various other types of saved rates (*i.e.*, rates above range maximums) are being converted to retained rates under 5 U.S.C. 5363.

We are taking this opportunity to reorganize the affected regulations and to clarify the meaning of certain provisions. We have replaced the verb "shall" with "must" for added clarity and readability. We intend that any provision using the verb "must" has the same meaning and effect as previous provisions using "shall."

We are also taking this opportunity to remove regulations that are obsolete. We are removing subpart C of part 531, which dealt with special geographic adjustments for law enforcement officers (LEOs) under section 404 of the Federal Employees Pay Comparability Act of 1990. All those special geographic adjustments for LEOs have been surpassed by regular locality payments under 5 U.S.C. 5304. In addition, we are removing subpart G of part 531, which dealt with "continued rates"—a form of saved rates that were created under the old interim geographic adjustment authority. For the few employees who may have an existing continued rate above the applicable rate range, the continued rate will be converted to a retained rate under 5 U.S.C. 5363, as described in the foregoing paragraph on pay retention changes.

These interim regulations also include conforming changes in other parts of OPM's regulations, such as corrections

of regulatory references and revisions of the definition of "rate of basic pay."

The remainder of this **SUPPLEMENTARY INFORMATION** reviews the significant changes made in the key affected parts and subparts of the regulations.

Special Rates

We have revised and reorganized OPM's regulations on special rate schedules for General Schedule employees in part 530, subpart C. The revisions implement certain provisions in section 301 of Public Law 108-411 and make other changes to clarify the rules governing these schedules. Following are the key provisions contained in the revised subpart C:

- A special rate is defined as consisting of a base rate (*i.e.*, the GS rate or, if applicable, the law enforcement officer (LEO) special base rate) and a special rate supplement. A special rate employee is entitled to the applicable GS rate or LEO special base rate for his or her grade and step, just as any other GS employee. A special rate employee's pay entitlement differs because of the special rate supplement.

- The purposes for which a special rate is basic pay are specified in regulation. In general, a special rate is basic pay for the same purposes as a locality rate.

- An agency may choose to exclude its employees from coverage under a proposed or existing special rate schedule.

- An employee is not entitled to a special rate if he or she is entitled to a higher rate of basic pay under another authority (*e.g.*, a locality rate or retained rate).

- A special rate may not exceed the rate for level IV of the Executive Schedule.

- At the time of a GS annual pay adjustment, a special rate employee's GS rate or LEO special base rate is adjusted. OPM determines whether the special rate supplement is adjusted and the amount of any adjusted supplement.

- Rules for converting an employee's rate of basic pay upon establishment, adjustment, or discontinuation of a special rate schedule are specified in subpart C. The conversion rules that apply to schedule adjustments implement 5 U.S.C. 5305(f).

Subpart C of part 530 does not contain all the pay-setting rules that apply to special rate employees. Parts 531 and 536 (dealing with basic pay administration and pay retention, respectively) also implement amendments to 5 U.S.C. 5305 made by Public Law 108-411. For example, section 5305(i) requires that a special rate undergo a geographic conversion

when the employee's official worksite is changed to a location where different pay schedules apply. This provision is implemented in 5 CFR 531.205. In addition, Public Law 108-411 amended the pay retention law (5 U.S.C. 5363(c)) to provide that a reduction in an employee's special rate as a result of a geographic conversion is not a basis for pay retention. This provision is implemented in 5 CFR 536.303(a).

House Report 108-733 (October 5, 2004) stated that section 5363(c) was "intended to clarify that local special rates are a Government tool to address a local labor market problem, not an employee entitlement that employees should be allowed to carry to another area where there is no such problem" (page 19). This approach provides for consistent treatment of special rates and locality rates for pay retention purposes.

House Report 108-733 (page 19) also emphasized that the amendments to section 5305 "would make clear that the Government has full authority to adjust or not to adjust special rate schedules based on staffing needs." The House Report explained that determinations regarding special rate schedule adjustments are made solely under OPM's authority in 5 U.S.C. 5305(d). This means OPM may make determinations regarding the adjustment of special rate supplements based on its assessment of staffing needs, without regard to the percentage increase applied to GS rates. (Special rate employees receive the same adjustment in their underlying GS rate as other GS employees. Thus, OPM's discretion lies in adjusting the special rate supplement, which, for any given grade in a special rate schedule, may be a fixed-dollar amount or a fixed-percentage increase.) OPM may, at any time, conduct general or targeted reviews of existing special rate schedules and make adjustments in special rate supplements as it deems necessary.

Section 530.309, "Miscellaneous provisions," is patterned after a parallel section of miscellaneous provisions in the locality pay regulations at 5 CFR 531.611 (which were part of the former locality pay regulations at 5 CFR 531.606).

Locality Rates

We have revised and reorganized OPM's regulations in part 531, subpart F, governing locality-based comparability payments under 5 U.S.C. 5304. The revisions implement certain provisions in section 301 of Public Law 108-411 and make other changes to clarify the rules governing these payments. Following are the key

changes contained in the revised subpart F:

- The definition of *scheduled annual rate of pay* is revised to exclude any retained rate. Based on amendments to 5 U.S.C. 5302(8) and 5363, a retained rate is no longer supplemented by locality payments. Instead, a retained rate is a rate that is derived from an employee's payable (highest) rate of basic pay (including any locality payment or special rate supplement) and compared to the highest applicable rate range for the employee's position (including a locality rate range or special rate range). (See later discussion of retained rates in the "Grade and Pay Retention" section of this

SUPPLEMENTARY INFORMATION.)

- Section 531.608(b) makes clear that a special rate employee is entitled to any applicable locality payment on the same basis as any other GS employee (*i.e.*, based on the employee's underlying GS rate or LEO special base rate); however, if the locality rate exceeds the corresponding special rate, the special rate entitlement is terminated.

- Section 531.609 clarifies that the geographic conversion principle applies to the conversion of an employee's locality rate when his or her official worksite is changed to a new location where different pay schedules apply. (This is consistent with the manner in which locality rates have always been treated.)

- Section 531.610 lists new purposes for which a locality rate is considered basic pay: (1) Applying GS pay administration provisions to the extent provided in part 531, subpart B; (2) applying pay administration provisions for prevailing rate employees that use a GS rate of basic pay (except as otherwise provided in part 532); (3) applying grade and pay retention provisions in 5 CFR part 536 (consistent with 5 U.S.C. 5361(4) and 5363, as amended); (4) computing recruitment, relocation, and retention incentives under 5 U.S.C. 5753 and 5754 (consistent with OPM's authority under those amended sections of law); and (5) computing certain performance-based cash awards as a percentage of basic pay (consistent with 5 U.S.C. 4505a, which was amended to eliminate the prohibition on using locality rates to compute such awards).

We are inviting comments on whether the final regulations should make a change in the treatment of locality rates in computing danger pay allowances and post differentials. Since August 2004, OPM regulations have provided that locality rates are considered basic pay in computing danger pay allowances and post differentials in

foreign areas for which the State Department has authorized danger pay allowances, as long as the employee's official worksite is located in a locality pay area (*i.e.*, within the 48 contiguous States). (See 69 FR 47353, August 5, 2004.) However, locality rates are not used in computing post differentials in other foreign areas or in nonforeign areas. These interim regulations retain these existing policies. We note that this issue has limited scope, since employees receiving locality rates are eligible for post differentials only when they are temporarily detailed (including a work assignment while in temporary duty travel status) to a post differential area for at least 42 consecutive days. By law, locality pay does not apply to employees whose official worksite is outside the 48 contiguous States. (See 5 U.S.C. 5304(f).)

Under these interim regulations, in post differential areas (foreign and nonforeign) where danger pay allowances do not apply, special rates are considered basic pay in computing post differentials, while locality rates are not. We invite comments on whether this difference in treatment is appropriate.

We also invite comments on whether we should continue to have a different policy for danger pay areas than for other post differential areas (foreign and nonforeign). Should we maintain the existing policy of using detailed employees' locality rates in computing danger pay allowances and post differentials in danger pay areas? Should we extend this policy to other post differential areas? If a policy determination is made to bar the use of locality rates in computing danger pay allowances or post differentials in all areas or to continue to bar the use of locality pay in computing post differentials in non-danger pay areas, should we also change the policy allowing detailed employees' special rates to be used in such computations so that locality rates and special rates are administered consistently? Commenters should provide specific reasons in support of their position.

Other significant clarifying changes in subpart F of part 531 include the following:

- In § 531.607(b), we address the special hourly rate computations that apply to firefighters covered by 5 CFR part 550, subpart M.

- Throughout subpart F, we replace the term *official duty station* with *official worksite*. (See especially §§ 531.602 and 531.605.)

In addition to using the new term *official worksite*, these interim regulations also implement changes in

determining an employee's official worksite that OPM proposed on January 5, 2005, as part of a larger notice of proposed rulemaking (70 FR 1068). That proposal would add a new § 531.605 to define the requirements for determining an employee's official duty station (hereafter referred to as "official worksite") for the purpose of identifying an employee's location-based pay entitlements, including special rate supplements and locality payments. The proposed regulations also addressed official worksite determinations for employees temporarily working at other locations and teleworking from an alternative worksite. We received comments on this part of our proposal from four agencies, one employee union, and two individuals.

An agency felt that the determination of an employee's official worksite for pay purposes should be made by individual agencies and not be subject to Governmentwide regulations. We do not agree. The regulations provide agencies a degree of flexibility in determining an employee's official worksite. However, providing certain specific criteria in regulations is essential to ensure that agencies pay employees fairly and consistently, especially in situations such as telework arrangements.

An agency recommended that § 531.605 be revised to permit an agency to leave the official worksite unchanged during the temporary assignment of an employee to a position of record in a different location when relocation expenses under 5 U.S.C. 5737 are not authorized. The agency correctly stated that under current policy, when an employee is temporarily promoted or reassigned (not detailed) to a position in a different geographic location, the position to which temporarily promoted or reassigned must be the employee's position of record for pay purposes. (Generally, if detailed, an employee is paid based on his or her permanent position of record, including the location-based pay entitlements associated with the official worksite of the permanent position.) Current policy provides that the employee must receive the location-based pay entitlements based on the official worksite of the temporary position of record. The agency believes that if the length and/or circumstances of the temporary promotion or reassignment do not warrant payment of relocation benefits under 5 U.S.C. 5737, agencies should be able to temporarily promote or reassign the employee to the new position of record, but leave the official worksite unchanged. Thus, the employee would receive the location-based pay

entitlements for the official worksite of his or her permanent position.

We believe there are some compelling arguments for changing the current policy regarding temporary promotions and reassignments to positions in a different location so that an employee's location-based pay entitlements are based on the official worksite of the employee's permanent position (unless the employee is receiving relocation benefits under 5 U.S.C. 5737). However, since this interim regulation takes effect upon publication, we are inviting comments on this proposed policy change so that we can fully consider all the relevant issues before making a change. Any change in the final regulations will take into account those comments.

The employee union and two individuals felt that official worksite determinations for pay purposes should be based on where the employee works most or the majority of the time. The commenters were particularly concerned that § 531.605(d) of the regulations would require agencies to designate the regular or reporting worksite as the employee's official worksite if the employee works at that site at least once a week. An agency requested that the regulations clarify that teleworkers must work at the reporting worksite at least once a week on a regular and recurring schedule and for a full workday.

We do not agree with using a majority-of-time criterion instead of a once-a-week criterion for determining the official worksite of employees for pay purposes. The once-a-week requirement in § 531.605(d) applies only to employees working under telework arrangements, which we believe require special rules. Under the interim regulations, the regular worksite will remain the teleworker's official worksite, unless the employee does not regularly spend some time at the regular worksite. We believe the once-a-week requirement is a reasonable standard. In addition, requiring agencies to track the number of hours an employee works at different worksites each week and whether the employee worked a full or partial workday at the regular worksite would be administratively burdensome for agencies and could result in frequent changes in an employee's official worksite and locality or other pay rates. However, we have revised the proposed regulations to provide that the teleworker must report to the regular worksite at least once a week on a regular and recurring basis in order for the regular worksite to be the employee's official worksite.

An agency recommended adding an exception to § 531.605(d) to provide agencies with the option of designating the regular worksite as the official worksite of a teleworker provided the telework site is within the commuting area of the regular worksite. The agency was concerned about applying the proposed rules to a number of its teleworkers who work at various locations other than their established official worksite.

The interim regulations revise § 531.605(d) to provide that an employee under a telework agreement whose work location varies on a daily basis need not report at least once a week to the established official worksite of the employee's position of record (where the employee's work activities are based) as long as the employee is performing work within the locality pay area for that regular official worksite at least once a week on a regular and recurring basis. The interim regulations provide that if an employee covered by a telework agreement does not report to the regular official worksite or an alternative worksite in the same locality pay area at least once a week, the employee's official worksite is the location of the telework site (except as provided in § 531.605(d)(3)). (Similar provisions apply in determining whether an employee's official worksite is covered by a special rate schedule or a nonforeign area cost-of-living allowance or post differential. See the definition of "official worksite" in §§ 530.302 and 591.201.)

An agency requested clarification as to the circumstances in which it would be appropriate for an agency to approve a temporary exception to allow a regular worksite to be the official worksite for pay purposes when a teleworker does not commute to the regular worksite at least once a week. Another commenter requested guidance on when agencies should reevaluate the official worksite determination in such temporary telework arrangements.

Section 531.605(d)(3) of these interim regulations includes an example of an appropriate situation in which an agency may make a temporary exception to the once-a-week requirement—namely, when an employee is recovering from an injury or medical condition that prevents the employee from commuting to the regular worksite. Other examples include temporary emergency situations at the regular worksite or a critical project that requires the employee to telework temporarily. The interim regulations allow an authorized agency official to determine the temporary situations in which an exception may be applied.

Agencies should periodically reevaluate the official worksite of an employee under a temporary telework arrangement.

An agency asked for clarification on how to determine the official worksite of an employee who normally teleworks at an alternative site full time when that employee is assigned to work in a different location on a temporary basis. Under § 531.605 of these interim regulations, agencies have the flexibility to change such an employee's official worksite to the location of a temporary work assignment or to keep the employee's official worksite at the location of the telework arrangement, depending on the nature of the assignment. Agencies may need to reevaluate such decisions periodically if the time spent on such temporary work assignments is extended. Agencies also may cancel the telework agreement in such situations.

Finally, several commenters felt that regulations should address the tax, travel, reduction in force, and bargaining unit coverage implications of making official worksite determinations. Since the official worksite regulations apply only when determining an employee's location-based pay entitlements, these comments are outside the scope of these regulations.

General Schedule Basic Pay Setting

We have revised and reorganized OPM's regulations on GS rate of basic pay determinations in part 531, subpart B. The revisions implement certain provisions in section 301 of Public Law 108-411 and make other changes to clarify the GS pay-setting rules. Following are the key changes contained in the revised subpart B:

- Additional terms are defined in the new § 531.203, including *highest applicable rate range*, *official worksite*, *payable rate*, *pay schedule*, *position of record*, and *special rate supplement*. Also, the term *rate of basic pay* is redefined to include a locality rate. (Under the former regulations, locality rates were ignored in applying the rules in subpart B.)

- Section 531.204 describes the relationship among various types of rates of basic pay—including GS rates, LEO special base rates, locality rates, and special rates.

- Section 531.205 sets forth the geographic conversion rule, which is used to convert an employee's rate(s) of basic pay when his or her official worksite is changed to a new location where different pay schedules apply. (This section implements the statutory geographic conversion provisions in 5 U.S.C. 5305(i), 5334(g), and 5363(c).)

- Section 531.206 establishes the order of precedence for processing simultaneous pay actions. In particular, this section shows that geographic conversions must be processed after any general pay adjustment (related to changes in pay schedules) but before any other pay action (e.g., a promotion).

- Section 531.212 includes new provisions related to the authority to set a newly appointed employee's rate of basic pay above the minimum of the rate range based on superior qualifications or special agency needs. In particular, we make clear that this authority is used to set an employee's "payable" or highest rate of basic pay, including consideration of any applicable locality rate or special rate.

- Sections 531.213 through 531.215 establish rules for setting pay upon lateral reassignment or transfer, promotion, or demotion. Promotions and demotions must be processed after applying the geographic conversion rule, if applicable, and using the converted payable rate of basic pay as the employee's existing rate immediately before the promotion or demotion. Locality rates and special rates are considered rates of basic pay in applying these rules.

- Section 531.216 modifies the rules regarding setting pay for employees moving from a Department of Defense or Coast Guard nonappropriated fund instrumentality (NAFI) to a GS position to take into account locality rates. Also, the NAFI maximum payable rate rule is revised to take into account the geographic location where the NAFI highest previous rate was earned, consistent with the rules governing geographic conversion.

- Section 531.221 modifies the GS maximum payable rate rule, which allows an agency to set an employee's rate of pay based on his or her "highest previous rate" in a Federal civilian job. The modified GS maximum payable rate rule now takes into account locality rates when the employee's highest previous rate was based on a special rate or on a rate earned in a non-GS pay system. (Under the interim regulations, if an employee's highest previous rate was earned in a GS position, the maximum payable rate rule generally is applied using the underlying GS rate (or LEO special base rate), which avoids the need to apply the geographic conversion rule.)

- Sections 531.241 through 531.247 consolidate various special rules for "GM employees" i.e., GS employees who were formerly covered by the Performance Management and Recognition System for managers and supervisors at grades GS-13, 14, and 15

and who may have rates of basic pay between the established GS step rates. Consistent with the changes made by Public Law 108–411 for other GS employees, GM employees' locality rates will be taken into account in applying the various pay-setting rules. If a GM employee is entitled to a special rate, the special rate is computed by adding the applicable special rate supplement on top of the GM employee's GS rate. (When pay schedules are adjusted, the GM employee's underlying GS rate must be redetermined using the relative position-in-range methodology presented in § 531.244, which is the same basic methodology used in OPM's former regulations.)

The use of locality rates in applying the GS pay-setting rules, along with the use of the geographic conversion rule when an employee's official worksite is changed to a new location, represent a significant change in GS pay administration. The geographic conversion rule requires that an employee's rate(s) of basic pay must first be converted to a corresponding rate(s) on the pay schedule that would apply to the employee's existing position of record if he or she were stationed at the new official worksite. No simultaneous change in the employee's position of record (defined as including grade, occupational series, agency, law enforcement officer status, and any other element that affects coverage under a pay schedule, other than the official worksite) or any simultaneous pay action (other than a general pay adjustment) is considered until after the geographic conversion. The converted rate(s) of basic pay resulting from the geographic conversion must be treated as the employee's existing rate(s) of basic pay in applying the next simultaneous pay action in the order of precedence. A reduction in an employee's payable rate of basic pay as a result of a geographic conversion is not a basis for pay retention, even if the move is involuntary. This does not represent a change in treatment of locality rates, but does represent a change in the treatment of special rates.

The legislative history of Public Law 108–411 shows that a major objective of the geographic conversion rule was to provide the same pay result that would have occurred if the employee in question had moved laterally without a change in position to the new geographic location and then underwent a position change. House Report 108–733 (October 5, 2004) stated that the geographic conversion rule "would make it clear that an employee with the same work history as another employee

will not have higher pay simply because he or she came from an area where higher pay rates applied, while also ensuring consistency between the treatment of locality rates and special rates" (page 20).

The geographic conversion rule will be particularly significant in terms of how it affects an employee who is promoted to a position at a different official worksite, where different pay schedules would apply to the employee's position of record before promotion. After applying any simultaneous general pay adjustment (as described in § 531.206), the agency must first convert the employee's rate(s) of basic pay to the applicable pay schedule(s) for the new official worksite, based on the employee's position of record (including grade) and step (or rate) before promotion. The resulting rate(s) of basic pay must be treated as the employee's existing rate(s) in processing the promotion action. (However, if the employee is simultaneously entitled to a within-grade increase or quality step increase on the same date as the promotion, that increase would be applied before processing the promotion.)

Once the geographic conversion rule has been applied, the agency must follow the promotion rule in § 531.214. The standard method of applying the promotion rule consists of the following steps:

(1) Find the employee's existing step (or rate) in the GS rate range (or LEO special base rate range, if applicable) and increase that rate by two GS within-grade increases.

(2) Determine the payable (highest) rate of basic pay for the step or rate determined in paragraph (1) by applying any applicable locality payment or special rate supplement.

(3) Identify the highest applicable rate range for the employee's position of record after promotion and find the lowest step rate in that range that equals or exceeds the rate determined in paragraph (2). This is the employee's payable rate of basic pay upon promotion.

The interim regulations provide for an alternate method of applying the promotion rule which involves (1) applying the promotion rule using the pay schedules that would apply to the employee's position of record if only the employee's grade were changed and (2) converting the resulting rate to the pay schedules for the actual position of record after promotion. This method yields a different result from the standard method only when there is a change in the employee's position of record (e.g., change in occupational

series) which would cause the employee to have a different pay schedule and different highest applicable rate range at the higher grade. For example, an occupational series change in conjunction with a promotion could result in an employee becoming covered by a special rate schedule at the higher grade. The standard method would not provide the employee with any increase in pay based on movement into a special rate category. In contrast, the alternate method would apply the promotion rule without regard to the new special rate schedule and then would laterally convert the resulting rate to the corresponding rate on the special rate schedule, which would provide an increase reflecting the difference between the special rate schedule and the former pay schedule. This alternate method is consistent with the method found in the former special rate regulations at 5 CFR 530.306(f), which dealt with the promotion of an employee from a position not covered by a special rate schedule to a position covered by a special rate schedule. However, the alternate method also applies in other situations, such as when an employee moves from a lower-paying special rate schedule to a higher-paying special rate schedule.

The objective of the alternate method is to treat an employee who is being directly promoted to a higher pay schedule the same as a similarly situated employee who is promoted and then later (in a separate action) reassigned to a position covered by the higher pay schedule. The alternate method mandatorily applies in lieu of the standard method whenever it produces a higher payable rate upon promotion. In addition, an agency may, at its sole discretion, use the alternate method when it produces a lower payable rate upon promotion. For example, if an employee is moving to a position in a different career field, an agency may determine that it is not appropriate to allow the employee's pay upon promotion to be set based on a special rate for the employee's former job.

The alternate method of applying the promotion rules departs from the standard method after the step of determining the payable (highest) rate of basic pay at the lower (pre-promotion) grade that reflects an increase of two within-grade increases. Under the alternate method, that payable rate must be compared to the highest applicable rate range for the employee's grade after promotion based on consideration of pay schedules that apply to the employee's position of record before promotion. Any pay schedule that

applies solely to the employee's position of record after promotion would be ignored. The employee's rate of basic pay is set at the lowest step rate in the highest applicable rate range that exceeds the specified rate. Then the employee is converted to the new highest applicable rate range (reflecting any new pay schedule that applies after promotion) by setting the payable rate at the corresponding step rate in that range.

To aid in understanding the alternate method, we provide an example using 2005 pay schedules. In this example, we are assuming that a GS-7, step 7, human resources specialist (occupational series GS-201) stationed in Atlanta, Georgia, is being promoted to a GS-9 information technology specialist position (occupational series GS-2210) in Washington, DC.

Step A—Apply the geographic conversion rule to determine the rates of basic pay for the GS-7, step 7, position in Washington, DC. Based on the GS-7 position before promotion (including the GS-201 occupational series), the pay schedules applicable to the employee in Washington, DC, would be the General Schedule and the locality rate schedule applicable in Washington, DC (Salary Table 2005-DCB).

Step B—Using the underlying General Schedule, increase the GS-7, step 7, rate by two within-grade increases, which produces the GS-7, step 9, rate (\$38,719).

Step C—The payable (highest) rate of basic pay for GS-7, step 9, is the corresponding GS-7, step 9, locality rate in Washington, DC (\$44,906).

Step D—If the employee were promoted to a GS-9 position in the GS-201 human resources management series, the highest applicable rate range for that GS-9 position after promotion would be the GS-9 locality rate range in Washington, DC (15.98 percent above GS rates). The GS-9, step 3, locality rate (\$46,255) is the lowest step rate in that range that equals or exceeds the GS-7, step 9, locality rate from step C.

Step E—Convert the GS-9, step 3, locality rate to the higher GS-9, step 3, special rate that applies to the employee's GS-2210 information technology specialist position after promotion. The applicable special rate schedule is Table 999C. The GS-9, step 3, special rate on that schedule is the payable rate of basic pay upon promotion (\$51,847). (At GS-9, a special rate in Table 999C is 30 percent above the corresponding GS rate.)

Step F—The standard method would have compared the GS-7, step 9, locality rate directly to the higher GS-9 range of special rates and produced a rate of GS-9, step 1 (\$48,607). Since the rate produced by the alternate method (GS-9, step 3, or \$51,847) is greater than the rate produced by the standard method, the result of the alternate method is used.

In addition to changes in subpart B of part 531 that relate directly to the changes made by Public Law 108-411, the interim regulations in § 531.212

(dealing with the superior qualifications and special needs pay-setting authority) include some policy clarifications and changes beyond the immediate requirements of Public Law 108-411. For example, the interim regulations define what is meant by superior qualifications and special needs so that agencies better understand how this pay flexibility may be used. The interim regulations also expand and clarify the exceptions to the 90-day break-in-service requirement to allow greater access to the superior qualifications and special needs pay-setting authority. For example, the interim regulations consolidate several of the former exceptions into a broader exception covering any temporary or time-limited appointment in the competitive or excepted service. If an individual was employed under any competitive or excepted service temporary appointment during the 90 days immediately preceding an appointment to a GS position, the agency could use the superior qualifications and special needs pay-setting authority. The interim regulations also expand the elements that can be considered in justifying the higher rate, allowing the use of factors other than existing pay, consistent with 5 U.S.C. 5333.

We are inviting comments regarding a proposal to establish a regulatory time limit on the period of time from which an employee's highest previous rate may be drawn. Consistent with current regulations, the interim regulations in § 531.221 (dealing with the maximum payable rate rule) establish no time limit regarding how long ago a highest previous rate was earned. We believe it would be reasonable to limit consideration of rates of pay earned during a recent time period (e.g., 5 or 10 years before the action in question). Even under the current regulations, an agency has discretion to set an employee's pay at any rate equal to or less than the maximum payable rate; thus, an agency could take into account the age of an employee's highest previous rate in exercising that discretion. The proposed time limit would reduce the administrative burden associated with identifying an employee's highest previous rate over an entire career and comparing the highest previous rate with pay schedules in effect many years ago.

General Schedule Within-Grade Increases

We have revised OPM's regulations on within-grade increases for General Schedule employees in part 531, subpart D. The revisions implement certain provisions in section 301 of

Public Law 108-411 and make other changes to clarify the rules governing GS within-grade increases.

We have revised subpart D to exclude consideration of special rates. For the purpose of subpart D, the term *rate of basic pay* is defined as a GS base rate or an LEO special base rate. Subpart D deals with adjusting an employee's base rate in connection with within-grade increases. Any applicable locality payment or special rate supplement is paid on top of the base rate.

We have revised the definition of *equivalent increase* in § 531.403 and related regulations in § 531.407. We have defined *equivalent increase* as an increase in an employee's rate of basic pay, or an opportunity for such an increase under non-GS pay systems, resulting from certain events or actions listed in § 531.407. The interim regulations no longer require that agencies add up the dollar value of multiple increases under non-GS pay systems in determining when an equivalent increase occurred, which was required under the former regulations at § 531.407(a) and (b). The new events-based approach avoids the need to consider locality payments, special rate supplements, or other similar supplements or to apply geographic conversion rules in making equivalent increase determinations. We note that the former regulations at § 531.407(d) had provided that a zero merit increase under the former Performance Management Recognition System would be treated as an equivalent increase, which is consistent with the events-based approach.

Grade and Pay Retention

We have revised and reorganized OPM's regulations on grade and pay retention in part 536. The revisions implement certain provisions in section 301 of Public Law 108-411, incorporate changes OPM previously issued as proposed regulations, and make other changes to clarify the rules governing the grade and pay retention authorities under 5 U.S.C. chapter 53, subchapter VI. We have reorganized part 536 into four subparts that provide (1) general provisions relating to grade and pay retention, (2) rules for grade retention, (3) rules for pay retention, and (4) appeals and miscellaneous provisions. Except for correcting citations and moving former § 536.308 to the grade retention subpart, the appeals and miscellaneous provisions formerly contained in 5 CFR part 536, subpart C, are not revised by this interim regulation. (See redesignated subpart D.)

The following new provisions in the revised part 536 implement section 301 of Public Law 108-411:

- Additional terms are defined in the new § 536.103, including *highest applicable rate range, official worksite, payable rate, pay schedule, position of record, and rate range*. Also, the term *rate of basic pay* is redefined to include a locality rate, consistent with 5 U.S.C. 5361(4). (Under the former regulations, locality rates were ignored when applying the rules in part 536.) The definition of *representative rate* is redefined as described later in this Supplementary Information.

- Sections 536.206, 536.301, 536.302, 536.303, 536.304, 536.305, and 536.308 incorporate the geographic conversion rule into the grade and pay retention regulations, where it is used to convert a rate(s) of basic pay when an employee's official worksite is changed to a new location where different pay schedules apply. The converted rate resulting from geographic conversion is treated as the employee's existing rate in applying the pay retention provisions. (These provisions implement the statutory geographic conversion provisions in 5 U.S.C. 5305(i), 5334(g), and 5363(c).)

- Section 536.105 clarifies when agencies must compare the grades of positions in different pay systems using representative rates under the grade retention rules. This section also provides that, for positions located at different official worksites where different pay schedules apply, the geographic conversion rules must be applied before comparing the representative rates. In addition, the definition of *representative rate* in § 536.103 is revised to mean the payable (highest) rate of basic pay (including any locality payment or special rate supplement) for the specified point in the range (e.g., GS step 4). The definition also provides that in comparing grades or work levels when one of the grades or work levels is not under a covered pay system, the representative rates that must be compared are the maximum payable rates of basic pay (including any locality payment, special rate supplement, or similar payment) that apply to the grade or level of each position. (The former regulations provided agencies with the flexibility to set the representative rate for positions under noncovered pay systems.) This revised definition of *representative rate* also must be used for making severance pay and discontinued service retirement reasonable offer determinations. See the definition of *reasonable offer* in § 550.703 and the

references in §§ 831.503(b)(3)(iv) and 842.206(c)(3)(iv).

- Section 536.206 modifies the rules for determining an employee's rate of basic pay when an employee becomes entitled to grade retention or becomes covered by different pay schedules during a period of grade retention and the order for processing such pay actions. If such an employee's rate of basic pay otherwise would be reduced upon placement in a lower-paying pay schedule (excluding a reduction that results from a geographic conversion), the employee is eligible for pay retention under 5 U.S.C. 5363 and 5 CFR part 536, subpart C, to the same extent as any other employee. Under the former regulations, a rate above the maximum rate that resulted from the application of the grade retention rules was not treated as a retained rate under 5 U.S.C. 5363. However, consistent with section 301(d)(2) of Public Law 108-411, and our regulatory authority in 5 U.S.C. 5365, we have revised the grade retention regulations to provide that the normal pay retention rules apply to employees with a retained grade.

- Sections 536.301 and 536.302 clarify the situations in which an agency must provide pay retention to an employee and the situations in which an agency may apply optional pay retention (after application of geographic conversion rules under § 536.303(a)). We also removed the requirement in former § 536.104(a)(5) that pay retention apply to an employee whose rate of basic pay otherwise would be reduced as a result of placement in a lower wage area. These changes are consistent with 5 U.S.C. 5363(c)(2), which provides that a reduction in an employee's rate of basic pay resulting from a geographic conversion is not a basis for entitlement to pay retention under 5 U.S.C. 5363.

- Section 536.301 also provides that an agency must provide pay retention under part 536, subpart C, to an employee whose rate of basic pay otherwise would be reduced (after geographic conversion) as a result of the application of the promotion rule in 5 U.S.C. 5334(b) and 5 CFR 531.214 when the employee's payable rate of basic pay after promotion exceeds the maximum rate of basic pay of the new rate range. Under the former regulations, a rate of basic pay above the maximum rate that resulted from application of the promotion rule was not treated as a retained rate under 5 U.S.C. 5363 and 5 CFR part 536. This change is required by an amendment to 5 U.S.C. 5334(b).

- Section 536.304 modifies the rules for determining an employee's pay retention entitlement. In particular, the

new regulations provide that an eligible employee is entitled to a retained rate if his or her rate of basic pay (including any locality payment or special rate, but after geographic conversion under § 536.303(a)) exceeds the maximum rate of the highest applicable rate range for the new position or geographic area. The retained rate will equal the employee's former rate of basic pay (including any locality payment or special rate). This section implements 5 U.S.C. 5363(b)(1).

- Section 536.305 modifies the rules for adjusting a retained rate at the time of a pay schedule adjustment. Consistent with 5 U.S.C. 5363(b)(2)(B), when a pay schedule adjustment causes the maximum rate of the highest applicable rate range for an employee's position to increase, the employee's retained rate is increased by 50 percent of the increase in that maximum rate. If an employee's retained rate would fall below the maximum rate after the 50 percent increase, the employee's payable rate is set at that maximum rate and pay retention ceases to apply. The interim regulations make clear that, consistent with 5 U.S.C. 5363(c), the geographic conversion rule in § 536.303(b) applies in lieu of the 50-percent adjustment rule when a pay schedule change is caused by a change in the location of the employee's official worksite. The interim regulations also make clear that the 50-percent adjustment rule does not apply if a pay schedule change is caused by a change in the employee's position of record.

- Section 536.304(b)(3) provides that, when initially established, a retained rate may not exceed (1) 150 percent of the maximum payable rate of basic pay of the highest applicable rate range for the grade of the employee's position of record or (2) the rate for level IV of the Executive Schedule. Section 536.306 provides that at no time may a retained rate exceed the rate for level IV of the Executive Schedule and that if an employee's retained rate is limited by the level IV rate, the employee's higher, uncapped rate is not maintained or used for any purpose. This level IV limitation is consistent with the level IV limit on locality rates under 5 U.S.C. 5304(g)(1) and special rates under 5 U.S.C. 5305(a)(1) for General Schedule employees and the level IV limitation on rates for prevailing rate employees under 5 U.S.C. 5373. Under amended 5 U.S.C. 5365(b), OPM is authorized to establish limitations on the application of pay retention provisions for employees in noncovered pay systems.

- Section 536.307 provides the purposes for which a retained rate is basic pay, consistent with 5 U.S.C.

5363(d). A retained rate is basic pay for many of the same purposes as a special rate or a locality rate. When a retained rate is not basic pay, the maximum rate of basic pay for the employee's grade must be used in place of the retained rate (e.g., for computing percentage-based awards under 5 CFR part 451 and recruitment, relocation, and retention incentives under 5 CFR part 575, subparts A, B, and C).

- Section 536.309 provides the rules for converting retained rates in effect on April 30, 2005, to a retained rate under new 5 U.S.C. 5363 and 5 CFR part 536, subpart C. This section covers an employee who on April 30, 2005, was receiving (1) a retained rate under 5 U.S.C. 5363, (2) a rate paid under 5 U.S.C. 5334(b) or 5362 that was greater than the maximum rate of basic pay payable for the grade of the employee's position of record, or (3) a continued rate of pay under 5 CFR part 531, subparts C or G, that was greater than the maximum rate of basic pay payable for the grade of the employee's position. Effective on May 1, 2005, the employee's new retained rate must equal his or her previous retained rate, including any applicable locality payment under 5 U.S.C. 5304.

On May 25, 2000, OPM published proposed changes in part 536 (65 FR 33785) regarding the applicability of grade and pay retention to employees moving within and between covered pay schedules (hereafter referred to as "covered pay systems"). Under 5 U.S.C. 5361, a covered pay system includes the General Schedule; a prevailing rate schedule under 5 U.S.C. chapter 53, subchapter IV; or a special occupational pay system under 5 U.S.C. chapter 53, subchapter IX. Consistent with the grade and pay retention statute, the former regulations provided grade and pay retention benefits for employees moving between positions within a covered pay system and between positions under different covered pay systems. In addition, OPM used its regulatory authority under 5 U.S.C. 5365 to provide agencies with the discretionary authority in the former regulations to apply grade and pay retention provisions to employees moving from positions not under a covered pay system to positions under a covered pay system.

In the regulations issued on May 25, 2000, we proposed to (1) provide agencies with the discretionary authority to apply pay retention provisions to employees moving to or within noncovered pay systems who would otherwise suffer a reduction in pay as a result of a management action and to freeze any resulting retained rate

(i.e., not provide the normal 50 percent pay adjustment under former 5 CFR 536.205(c)); (2) freeze the retained rate of an employee who moves from a noncovered pay system to a covered pay system and who receives a rate in excess of the maximum rate applicable to the covered pay system; and (3) prohibit the application of grade retention to any employee who moves from a noncovered pay system.

We received comments from an agency and an employee association on the proposed regulations. The agency requested that OPM amend the regulations to provide agencies with the administrative authority to establish a pay adjustment mechanism for an employee on pay retention under a noncovered pay system as consistent as possible with the General Schedule mechanism in the former 5 CFR 536.205(c). The association suggested that we modify the regulations to allow such an employee to receive the reduced pay adjustment of 50 percent, as long as the rate of pay does not exceed the pay level previously held, or the maximum rate of the new position, whichever is greater.

We revisited the proposal to provide agencies with the authority to apply pay retention provisions to employees moving to or within noncovered pay systems and have decided not to include this authority in the revised part 536. Agencies may continue to apply pay retention provisions at their discretion to employees moving from a noncovered pay system to a covered pay system. See new § 536.102(a).

The association also objected to our proposal to freeze the retained rates of employees who move from a noncovered pay system to a covered pay system and who receive a retained rate in excess of the maximum rate applicable to the covered pay system. We revisited this issue and have decided not to include this proposal in the revised part 536. The revised part 536 provides that employees who move from noncovered pay systems to covered pay systems and receive a retained rate are entitled to the normal 50 percent pay adjustment under new § 536.305. (Note that such retained rates are subject to the limitation under new § 536.306.)

These interim regulations retain the proposal that prohibits agencies from applying grade retention to an employee who moves into a covered pay system from a noncovered pay system. See new exclusion in § 536.102(d). Accordingly, we are removing the rule in former § 536.203(b) for determining a retained grade for an employee who moves from a position not under a covered pay

system to a position under a covered pay system. Employees entitled to grade retention immediately prior to the effective date of these regulations as a result of movement from a noncovered pay system to a covered pay system will remain entitled to grade retention until one of the terminating conditions in § 536.208 applies.

The revised part 536 contains the following additional significant clarifying and conforming changes regarding the coverage, eligibility, and applicability of grade and pay retention:

- Section 536.102 merges the coverage, applicability, and exclusionary provisions from the former regulations into a single coverage section that clarifies the employees covered by and excluded from the regulations, including the coverage of employees in Department of Defense and Coast Guard nonappropriated fund instrumentality (NAFI) positions. (See also new § 536.202(d) for information on NAFI coverage.)

- Section 536.103 adds new definitions of *covered pay system* (consistent with the definition of *covered pay schedule* under 5 U.S.C. 5361), *employee*, *General Schedule*, *management action*, and *prevailing rate employee* and revises the definitions of *reduced in grade or pay at the employee's request* (formerly *demotion at an employee's request*), *reduced in grade or pay for personal cause* (formerly *demotion for personal cause*), *temporary promotion*, and *temporary reassignment* to clarify coverage and eligibility provisions.

- Section 536.201 clarifies the conditions under which a movement to a lower grade is considered to be a result of reduction in force (RIF) procedures or a reclassification process for grade retention purposes, consistent with the guidance in the former Federal Personnel Manual.

- Section 536.203 eliminates the requirement that the 52 weeks of service needed for optional grade retention eligibility in RIF situations must be in an *agency* as defined in 5 U.S.C. 5102, but requires that such service be under a covered pay system. This change is consistent with the new rule in § 536.102(d) barring agencies from providing grade retention to employees moving from a noncovered pay system to a covered pay system.

- Section 536.205 clarifies that an employee with a retained grade also retains the pay system associated with that retained grade, even if the employee's actual position is in a different covered pay system.

- Sections 536.207, 536.208, and 536.308 provide that an employee loses

eligibility for or entitlement to grade and pay retention upon movement to a position not under a covered pay system.

SES Pay Retention

We have revised OPM's regulations on establishing, adjusting, and terminating saved rates for former members of the Senior Executive Service (SES) who are guaranteed placement in a position covered by another pay system (e.g., the General Schedule pay system), as provided in subpart G of part 359. Under our broad regulatory authority in 5 U.S.C. 3596, we are revising § 359.705 to make changes that are consistent with (1) the changes made in the pay retention provisions in part 536 in implementing section 301 of Public Law 108-411 and (2) congressional intent as reflected in uncodified section 301(d)(2) of that Act. The significant changes made in the interim regulations are as follows:

- Section 359.705(c) provides that an SES saved rate may not be supplemented by any locality payment or other supplement. With the amendment of 5 U.S.C. 5302(8), locality pay is no longer paid on top of any kind of retained or saved rate.
- Section 359.705(g) provides for conversion of any existing locality-adjusted saved rate to a new saved rate of equal value on May 1, 2005. Without such a conversion, employees might suffer a reduction in pay under the new rules. The saved rate will be compared to the highest applicable rate range (including a locality rate range or special rate range) for the employee's position of record.
- Section 359.705(b) provides that, in determining the amount of a saved rate, an agency must take into account any locality rate or special rate (1) currently payable for the GS position in which he or she is placed upon removal from the SES and (2) currently payable for the GS position held before placement in the SES.

• Section 359.705(d) provides that the 50-percent adjustment rule does not apply when an employee's rate range maximum is increased due to a change in the employee's official worksite. Instead, the retained rate will be adjusted under the geographic conversion authority in paragraph (e). For GS employees receiving a saved rate, the geographic conversion rule is the same as that used for retained rates under part 536 (i.e., it maintains the relative position of the retained rate vis-a-vis the range maximum). Also, the 50-percent adjustment rule does not apply when an employee's rate range maximum is increased as a result of a

position change that caused the employee to become covered by a new pay schedule.

Other changes in § 359.705 are clarifications. For example, we have clarified that a saved rate terminates when an employee becomes entitled to a higher rate of basic pay—e.g., when the 50-percent adjustment would cause the saved rate to fall below the range maximum and the employee's pay is set at the range maximum.

Waiver of Notice of Proposed Rulemaking and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These interim regulations implement section 301 of Public Law 108-411, which became effective on May 1, 2005. Thus, these interim regulations are necessarily effective retroactive to May 1, 2005. Waiver of the requirement for proposed rulemaking and making the effective date less than 30 days after publication are necessary to ensure timely implementation of the law as intended by Congress. To delay implementation of these regulations by imposing a general notice of proposed rulemaking or an additional 30-day implementation requirement would be contrary to the public interest of good governance. It would leave Federal agencies without regulations, required by law, directing those agencies in implementing complex and extensive pay administration rules. Delay in implementation would prevent uniform and consistent application of the new pay administration rules. The public and the Federal workforce will be benefited by timely implementation of these regulations. Comments are being solicited which will assist OPM in issuing final regulations.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

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

List of Subjects in 5 CFR 294, 359, 362, 451, 530, 531, 532, 534, 536, 550, 591, 630, 831, and 842

Administrative practice and procedure; Air traffic controllers; Alimony; Claims; Decorations, medals,

awards; Disability benefits; Firefighters; Freedom of information; Government employees; Hospitals; Income taxes; Intergovernmental relations; Law enforcement officers; Pensions; Reporting and recordkeeping requirements; Research; Retirement; Students; Travel and transportation expenses; Wages.

Office of Personnel Management.

Dan G. Blair,
Acting Director.

- For the reasons stated in the preamble, OPM is amending parts 294, 359, 362, 451, 530, 531, 532, 534, 536, 550, 591, 630, 831, and 842 of title 5 of the Code of Federal Regulations as follows:

PART 294—AVAILABILITY OF OFFICIAL INFORMATION

- 1. The authority citation for part 294 is revised to read as follows:

Authority: 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502, as amended by the Freedom of Information Reform Act of 1986, Pub. L. 99-570, and E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

Subpart D—Cross References

§ 294.401 [Amended]

- 2. Amend § 294.401 by removing the reference “536.307” and adding in its place “536.405”.

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

- 3. The authority citation for part 359 continues to read as follows:

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

Subpart G—Guaranteed Placement

- 4. Revise § 359.705 to read as follows:

§ 359.705 Pay.

(a) An appointee placed under this subpart in a position outside the SES (in the same or different agency) is entitled to receive basic pay at the highest of—

(1) The rate of basic pay in effect for the position in which the appointee is being placed;

(2) The rate of basic pay currently in effect for the position the appointee held immediately before being appointed to the SES; or

(3) The rate of basic pay in effect for the appointee immediately before removal from the SES.

(b)(1) The rate of basic pay under paragraph (a)(1) and (2) of this section includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, or

similar payment under other legal authority.

(2) When an employee is entitled to a payable rate of basic pay under paragraph (a)(2) or (3) of this section which exceeds the maximum payable rate of basic pay for the grade or level of the employee's position after placement, the resulting saved rate is subject to the adjustment and termination rules in paragraphs (d) through (f) of this section.

(c) For an employee placed in a General Schedule position, a saved rate established under this section may not be supplemented by a locality payment under 5 U.S.C. 5304, a special rate supplement under 5 U.S.C. 5305, or a similar payment under other legal authority.

(d) A saved rate established under this section must be adjusted in connection with a pay schedule adjustment according to the following rules:

(1) When the maximum payable rate of basic pay for the grade or level of an employee's position is increased while the employee is receiving a saved rate, the employee is entitled to a pay adjustment equal to 50 percent of the amount of the increase in that maximum payable rate, except as otherwise provided in this section.

(2) If an employee's official worksite is changed while the employee is receiving a saved rate, a change in the applicable range maximum because of a change in an employee's official worksite is not considered in applying paragraph (d)(1) of this section. Instead, any adjustment of the employee's saved rate in conjunction with a change in official worksite must be determined under paragraph (e) of this section. If an employee's range maximum is increased because of a pay schedule adjustment on the same effective date as a change in the employee's official worksite, the saved rate must be adjusted under paragraph (d)(1) of this section before applying paragraph (e) of this section.

(3) A change in an employee's rate range maximum resulting from a change in the employee's position (e.g., change in occupational series) that causes the employee to be covered by a different pay schedule does not result in application of paragraph (d)(1) of this section.

(4) When an employee's saved rate becomes equal to or lower than the maximum payable rate of basic pay for the grade or level of the employee's position, the employee is entitled to the maximum payable rate, and saved pay under this section ceases to apply.

(e) When an employee receiving a saved rate established under this section is covered by a pay system that provides

different basic pay schedules based on geographic location (such as the General Schedule pay system), the saved rate must be adjusted in conjunction with a change in the employee's official worksite consistent with the geographic conversion rule for retained rates under 5 CFR 536.303(b).

(f) A saved rate established under this section must be terminated if—

(1) The employee has a break in service of 1 workday or more;

(2) The employee is demoted based on unacceptable performance or conduct or at the employee's request; or

(3) The employee becomes entitled to a rate of basic pay that is equal to or higher than the saved rate.

(g) If an employee is receiving a saved rate established under this section on May 1, 2005 (when section 301 of Pub. L. 108-411 took effect), any locality payment under 5 U.S.C. 5304 formerly paid in addition to the employee's saved rate no longer applies as of that date. Any locality-adjusted saved rate in effect and payable on April 30, 2005, must be converted to an equal saved rate effective on May 1, 2005. If the employee received no locality payment because of a pay limitation, no conversion under this paragraph is required.

PART 362—PRESIDENTIAL MANAGEMENT INTERN PROGRAM

■ 5. The authority citation for part 362 is revised to read as follows:

Authority: E.O. 12364, 47 FR 22931, 3 CFR, 1982 Comp., p. 185.

Subpart B—Program Administration

§ 362.202 [Amended]

■ 6. In § 362.202, amend paragraph (d) by removing the reference “rules under 5 CFR 531.203(c)” and adding in its place “rule under 5 CFR 531.221”.

PART 451—AWARDS

■ 7. The authority citation for part 451 is revised to read as follows:

Authority: 5 U.S.C. 4302, 4501-4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966-1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart A—Agency Awards

■ 8. In § 451.104, revise paragraph (g) to read as follows:

§ 451.104 Awards.

* * * * *

(g) When granting an award paid as a percentage of basic pay under 5 U.S.C. 4505(a)(2)(A), the rate of basic pay used must include any applicable

locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority. For an employee receiving a retained rate under 5 CFR part 536, subpart C (or similar authority, such as 5 CFR 359.705), the rate of basic pay is the maximum payable rate for the employee's grade or level, rather than the retained rate.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 9. The authority citation for part 530 is revised to read as follows:

Authority: 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338 and sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103-89, 107 Stat. 981.

■ 10. Revise subpart C to read as follows:

Subpart C—Special Rate Schedules for Recruitment and Retention

General Provisions

Sec.

530.301 Purpose and applicability.

530.302 Definitions.

530.303 Coverage.

530.304 Establishing or increasing special rates.

530.305 Agency requests for new or increased special rates.

530.306 Evaluating agency requests for new or increased special rates.

530.307 OPM review and adjustment of special rate schedules.

530.308 Treatment of special rate as basic pay.

530.309 Miscellaneous provisions.

Setting an Employee's Rate of Pay

530.321 General.

530.322 Setting pay when a special rate is newly established or increased.

530.323 Setting pay when a special rate is discontinued or decreased.

Subpart C—Special Rate Schedules for Recruitment and Retention

General Provisions

§ 530.301 Purpose and applicability.

(a) **Purpose.** This subpart contains OPM regulations implementing 5 U.S.C. 5305, which authorizes the establishment of special rates of pay for Federal employees in executive agencies to address significant recruitment or retention problems. This subpart also contains rules for determining an employee's rate of pay when a special rate schedule is established, increased, decreased, or discontinued, or when conditions for coverage under a special rate schedule are changed. All other pay actions for special rate employees are governed by the pay-setting rules in 5 CFR parts 531 and 536.

(b) *Applicability.* Except as explained in § 530.303(a), this subpart applies only to GS employees.

§ 530.302 Definitions.

In this subpart:

Agency means an executive agency as defined in 5 U.S.C. 105.

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

Employee has the meaning given that term in 5 U.S.C. 2105.

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. It also refers to the pay schedule of GS rates established under 5 U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

GM employee has the meaning given that term in 5 CFR 531.203.

GS rate means a rate of basic pay within the General Schedule, excluding any LEO special base rate and additional pay of any kind such as locality payments or special rate supplements. A rate payable to a GM employee is considered a GS rate.

Highest applicable rate range means the rate range applicable to an employee's position that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates may exceed an applicable locality rate range. In certain circumstances, the *highest applicable rate range* may consist of two types of pay rates from different pay schedules—*e.g.*, a range where special rates (based on a fixed dollar supplement) are higher in the lower portion of the range and locality rates are higher in the higher portion of the range.

Law enforcement officer or *LEO* has the meaning given that term in 5 CFR 550.103.

LEO special base rate means a special base rate established for GS law enforcement officers at grades GS-3 through GS-10 under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509, November 5, 1990, as amended) which is used in lieu of a GS rate.

Locality payment has the meaning given that term in 5 CFR 531.602.

Locality rate means a GS rate or an LEO special base rate, if applicable, plus any applicable locality payment.

Official worksite means the official location of an employee's position of record as determined under 5 CFR 531.605. *Official worksite* is synonymous with the term "official duty station" as used in 5 U.S.C. 5305(i).

OPM means the Office of Personnel Management.

Pay schedule means a set of rate ranges established for GS employees under a single authority—*i.e.*, the General Schedule, an LEO special base rate schedule (for grades GS-3 through 10), a locality rate schedule based on GS rates, a locality rate schedule based on LEO special base rates (for grades GS-3 through 10), a special rate schedule under this subpart, or a similar schedule under 38 U.S.C. 7455. A pay schedule applies to or covers a defined category of employees based on established coverage conditions (*e.g.*, official worksite, occupation). A pay schedule is considered to apply to or cover an employee who meets the established coverage conditions even when a rate under that schedule is not currently payable to the employee because of a higher pay entitlement under another pay schedule.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description, excluding any position to which the employee is temporarily detailed. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions, including a GS rate, an LEO special base rate, a locality rate, a special rate under this subpart or a similar rate under 38 U.S.C. 7455, or a retained rate under 5 CFR 359.705 or 5 CFR part 536, but excluding additional pay of any other kind.

Rate range or *range* means the range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate. A rate range may consist of GS rates, LEO special base

rates, locality rates, special rates, or similar rates under other legal authority.

Retained rate means a rate above the maximum rate of the rate range applicable to the employee which is payable under 5 CFR part 536 or, for a former member of the Senior Executive Service, under 5 CFR 359.705.

Special rate means a rate of pay within a special rate schedule established under this subpart.

Special rate schedule means a pay schedule established under this subpart to provide higher rates of pay for specified categories of GS positions or employees at one or more grades. An increased or decreased special rate schedule refers to an increase or decrease in one or more rate ranges within that schedule.

Special rate supplement means the portion of a special rate paid above an employee's GS rate after applying any applicable pay limitation. For a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate, a special rate supplement increases the LEO's pay only to the extent that the resulting special rate exceeds the LEO's rate of basic pay. The payable amount of a special rate supplement is subject to the Executive Level IV limitation, as provided in § 530.304(a).

§ 530.303 Coverage.

(a) Under 5 U.S.C. 5305, OPM may establish special rates for employees paid under a statutory pay system (as defined in 5 U.S.C. 5302(1)) or any other pay system established by or under Federal statute for civilian positions in the executive branch. Special rates apply only to GS employees unless the approved schedule coverage criteria specifically state otherwise. OPM will establish special rate schedules covering employees under a non-GS pay system only at the request of the agency responsible for administering that system. For employees covered by a non-GS pay system, the responsible agency is subject to the requirements in 5 U.S.C. 5305. To the extent the statutory or regulatory provisions governing the non-GS pay system differ from the regulatory provisions of this subpart, the responsible agency must follow policies that are consistent as possible with this subpart.

(b) An employee's coverage under a special rate schedule is subject to the coverage conditions established by OPM for that schedule, except as provided in paragraph (c) of this section. The coverage conditions for a special rate schedule may be based on occupation, grade, employing agency, geographic location of official worksite, or other

factors OPM may determine to be appropriate. An agency determination as to whether an employee meets the coverage conditions for a special rate schedule must be based on the employee's position of record and official worksite. An agency also may be required to consider other employee-specific factors established by OPM to determine special rate coverage, such as special qualifications or certifications.

(c) An agency must pay the applicable special rate to any employee who meets the coverage conditions established by OPM with respect to a special rate schedule unless an authorized agency official determines that a category of employees of the agency will not be covered by a proposed or existing special rate schedule, subject to the following requirements:

(1) An authorized agency official may determine that a category of employees of the agency will not be covered by a special rate request or a proposed new special rate schedule. The official must provide written notice to OPM that identifies the specific category or categories of employees who will not be covered by the special rate schedule. The notice must be received by OPM before the effective date of the new special rate schedule.

(2) An authorized agency official may remove a category of employees of the agency from coverage under an existing special rate schedule. The official must provide written notice to OPM that identifies the specific category or categories of employees who will not be covered by the special rate schedule. The loss of coverage under a special rate schedule will become effective on the first day of the first pay period beginning on or after the date of the notice to OPM.

(d) An employee covered by a special rate schedule is not entitled to a special rate for any purpose with respect to any period during which the employee is entitled to a higher rate of basic pay under any other legal authority. For example, an employee is not entitled to a special rate if he or she is entitled to a higher locality rate or a retained rate.

§ 530.304 Establishing or increasing special rates.

(a) OPM may increase the minimum rates of pay otherwise payable to a category of employees in one or more areas or locations, grades or levels, occupational groups, series, classes, or subdivisions thereof, when it is necessary to address existing or likely significant recruitment or retention difficulties. OPM will consider the circumstances listed in paragraph (b) of this section and the factors listed in

§ 530.306 when evaluating the need for special rates. When OPM establishes a minimum special rate under this authority, corresponding increases also may be made in one or more of the remaining rates of the affected grade or level. For any given grade, a minimum special rate may not exceed the maximum rate of basic pay for the rate range (excluding any locality rate, other special rate, or similar payment under other legal authority) by more than 30 percent. A special rate is not payable if it exceeds the rate for level IV of the Executive Schedule.

(b) The circumstances considered by OPM in evaluating the need for special rates are the following:

(1) Rates of pay offered by non-Federal employers which are significantly higher than those payable by the Government within the area, location, occupational group, or other category of positions under GS pay system;

(2) The remoteness of the area or location involved;

(3) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(4) Any other circumstances OPM considers appropriate.

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used for grades GS-1 and GS-2, where within-grade increases vary throughout the range.

(d) If OPM establishes a special rate schedule that covers only law enforcement officers, OPM may compute the special rate supplement for grades GS-3 through 10 as a fixed percentage of LEO special base rates instead of GS rates. With respect to such a schedule, references to GS rates in § 530.307 are deemed to be references to LEO special base rates.

§ 530.305 Agency requests for new or increased special rates.

(a) An agency may request that a special rate schedule be established or increased or that its employees be covered by an existing special rate schedule at any time. An authorized agency official in the agency headquarters office must submit to OPM any request to establish or increase special rates for a category of agency employees. The request must include a certification by the authorized agency official that the requested special rates

are necessary to ensure adequate staffing levels to accomplish the agency's mission.

(b) The authorized agency official is responsible for submitting complete supporting data for any request for new or higher special rates. OPM may require that the supporting data include a survey of prevailing non-Federal pay rates in the relevant labor market.

(c) OPM may coordinate an agency special rate request with other agencies that have similar categories of employees. OPM may designate a lead agency to assist in coordinating the collection of relevant data. Each affected agency is responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate, unless the agency determines that a category of its employees will not be covered by the proposed special rate schedule, as provided in § 530.303(c).

§ 530.306 Evaluating agency requests for new or increased special rates.

(a) In evaluating agency requests for new or increased special rates, OPM may consider the following factors:

(1) The number of existing vacant positions and the length of time they have been vacant;

(2) The number of employees who have quit (*i.e.*, voluntarily left Federal service), including, when available, a subcount of the number of employees who quit to take a comparable position offering higher pay;

(3) Evidence to support a conclusion that recruitment or retention problems likely will develop (if such problems do not already exist) or will worsen;

(4) The number of vacancies an agency tried to fill, compared to the number of hires and offers made;

(5) The nature of the existing labor market;

(6) The degree to which an agency has considered and used other available pay flexibilities to alleviate staffing problems, including the superior qualifications and special needs pay-setting authority in 5 CFR 531.212 and recruitment, relocation, and retention incentives under 5 CFR part 575;

(7) The degree to which an agency has considered relevant non-pay solutions to staffing problems, such as conducting an aggressive recruiting program, using appropriate appointment authorities, redesigning jobs, establishing training programs, and improving working conditions;

(8) The effect of the staffing problem on the agency's mission; and

(9) The level of non-Federal rates paid for comparable positions. Data on non-Federal salary rates may be

supplemented, if appropriate, by data on Federal salary rates for comparable positions established under a non-GS pay system.

(b) In determining the level at which to set special rates, OPM may consider the following factors:

(1) The pay levels that, in OPM's judgment, are necessary to recruit or retain an adequate number of qualified employees based on OPM's findings with respect to the factors set forth in paragraph (a) of this section;

(2) The dollar costs that will be incurred if special rates are not authorized;

(3) The level of pay for comparable positions; and

(4) The need to provide for a reasonable progression in pay from lower grade levels to higher grade levels to avoid pay alignment problems (e.g., such as might result from applying the two-step promotion rule in 5 U.S.C. 5334(b)).

(c) No one factor or combination of factors specified in paragraph (a) or (b) of this section requires OPM to establish or increase special rates or to set special rates at any given level.

§ 530.307 OPM review and adjustment of special rate schedules.

(a) OPM may review an established special rate schedule at any time to determine whether that schedule should be increased, decreased, or discontinued, taking into account the circumstances listed in § 530.304(b) and the factors listed in § 530.306 that led to establishing the schedule. An authorized agency official may request that OPM conduct such a review of one or more special rate schedules.

(b) OPM may designate lead agencies to assist in the review of designated special rate schedules and to coordinate the collection of relevant data. Each affected agency is responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate.

(c) OPM will adjust a special rate schedule by determining the amount of the special rate supplement to be paid on top of the current GS rate for each rate range within the schedule. OPM will determine the extent to which special rate supplements are to be adjusted (increased or decreased), if at all, and when the special rate supplements are to be adjusted. As provided in 5 U.S.C. 5305(d), special rate schedule adjustments made by OPM have the force and effect of statute.

(d)(1) For special rate schedules computed by applying a fixed-percentage supplement on top of each GS rate within a rate range, OPM may

require that a change in the underlying GS rate automatically results in an adjusted special rate schedule, unless OPM determines that an adjustment in the supplement percentage is appropriate for one or more special rate schedules.

(2) For special rate schedules computed by applying a fixed-dollar supplement on top of each GS rate within a rate range, OPM may require that special rate supplements generally be adjusted to reflect the increase in GS rates, unless OPM determines that a different adjustment is appropriate for one or more special rate schedules.

(e) If OPM determines that a special rate schedule, or a rate range within a special rate schedule, is no longer needed to ensure satisfactory recruitment or retention of qualified employees, OPM may discontinue the schedule or rate range. Consistent with § 530.303(d), if all employees and positions covered by a special rate schedule or rate range are entitled to a higher rate of basic pay, the schedule or rate range (as applicable) will be automatically discontinued.

(f) OPM may change the established conditions for coverage under a special rate schedule at any time based on a reevaluation of the circumstances and factors that led to establishing the schedule. Expansion of coverage is equivalent to establishing a special rate schedule for a category of affected employees. Reduction of coverage is the equivalent of discontinuing a special rate schedule for a category of affected employees.

(g) When a special rate schedule is adjusted or discontinued, or when there is a change in a schedule's coverage criteria, the rate of pay for affected employees must be set as provided in §§ 530.321 through 530.323.

§ 530.308 Treatment of special rate as basic pay.

Except as otherwise specifically provided under other legal authority, a special rate is considered a rate of basic pay only for the following purposes:

(a) The purposes for which a locality rate is considered to be a rate of basic pay in computing other payments or benefits, to the extent provided by 5 CFR 531.610, except as otherwise provided in paragraphs (b) through (d) of this section;

(b) Computation of nonforeign area cost-of-living allowances and post differentials under 5 U.S.C. 5941 and 5 CFR part 591, subpart B;

(c) Computation of foreign area post differentials under 5 U.S.C. 5925(a) and danger pay allowances under 5 U.S.C. 5928; and

(d) Application of pay administration provisions for prevailing rate employees which consider rates of basic pay under the GS pay system in setting pay (except as otherwise provided in 5 CFR part 532), subject to the requirement that, if the employee's actual special rate would not apply at the official worksite for the prevailing rate position, a special rate may be used only if it is a corresponding special rate on a special rate schedule that would cover the employee if his or her GS position of record were located at the same official worksite as the prevailing rate position, consistent with the geographic conversion rule in 5 CFR 531.205.

§ 530.309 Miscellaneous provisions.

(a) A special rate may be paid only for those hours for which an employee is in a pay status.

(b) A pay increase caused by an employee becoming entitled to a new or higher special rate supplement is not an equivalent increase in pay within the meaning of 5 U.S.C. 5335. (See 5 CFR 531.407(c).)

(c) A special rate is included in an employee's *total remuneration*, as defined in 5 CFR 551.511(b), and *straight time rate of pay*, as defined in 5 CFR 551.512(b), for the purpose of overtime pay computations under the Fair Labor Standards Act of 1938, as amended.

(d) The reduction or termination of an employee's special rate supplement in accordance with the requirements of this subpart is not an adverse action under 5 CFR part 752, subpart D, or an action under 5 CFR 930.214.

Setting an Employee's Rate of Pay

§ 530.321 General.

(a) This section and §§ 530.322 and 530.323 provide conversion rules for setting an employee's pay when a special rate schedule is established, increased, decreased, or discontinued, or when an employee's coverage under an existing special rate schedule is affected by a change in coverage criteria. These conversion rules do not apply to changes in an employee's special rate entitlements based on a change in the employee's position of record or official worksite. Pay-setting rules for other personnel actions affecting special rate employees are provided in 5 CFR parts 531 and 536. For example, if an employee becomes covered by a special rate schedule as a result of a change in the employee's official worksite, the geographic conversion rule in 5 CFR 531.205 must be used to set the employee's rate(s) of basic pay in the new location before considering any

other simultaneous pay action (other than a general pay adjustment).

(b) The conversion rules in §§ 530.322 and 530.323 are considered general pay adjustments for the purpose of applying 5 CFR 531.206 (dealing with the order of precedence for processing simultaneous pay actions). The rate(s) of pay resulting from these conversion rules are considered the employee's existing rate(s) of pay before processing the next simultaneous pay action in the order of precedence.

§ 530.322 Setting pay when a special rate schedule is newly established or increased.

(a) *General rule.* When an employee holds a position that becomes covered by a newly established special rate schedule (including a schedule for which coverage is expanded) or increased special rate schedule (including an increased special rate range within a schedule), the agency must set the employee's rate of pay at the step or rate of the grade on the new special rate schedule that corresponds to the employee's existing numerical step or rate (as in effect immediately before the new special rate schedule takes effect), except as otherwise provided in this section. The corresponding special rate is determined by adding the applicable special rate supplement on top of the employee's GS rate, subject to the limitation that no special rate may exceed the rate for level IV of the Executive Schedule. For an employee receiving an LEO special base rate, add the applicable special rate supplement to the GS rate for the employee's grade and step, except as otherwise provided under § 530.304(d).

(b) *Employee entitled to a higher rate of basic pay.* As provided in § 530.303(d), if an employee meeting the coverage conditions for a newly established or increased special rate schedule is entitled to a higher rate of basic pay under other legal authority, the employee must be paid at that higher rate.

(c) *Employee receiving a retained rate.* When an employee is receiving a retained rate immediately before the employee's position is covered by a newly established or increased special rate schedule, the agency must determine the employee's rate of pay consistent with the requirements in 5 CFR part 536, subpart C (or 5 CFR 359.705 for a former member of the Senior Executive Service receiving a retained rate under that section).

§ 530.323 Setting pay when a special rate is discontinued or decreased.

(a) *General.* This section applies when a special rate applicable to a position is discontinued or decreased because of—

(1) A reduction or termination of the rates of the special rate schedule (or of rates of a rate range within a schedule); or

(2) The reduction in the scope of coverage of the special rate schedule.

(b) *Employee entitled to pay retention.* When a special rate applicable to a position is discontinued or decreased, and an employee holding the position is entitled to pay retention under 5 CFR part 536 as a result, the employee's rate of pay must be set consistent with the requirements in 5 CFR part 536, subpart C.

(c) *Employee not entitled to pay retention.* When a special rate applicable to a position is discontinued or decreased, and an employee holding the position is not entitled to pay retention under 5 CFR part 536, the employee's rate of pay is set in the highest applicable rate range at the grade and step (or rate) that corresponds to the grade and step (or rate) for the employee's existing special rate (as in effect immediately before the schedule change).

(d) *Employee receiving a retained rate.* When a special rate applicable to a position is discontinued or decreased, and the employee holding the position is receiving a retained rate immediately before the schedule change, the employee's rate of pay must be set consistent with the requirements in 5 CFR part 536, subpart C (or 5 CFR 359.705 for a former member of the Senior Executive Service receiving a retained rate under that section).

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 11. The authority citation for part 531 is revised to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5338; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

■ 12. Revise subpart B to read as follows:

Subpart B—Determining Rate of Basic Pay

General Provisions

Sec.

- 531.201 Purpose.
- 531.202 Coverage.
- 531.203 Definitions.
- 531.204 Entitlement to other rates of pay.
- 531.205 Converting pay upon change in location of employee's official worksite.
- 531.206 Order of processing simultaneous pay actions.
- 531.207 Applying annual pay adjustments.

Setting Pay When Appointment or Position Changes

- 531.211 Setting pay for a newly appointed employee.
- 531.212 Superior qualifications and special needs pay-setting authority.
- 531.213 Setting pay upon change in position without a change in grade.
- 531.214 Setting pay upon promotion.
- 531.215 Setting pay upon demotion.
- 531.216 Setting pay when an employee moves from a Department of Defense or Coast Guard nonappropriated fund instrumentality.
- 531.217 Special conversion rules for certain non-GS employees.

Using a Highest Previous Rate Under the Maximum Payable Rate Rule

- 531.221 Maximum payable rate rule.
- 531.222 Rates of basic pay that may be used as the highest previous rate.
- 531.223 Rates of basic pay that may not be used as the highest previous rate.

Special Rules for GM Employees

- 531.241 Retaining and losing GM status.
- 531.242 Setting pay upon loss of GM status.
- 531.243 Promotion of a GM employee.
- 531.244 Adjusting a GM employee's rate at the time of an annual pay adjustment.
- 531.245 Computing locality rates and special rates for GM employees.
- 531.246 Within-grade increases for GM employees.
- 531.247 Maximum payable rate rule for GM employees.

Subpart B—Determining Rate of Basic Pay

General Provisions

§ 531.201 Purpose.

This subpart contains regulations of the Office of Personnel Management (OPM) implementing 5 U.S.C. 5332, 5333, and 5334, which deal with setting and adjusting rates of basic pay for General Schedule (GS) employees. These regulations are supplemented by regulations on GS within-grade increases in subpart D of this part; GS quality step increases in subpart E of this part; locality rates in subpart F of this part; special rates in 5 CFR part 530, subpart C; and grade and pay retention in 5 CFR part 536.

§ 531.202 Coverage.

This subpart covers employees who occupy positions classified and paid under the GS classification and pay system, as provided in 5 U.S.C. 5102 and 5331 or other applicable laws. Law

enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10. This subpart also covers GS employees who receive special rates under 5 U.S.C. 5305 and 5 CFR part 530, subpart C.

§ 531.203 Definitions.

In this subpart:

Agency means an Executive agency as defined in 5 U.S.C. 105 or an agency in the legislative branch with employees covered by this subpart. To the extent that the regulations in this subpart relate to non-GS service in the Federal Government, *agency* includes any other agency in the Federal Government.

Demotion means a change of an employee, while continuously employed, from one GS grade to a lower GS grade, with or without a reduction in pay.

Employee means an employee as defined in 5 U.S.C. 2105 who is covered by this subpart. For the purpose of determining eligibility under the superior qualifications and special needs pay-setting authority in § 531.212 and applying the maximum payable rate provisions in §§ 531.216 and 531.221 (which consider rates of pay received during non-GS service in the Federal Government), *employee* also includes any employee as defined in 5 U.S.C. 2105 and—

(1) An individual employed by the U.S. Postal Service or the Postal Rate Commission who would be considered an employee under 5 U.S.C. 2105 but for the exclusion in section 2105(e); and

(2) An individual employed by a Department of Defense or Coast Guard nonappropriated fund instrumentality (as described in 5 U.S.C. 2105(c)) for service covered by § 531.216 (for the purpose of applying that section and §§ 531.211 and 531.212).

Existing rate means the rate received immediately before a pay action takes effect, after processing a general pay adjustment and any other simultaneous pay action that is higher in the order of precedence under § 531.206. For example, the *existing rate* immediately before a promotion action must reflect any geographic conversion under § 531.205 and any simultaneous within-grade increase or quality step increase.

Federal Government means all entities of the Government of the United States, including the U.S. Postal Service and the Postal Rate Commission. The District of Columbia is deemed to be part of the Federal Government with respect to employees of the government of the District of Columbia (DC) who

were first employed by that government before October 1, 1987. A Department of Defense or Coast Guard nonappropriated fund instrumentality (as described in 5 U.S.C. 2105(c)) is not considered part of the Federal Government except for the purpose of applying §§ 531.211 and 531.212 to employees covered by § 531.216 upon employment in a GS position.

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. It also refers to the pay schedule of GS rates established under 5 U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

GM employee means a GS employee who was formerly covered by the Performance Management and Recognition System under 5 U.S.C. chapter 54 on October 31, 1993 (and therefore became covered on November 1, 1993, by section 4 of Pub. L. 103-89, the Performance Management and Recognition System Termination Act of 1993), and who continues thereafter to occupy a position as a supervisor or management official (as defined in 5 U.S.C. 7103(a)(10) and (11)) in the same grade of the General Schedule (GS-13, 14, or 15) and in the same agency without a break in service of more than 3 days. (See § 531.241.) Any reference to employees, grades, positions, or rates of basic pay under the General Schedule includes GM employees.

GS rate means a rate of basic pay within the General Schedule, excluding any LEO special base rate and additional pay of any kind such as locality payments or special rate supplements. A rate payable to a GM employee is considered a GS rate even though the rate may fall between GS step rates.

Highest applicable rate range means the rate range applicable to a GS employee based on a given position of record and official worksite that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates may exceed an applicable locality rate range. In certain circumstances, the *highest applicable rate range* may consist of two types of pay rates from different pay schedules—*e.g.*, a range where special rates (based on a fixed dollar supplement) are higher in the lower portion of the range and locality

rates are higher in the higher portion of the range.

Law enforcement officer or *LEO* has the meaning given that term in 5 CFR 550.103.

LEO special base rate means a special base rate established for GS law enforcement officers at grades GS-3 through GS-10 under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509, November 5, 1990, as amended) which is used in lieu of a GS rate.

Locality payment means a locality-based comparability payment payable to GS employees under 5 U.S.C. 5304 and 5 CFR part 531, subpart F.

Locality rate means a GS rate or an LEO special base rate, if applicable, plus any applicable locality payment.

Official worksite means the official location of the employee's position of record, as determined under 5 CFR 531.605.

OPM means the Office of Personnel Management.

Payable rate means the highest rate of basic pay to which an employee is entitled based on the employee's position of record, official worksite, and step (or relative position in range for a GM employee) or, if applicable, a retained rate.

Pay schedule means a set of rate ranges established for GS employees under a single authority—*i.e.*, the General Schedule, an LEO special base rate schedule (for grades GS-3 through 10), a locality rate schedule based on GS rates, a locality rate schedule based on LEO special base rates (for grades GS-3 through 10), or a special rate schedule. A pay schedule applies to or covers a defined category of employees based on established coverage conditions (*e.g.*, official worksite, occupation). A pay schedule is considered to apply to or cover an employee who meets the established coverage conditions even when a rate under that schedule is not currently payable to the employee because of a higher pay entitlement under another pay schedule.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description, excluding any position to which the employee is temporarily detailed. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation

before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

Promotion means a GS employee's movement from one GS grade to a higher GS grade while continuously employed (including such a movement in conjunction with a transfer).

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by a GS employee before any deductions, including a GS rate, an LEO special base rate, a special rate, a locality rate, a retained rate, but exclusive of additional pay of any other kind. For the purpose of applying the maximum payable rate rules in §§ 531.216 and 531.221 to non-GS employees, *rate of basic pay* means a rate of pay under other legal authority which is equivalent to a rate of basic pay for GS employees, as described in this definition.

Rate range or *range* means a range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate. A rate range may consist of GS rates, LEO special base rates, locality rates, special rates, or, for non-GS employees, similar rates under other legal authority.

Reassignment means a change of an employee, while serving continuously in the same agency, from one position to another without promotion or demotion.

Reemployment means employment, including reinstatement or another type of appointment, after a break in service of at least 1 full workday.

Retained rate means a rate above the maximum rate of the rate range applicable to a GS employee which is payable under 5 CFR part 536 or, for a former member of the Senior Executive Service, under 5 CFR 359.705.

Special rate means a rate of pay within a special rate schedule established under 5 CFR part 530, subpart C, or a similar rate for GS employees established under other legal authority (e.g., 38 U.S.C. 7455). The term *special rate* does not include an LEO special base rate.

Special rate schedule means a pay schedule established under 5 CFR part 530, subpart C, to provide higher rates of pay for specified categories of GS positions or employees at one or more grades or levels or a similar schedule established for GS employees under other legal authority (e.g., 38 U.S.C. 7455).

Special rate supplement means the portion of a special rate paid above an employee's GS rate after applying any

applicable pay limitation. For a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate under 5 CFR part 530, subpart C, the special rate supplement increases the LEO's pay only to the extent that the resulting special rate exceeds the LEO's rate of basic pay.

Temporary promotion means a time-limited promotion with a not-to-exceed date or a specified term.

Transfer means a change of an employee, without a break in service of 1 full workday, from one branch of the Federal Government (executive, legislative, or judicial) to another or from one agency to another.

Where different pay schedules apply means, in the context of applying the geographic conversion rule, that an employee's official worksite is changed to a new location that would cause the employee to lose or gain coverage under a location-based pay schedule (i.e., locality rate schedule or special rate schedule) if the employee were to remain in the same position of record.

Within-grade increase has the meaning given that term in § 531.403.

§ 531.204 Entitlement to other rates of pay.

(a) A law enforcement officer is entitled to LEO special base rates in lieu of GS rates at grades GS-3 through GS-10. A law enforcement officer is entitled to the LEO special base rate that corresponds to his or her grade and step. If an employee loses LEO status, the employee is entitled to the GS rate for his or her grade and step unless a higher rate is set under the maximum payable rate rule in § 531.221 or under the pay retention rules in 5 CFR part 536, as applicable. LEO special base rates are used in computing locality rates, as provided in subpart F of this part. A law enforcement officer may be entitled to a special rate that is computed using the underlying GS rate for the LEO's grade and step.

(b) When an employee's GS rate or LEO special base rate is determined under the rules of this subpart, the agency must determine any other rate of basic pay to which the employee is entitled, including a locality rate under subpart F of this part and a special rate under 5 CFR part 530, subpart C, or other legal authority (e.g., 38 U.S.C. 7455). The employee is entitled to the highest applicable rate of basic pay as his or her payable rate. When an employee's special rate is surpassed by a higher locality rate, his or her entitlement to a special rate is terminated, as provided in § 530.303(d).

(c) When application of the rules in this subpart results in setting an employee's payable rate in the highest

applicable pay schedule (e.g., a locality rate schedule or a special rate schedule), the agency must determine the employee's underlying GS rate or LEO special base rate, as applicable, based on that payable rate (i.e., by finding the corresponding underlying rate with the same grade and step (or relative position) as the payable rate).

§ 531.205 Converting pay upon change in location of employee's official worksite.

When an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee's rate(s) of basic pay to the applicable pay schedule(s) in the new location before processing any simultaneous pay action (other than a general pay adjustment, as provided in § 531.206). The agency must first set the employee's rate(s) of basic pay in the applicable pay schedule(s) in the new location based on his or her position of record (including grade) and step (or rate) immediately before the change in the employee's official worksite. The resulting rate must be used as the existing rate in processing the next simultaneous pay action in the order of precedence, using the applicable pay schedules in the new location. In conjunction with any simultaneous pay actions, the employee's rate(s) of basic pay will then be set based on the employee's new position of record and new official worksite.

§ 531.206 Order of processing simultaneous pay actions.

When multiple pay actions with the same effective date affect an employee's rate of basic pay, the actions will be processed in the following order:

(a) Process general pay adjustments before any individual pay action that takes effect at the same time. General pay adjustments include an annual adjustment in the General Schedule under 5 U.S.C. 5303; an adjustment in LEO special base rates; an adjustment of a locality pay percentage under subpart F of this part; the establishment or adjustment of a special rate schedule under 5 CFR part 530, subpart C, or similar legal authority (e.g., 38 U.S.C. 7455); and an adjustment of a retained rate under 5 CFR 359.705(d)(1) and 536.305(a)(1) based on the establishment or adjustment of a pay schedule.

(b) Convert the employee's rate(s) of pay to reflect any change in the location of the employee's official worksite, as prescribed in § 531.205 (or similar geographic conversion provision).

(c) Process any within-grade increase or quality step increase to which the employee is entitled.

(d) Process any promotion action using the rates of pay and rate ranges in the sequence prescribed in § 531.214.

(e) Except as otherwise provided in paragraphs (a) through (d) of this section or other regulation, process individual pay actions that take effect at the same time in the order that gives the employee the maximum benefit.

§ 531.207 Applying annual pay adjustments.

(a) Except as otherwise provided in this section, on the effective date of a GS pay adjustment under 5 U.S.C. 5303 or similar authority, an agency initially must set the GS rate of a GS employee at the new rate of the adjusted General Schedule corresponding to the employee's grade and step in effect immediately before the effective date of the pay adjustment. Any simultaneous pay actions must be processed after the pay adjustment, as provided in § 531.206.

(b) For employees receiving a retained rate immediately before the effective date of a GS annual pay adjustment, the agency must adjust the employee's rate of basic pay under the rules in 5 CFR 536.305 (or under 5 CFR 359.705 for former members of the Senior Executive Service receiving a retained rate under that section).

(c) For GM employees, the agency must follow the rules in § 531.244.

Setting Pay When Appointment or Position Changes

§ 531.211 Setting pay for a newly appointed employee.

(a) *First appointment.* An agency must set the payable rate of basic pay for an employee receiving his or her first appointment (regardless of tenure) as a civilian employee of the Federal Government at the minimum rate of the highest applicable rate range for the employee's position of record, except as provided in § 531.212.

(b) *Reemployment.* For an employee who has previous civilian service in the Federal Government, an agency must set the payable rate of basic pay upon reemployment at the minimum rate of the highest applicable rate range for the employee's position of record unless—

(1) The employee meets the conditions in § 531.212 and an agency determines it is appropriate to set pay under that section; or

(2) The employee is eligible for a higher payable rate under the maximum payable rate rule in § 531.221 and the agency chooses to apply that rule.

§ 531.212 Superior qualifications and special needs pay-setting authority.

(a) *Agency authority.* (1) An agency may use the superior qualifications and special needs pay-setting authority in 5 U.S.C. 5333 to set the payable rate of basic pay for an employee above the minimum rate of the highest applicable rate range for the employee's position of record. The superior qualifications and special needs pay-setting authority may be used for—

(i) A first appointment (regardless of tenure) as a civilian employee of the Federal Government; or

(ii) A reappointment that is considered a new appointment under 5 U.S.C. 5333 because it meets the conditions prescribed in paragraph (a)(2) and (3) of this section.

(2) An agency may use the superior qualifications and special needs pay-setting authority for a reappointment only when the employee has had a break in service of at least 90 days from the last period of civilian employment with the Federal Government, except as provided in paragraph (a)(3) of this section.

(3) An agency may use the superior qualifications and special needs pay-setting authority for a reappointment without requiring a 90-day break in service if the candidate's civilian employment with the Federal Government during the 90-day period immediately preceding the appointment was limited to one or more of the following:

(i) Employment under a time-limited or non-permanent appointment in the competitive or excepted service;

(ii) Employment under an appointment as an expert or consultant under 5 U.S.C. 3109 and 5 CFR part 304; or

(iii) Employment under a provisional appointment designated under 5 CFR 316.403.

(4) Service as an employee of a nonappropriated fund instrumentality (NAFI) of the Department of Defense or Coast Guard is not considered employment by the Federal Government under this section except for employees covered by § 531.216 upon appointment or reappointment (*i.e.*, employees who move from NAFI position to GS position with a break in service of 3 days or less and without a change in agency).

Employees covered by § 531.216 upon appointment or reappointment to a GS position are not eligible to have pay set under the superior qualifications or special needs authority, since their NAFI employment is considered employment by the Federal Government. Otherwise, NAFI

employment does not block application of this section.

(b) *Superior qualifications or special needs determination.* An agency may set the payable rate of basic pay of a newly appointed employee above the minimum rate of the grade under this section if the candidate meets one of the following criteria:

(1) The candidate has superior qualifications. An agency may determine that a candidate has superior qualifications based on the level, type, or quality of the candidate's skills or competencies demonstrated or obtained through experience and/or education, the quality of the candidate's accomplishments compared to others in the field, or other factors that support a superior qualifications determination. The candidate's skills, competencies, experience, education, and/or accomplishments must be relevant to the requirements of the position to be filled. These qualities must be significantly higher than that needed to be minimally required for the position and/or be of a more specialized quality compared to other candidates; or

(2) The candidate fills a special agency need. An agency may determine that a candidate fills a special agency need if the type, level, or quality of skills and competencies or other qualities and experiences possessed by the candidate are relevant to the requirements of the position and are essential to accomplishing an important agency mission, goal, or program activity. A candidate also may meet the special needs criteria by meeting agency workforce needs, as documented in the agency's strategic human capital plan.

(c) *Pay rate determination.* An agency may consider one or more of the following factors, as applicable in the case at hand, to determine the step at which to set an employee's payable rate of basic pay using the superior qualifications and special needs pay-setting authority:

(1) The level, type, or quality of the candidate's skills or competencies;

(2) The candidate's existing salary, recent salary history, or salary documented in a competing job offer (taking into account the location where the salary was or would be earned and comparing the salary to payable rates of basic pay in the same location);

(3) Significant disparities between Federal and non-Federal salaries for the skills and competencies required in the position to be filled;

(4) Existing labor market conditions and employment trends, including the availability and quality of candidates for the same or similar positions;

- (5) The success of recent efforts to recruit candidates for the same or similar positions;
- (6) Recent turnover in the same or similar positions;
- (7) The importance/criticality of the position to be filled and the effect on the agency if it is not filled or if there is a delay in filling it;
- (8) The desirability of the geographic location, duties, and/or work environment associated with the position;
- (9) Agency workforce needs, as documented in the agency's strategic human capital plan; or
- (10) Other relevant factors.

(d) *Consideration of recruitment incentive.* In determining whether to use the superior qualifications and special needs pay-setting authority and the level at which the employee's payable rate of basic pay should be set, an agency must consider the possibility of authorizing a recruitment incentive under 5 CFR part 575, subpart A.

(e) *Approval and documentation requirements.* (1) An agency must approve each determination to use the superior qualifications and special needs pay-setting authority prior to the candidate entering on duty. Each determination must be made in writing and reviewed and approved by an official of the agency who is at least one level higher than the employee's supervisor, unless there is no official at a higher level in the agency.

(2) An agency must document all of the following for each determination to use the superior qualifications and special needs pay-setting authority sufficient to allow reconstruction of the action taken in each case:

(i) The superior qualifications of the candidate under paragraph (b)(1) of this section or the special agency need for the candidate's services under paragraph (b)(2) of this section which justifies a higher than minimum rate;

(ii) An explanation of the factor(s) and supporting documentation under paragraph (c) of this section which were used to justify the rate at which the employee's pay is set. The written documentation must explain how the factors directly relate to the rate approved; and

(iii) The reasons for authorizing a higher than minimum rate instead of or in addition to a recruitment incentive under 5 CFR part 575, subpart A.

(f) *Ensuring compliance.* An agency must establish appropriate internal guidelines and evaluation procedures to ensure compliance with the law, this section of OPM regulations, and agency policies.

§ 531.213 Setting pay upon change in position without a change in grade.

For an employee who is moved laterally (by transfer, reassignment, change in type of appointment, change in official worksite, or other change in position) from one GS position to a different GS position without a change in grade or a break in service, the agency must determine the employee's payable rate of basic pay and any underlying rate(s)s of basic pay based on the employee's new position of record, new official worksite, and the step (or rate) in effect before the position change. If an employee is eligible to receive a higher rate under the maximum payable rate rule in § 531.221, the agency may choose to apply that rule. If an employee is entitled to pay retention, the agency must apply the rules in 5 CFR part 536.

§ 531.214 Setting pay upon promotion.

(a) *General.* An agency must set an employee's payable rate of basic pay upon promotion following the rules in this section, consistent with 5 U.S.C. 5334(b). The promotion rule in 5 U.S.C. 5334(b) and the implementing rules in this section apply only to a GS employee who is promoted from one GS grade to a higher GS grade. Consistent with § 531.206, any general pay adjustment that takes effect on the same day as a promotion action must be processed before applying the rules in this section.

(b) *Geographic conversion.* When an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee to the applicable pay schedule(s) and rate(s) of basic pay for the new official worksite based on the employee's position of record before promotion as provided in § 531.205 before processing a simultaneous promotion action.

(c) *Simultaneous within-grade increase.* When an employee is entitled to a within-grade increase or a quality step increase that is effective at the same time as a promotion, the agency must process that increase before processing the promotion action.

(d) *Promotion rule.* (1) *General.* An agency must determine an employee's payable rate of basic pay upon promotion using the standard method in paragraph (d)(3) of this section or the alternate method in paragraph (d)(4) of this section, subject to the special rule in paragraph (d)(5) of this section for employees receiving a retained rate before promotion. A determination regarding whether the alternate method is used in place of the standard method depends on the pay schedules that

apply to an employee before and after promotion, as provided in paragraph (d)(2) of this section. In this paragraph (d), references to an employee's rate or range "before promotion" mean the rate or range before promotion but after any geographic conversion required by paragraph (b) of this section.

(2) *Determining applicable method.*

The following rules govern determinations regarding which promotion method to use:

(i) Apply the standard method exclusively if the employee is covered by the same pay schedules before and after promotion. For example, an employee may be covered by the General Schedule and the same locality rate schedule before and after promotion.

(ii) Apply the alternate method if the employee is covered by different pay schedules before and after promotion and if the alternate method will produce a higher payable rate upon promotion than the standard method. For example, an employee may be covered after promotion by a special rate schedule that did not apply to him or her before promotion, and the alternate method will produce a higher rate.

(iii) Apply the standard method in all other circumstances, except that an agency may, at its sole and exclusive discretion, apply the alternate method for an employee covered by different pay schedules before and after promotion even though the method produces a lesser payable rate than the standard method, but only under the following conditions:

(A) The agency determines it would be inappropriate to use the alternate method based on a finding that the higher pay for the position before promotion is not sufficiently related to the knowledge and skills required for the position after promotion; and

(B) The agency informs the employee of the determination to use the alternate method before the effective date of the promotion.

(3) *Standard method.* (i) The standard method of applying the promotion rule is presented in the following table:

Promotion Rule—Standard Method

Step A—If applicable, apply the geographic conversion rule in § 531.205 to determine the employee's rate(s) and range(s) of basic pay based on the employee's position of record before promotion and the new official worksite, as required by paragraph (b) of this section. Also, if applicable, provide any simultaneous within-grade increase or quality step increase, as required by paragraph (c) of this section. Use the resulting rate(s) of basic pay as the existing rate(s) in effect immediately before promotion in applying steps B and C.

Step B—Identify the employee's existing GS rate (or LEO special base rate) in the grade before promotion, and increase that rate by two GS within-grade increases for that grade.

Step C—Determine the payable (highest) rate of basic pay for the step or rate determined in step B by applying any locality payment or special rate supplement applicable to the given grade, based on the employee's position of record before promotion and official worksite after promotion. (If the rate determined in step B is above the range maximum, use the same locality payment or special rate supplement that applies to rates within the rate range.)

Step D—Identify the highest applicable rate range for the employee's position of record after promotion and find the lowest step rate in that range that equals or exceeds the rate determined in step C. This is the employee's payable rate of basic pay upon promotion. (If the rate identified in step C exceeds the maximum of the rate range identified in this step, the employee's payable rate is that maximum rate, or, if the employee's existing rate is higher than that maximum rate, a retained rate under 5 CFR part 536 equal to that existing rate.)

(ii) Example of standard method: A GS-11, step 5, employee in Los Angeles is promoted to a GS-12 position in Kansas City. In Kansas City, a special rate schedule would apply to the employee's GS-11 position, but at GS-12 no special rate range applies; instead, just a locality rate range applies. Thus, different pay schedules apply to the employee in Kansas City before and after promotion. The agency determines that the standard method produces a higher rate than the alternate method because the employee is covered by a special rate schedule before promotion but not after promotion. The agency also determines it will not invoke the exception provision under paragraph (d)(2)(iii). The agency applies the standard method as follows:

Step A—Apply the geographic conversion rule to determine the rates of basic pay for the GS-11, step 5, position in Kansas City. The pay schedules applicable to the employee in Kansas City are the General Schedule, the locality rate schedule applicable in Kansas City, and the special rate schedule applicable to the employee's position in Kansas City.

Step B—Using the underlying General Schedule, increase the GS-11, step 5, rate by two within-grade increases, which produces the GS-11, step 7, rate.

Step C—The payable (highest) rate of basic pay for GS-11, step 7, is the corresponding GS-11, step 7, special rate that would be applicable to the GS-11 position in Kansas City.

Step D—The highest applicable rate range for the GS-12 position after promotion is the GS-12 locality rate range under the Kansas City locality rate schedule. Find the lowest step rate in that range that equals or exceeds the GS-11, step 7, special rate from step C. That step rate is the payable rate of basic pay upon promotion.

(4) *Alternate method.* (i) The alternate method of applying the promotion rule, which involves using pay schedules applicable before promotion and then converting pay to a different schedule applicable after promotion, is presented in the following table:

Promotion Rule—Alternate Method

Steps A, B, C—Same as standard method in paragraph (d)(3) of this section.

Step D—Identify the highest applicable rate range for the employee's grade after promotion based on consideration of any pay schedule that applied to the employee's position of record *before* promotion (after any geographic conversion). (Do not consider pay schedules that apply only to the employee's new position of record after promotion. For example, if a particular special rate schedule applies only to an employee's position of record after promotion, disregard that schedule in applying this step.) Find the lowest step in the highest applicable rate range that equals or exceeds the rate identified in step C. (If the rate identified in step C exceeds the maximum of the rate range identified in this step, the employee's payable rate is that maximum rate, or, if the employee's existing rate is higher than that maximum rate, a retained rate under 5 CFR part 536 equal to that existing rate.)

Step E—Convert the lowest step rate identified in step D to a corresponding step rate (same step) in the highest applicable rate range for the employee's new position of record after promotion. This is the employee's alternate payable rate of basic pay upon promotion. (If the rate derived under step D was a retained rate, determine the alternate payable rate of basic pay as provided in paragraph (d)(4)(ii) of this section.)

Step F—If the alternate payable rate identified in step E exceeds the payable rate resulting from the standard method in paragraph (d)(3) of this section, the employee is entitled to the alternate rate upon promotion. Otherwise, the employee is entitled to the payable rate derived under the standard method, except as provided in paragraph (d)(2)(iii) of this section.

(ii) In applying step E of the table in paragraph (d)(4)(i) of this section, if the rate derived under step D was a retained rate, compare the retained rate to the highest applicable rate range identified in step E. If the retained rate exceeds the maximum of that rate range, the retained rate continues and is the employee's alternate payable rate upon promotion. If the retained rate is below the rate range maximum, the employee's alternate payable rate upon promotion is the maximum rate of the range (step 10).

(iii) Example of alternate method: A GS-7, step 7, employee in Atlanta is promoted to a GS-9 position in Washington, DC. The promotion involves not only a change in grade but also a change in the employee's occupational series. In Washington, DC,

no special rate schedule would apply to a GS-7 or GS-9 position in the old occupational series, but a special rate schedule does apply to the GS-9 position in the new occupational series. Thus, different pay schedules apply before and after promotion, and the alternate method would result in a higher rate than the standard method. As provided in paragraph (d)(2)(ii) of this section, the agency must apply the alternate method and compare the result to the result derived under the standard method, as follows:

Step A—Apply the geographic conversion rule in § 531.205 to determine the rates of basic pay for the GS-7, step 7, position in Washington, DC. Based on the GS-7 position before promotion (including the old occupational series), the pay schedules applicable to the employee in Washington, DC, would be the General Schedule and the locality rate schedule applicable in Washington, DC.

Step B—Using the underlying General Schedule, increase the GS-7, step 7, rate by two within-grade increases, which produces the GS-7, step 9, rate.

Step C—The payable (highest) rate of basic pay for GS-7, step 9, is the corresponding GS-7, step 9, locality rate in Washington, DC.

Step D—If the employee were promoted to a GS-9 position in the old occupational series, the highest applicable rate range for that GS-9 position after promotion would be the GS-11 locality rate range in Washington, DC. The GS-9, step 3, locality rate is the lowest step rate in that range that equals or exceeds the GS-7, step 9, locality rate from step C.

Step E—Convert the GS-9, step 3, locality rate to the higher GS-9, step 3, special rate that applies to the employee's position after promotion (including the new occupational series). That GS-9, step 3, special rate is the payable rate of basic pay upon promotion.

Step F—Assume that the standard method would have compared the GS-7, step 9, locality rate directly to the higher GS-9 range of special rates and produced a rate of GS-9, step 1. Since the rate produced by the alternate method (GS-9, step 3) is greater than the rate produced by the standard method, the result of the alternate method is used.

(5) *If employee was receiving a retained rate before promotion.* (i) If an employee's existing payable rate of basic pay before promotion is a retained rate, apply the applicable promotion methods in paragraphs (d)(3) or (d)(4) of this section as if the employee were receiving the maximum rate of the employee's grade before promotion.

(ii) If the payable rate of basic pay after promotion determined under paragraph (d)(5)(i) of this section is greater than the employee's existing retained rate, the employee is entitled to that payable rate.

(iii) If the existing retained rate is greater than the rate determined under

paragraph (d)(5)(i) of this section, the retained rate must be compared to the highest applicable rate range for the position after promotion, as provided in 5 CFR 536.304. The employee is entitled to the lowest step rate in the range that equals or exceeds the retained rate or, if the retained rate exceeds the range maximum, to the retained rate.

(6) *If employee is promoted from GS-1 or GS-2.* In applying the promotion rule to an employee who is promoted from step 9 or 10 of grade GS-1 or GS-2, the value of two within-grade increases is determined by doubling the within-grade increase between step 9 and 10 for the applicable grade.

(e) *Temporary promotions.* Pay is set for an employee receiving a temporary promotion on the same basis as a permanent promotion. Upon expiration or termination of the temporary promotion, pay is set as provided in § 531.215(c). If a temporary promotion is made permanent immediately after the temporary promotion ends, the agency may not return the employee to the lower grade; instead, the agency must convert the employee's temporary promotion to a permanent promotion without a change in pay.

(f) *Corrections of demotions.* The promotion rule in this section may not be used in correcting an erroneous demotion. (See § 531.215(e).)

§ 531.215 Setting pay upon demotion.

(a) *General.* Except as otherwise provided in this section, an employee who is demoted is entitled to the minimum payable rate of basic pay for the lower grade unless the agency sets the employee's pay at a higher rate under—

(1) The grade and pay retention rules in 5 CFR part 536, as applicable; or

(2) The maximum payable rate rule in § 531.221, as applicable.

(b) *Geographic conversion.* If the employee's official worksite after demotion is in a different geographic location where different pay schedules apply, the agency must first convert the employee's payable rate of pay as required by § 531.205 before setting the demoted employee's pay using the grade and pay retention rules in 5 CFR part 536 or the maximum payable rate rule in § 531.221.

(c) *Expiration or termination of a temporary promotion.* (1) When an employee is returned to the lower grade from which promoted on expiration or termination of a temporary promotion, the agency must set the employee's payable rate of basic pay in the lower grade as if he or she had not been temporarily promoted, unless the agency sets pay at a higher rate under

the maximum payable rate rule in § 531.221. As provided in subpart D of this part, time during the temporary promotion may be creditable service towards GS within-grade increases in the lower grade.

(2) If a temporary promotion is made permanent immediately after the temporary promotion ends, the agency may not return the employee to the lower grade. (See § 531.214(e).)

(d) *Demotion upon failure to complete a supervisory probationary period.* When an employee promoted to a supervisory or managerial position does not satisfactorily complete a probationary period established under 5 U.S.C. 3321(a)(2) and is returned to a position at the lower grade held before the promotion, the agency must set the employee's payable rate of basic pay upon return to the lower grade as if the employee had not been promoted to the supervisory or managerial position, unless the agency sets pay at a higher rate under the maximum payable rate rule in § 531.221. As provided in subpart D of this part, time served following the promotion may be creditable service towards GS within-grade increases in the lower grade. However, nothing in this paragraph prohibits an agency from taking action against an employee covered by this paragraph for cause unrelated to supervisory or managerial performance and setting pay in accordance with such action.

(e) *Correcting an erroneous demotion.* When a demotion is determined to be erroneous and is canceled, the agency must set the employee's rate of basic pay as if the employee had not been demoted. The action is a correction of the original demotion action and may not be treated as a promotion under § 531.214. For example, when a demotion based on a reclassification of the employee's position is found to be erroneous and is corrected retroactively under 5 CFR 511.703, the corrective action is cancellation of the original demotion.

§ 531.216 Setting pay when an employee moves from a Department of Defense or Coast Guard nonappropriated fund instrumentality.

(a) *General.* This section governs the setting of pay for an employee who moves to a GS position from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (NAFI) (as described in 5 U.S.C. 2105(c)) without a break in service of more than 3 days and without a change in the employing agency. If an employee moves from an NAFI position to a GS position with a break of more

than 3 days or in conjunction with a transfer to a different agency, the employee has no special conversion rights, and this section does not apply.

(b) *NAFI highest previous rate.* For the purpose of this section, the term "NAFI highest previous rate" means the highest rate of basic pay received by an employee during service in a NAFI position, as described in 5 U.S.C. 2105(c).

(c) *Voluntary move.* (1) For a Department of Defense or Coast Guard employee who moves voluntarily, without a break in service of more than 3 days, from an NAFI position in the Department of Defense or the Coast Guard to a GS position in the same agency, the agency may set the employee's initial payable rate of basic pay at any step rate in the highest applicable rate range currently in effect for the employee's GS position of record and official worksite which does not exceed the employee's NAFI highest previous rate of pay, except as provided in paragraph (c)(2) or (3) of this section.

(2) If the highest applicable rate range would be different if the official worksite for the employee's position of record were located at the place where the employee was stationed while earning the NAFI highest previous rate, the agency must determine the employee's maximum payable rate of basic pay as follows:

(i) Compare the NAFI highest previous rate to the highest applicable rate range currently in effect in the location where the employee was stationed while earning that rate. The highest applicable rate range is determined based on the pay schedules that would be applicable to the employee's current GS position of record if the employee were stationed in that location. Identify the highest step rate in the highest applicable rate range that was equal to or lower than the NAFI highest previous rate. If the NAFI highest previous rate is less than the range minimum, identify the minimum step rate (step 1).

(ii) Identify the step rate in the highest applicable rate range for the employee's current official worksite and position of record that corresponds to the step rate derived under paragraph (c)(2)(i) of this section. That corresponding rate is the maximum payable rate at which the agency may set the employee's pay under this section, except as provided by paragraph (c)(3) of this section. The agency may set the employee's rate of basic pay at any step rate below that maximum payable rate.

(3) An agency may choose to apply the maximum payable rate rule in § 531.221 based on a non-NAFI rate of

basic pay if that rule provides a higher rate than provided by paragraph (c)(1) or (2) of this section.

(d) *Involuntary move.* (1) For a Department of Defense or Coast Guard employee who is moved involuntarily (as defined in paragraph (d)(3) of this section), without a break in service of more than 3 days, from a position with substantially the same duties in a Department of Defense or Coast Guard NAFI to a GS position in the same agency, the employee is entitled to an initial payable rate of basic pay at the lowest step rate of the grade that is equal to or greater than the employee's rate of basic pay in the NAFI position immediately before the move. The agency must compare the employee's former NAFI rate to the highest applicable rate range for the employee's GS position of record and official worksite.

(2) For an employee covered by paragraph (d)(1) of this section, the agency may set the initial payable rate of basic pay at any of the following rates, unless the employee is entitled to receive a higher rate of basic pay under paragraph (d)(1) of this section:

(i) A step rate within the highest applicable rate range for the employee's GS position of record and official worksite that does not exceed the employee's NAFI highest previous rate (consistent with the method prescribed in paragraphs (c)(1) and (2) of this section);

(ii) A rate determined under the maximum payable rate rule in § 531.221 (using non-NAFI rates of basic pay); or

(iii) A rate determined under the authority to grant pay retention in 5 CFR 536.302(a).

(3) For the purpose of this paragraph (d), "moved involuntarily" means the movement of the incumbent of an NAFI position in the Department of Defense or the Coast Guard with the position when it is moved to the civil service employment system of the Department of Defense or the Coast Guard, respectively.

§ 531.217 Special conversion rules for certain non-GS employees.

When an employee moves (without a break in service) to a GS position from a non-GS system under an authority in 5 U.S.C. chapters 47, 95, or similar provision of law, and that authority provides that an employee will be converted to GS-equivalent rates immediately before leaving the non-GS system, the employee is considered a GS employee in applying the provisions of this subpart.

Using a Highest Previous Rate Under the Maximum Payable Rate Rule

§ 531.221 Maximum payable rate rule.

(a) *General.* (1) An agency may apply the maximum payable rate rule as described in this section to determine an employee's payable rate of basic pay under the GS pay system at a rate higher than the otherwise applicable rate upon reemployment, transfer, reassignment, promotion, demotion, or change in type of appointment. (Note: Special rules for GM employees are provided in § 531.247.) A payable rate set under this section must take effect on the effective date of the action involved. This section may not be used to set an employee's rate of basic pay retroactively unless a retroactive action is required to comply with a nondiscretionary agency policy.

(2) At its discretion, an agency may set an employee's rate(s) of basic pay at the maximum rate identified under this section or at a lower rate. However, the employee's rate may not be lower than the rate to which he or she is entitled under any other applicable pay-setting rule.

(3) In applying this section, an agency must use applicable annual rates of pay or, if a rate under a non-GS system is an hourly rate, convert the hourly rate to an annual rate.

(b) *When highest previous rate is based on a GS rate or LEO special base rate.* When an employee's highest previous rate (as determined under § 531.222) is based on a GS rate or an LEO special base rate paid under the GS pay system, an agency must determine the maximum payable rate of basic pay that may be paid to the employee as follows:

(1) Compare the employee's highest previous rate with the GS rates for the grade in which pay is currently being set. For this comparison, use the schedule of GS rates in effect at the time the highest previous rate was earned. In applying this paragraph to an employee who was a law enforcement officer receiving an LEO special base rate when the highest previous rate was earned, compare the highest previous rate to the applicable LEO special base rates in lieu of GS rates if the grade in which pay is currently being set is one of the grades from GS-3 through GS-10.

(2) Identify the lowest step in the grade at which the GS rate (or LEO special base rate, if applicable) was equal to or greater than the employee's highest previous rate. If the employee's highest previous rate was greater than the maximum GS rate (or LEO special base rate, if applicable) for the grade, identify the step 10 rate (i.e., maximum rate of the grade).

(3) Identify the rate on the currently applicable range of GS rates or LEO special base rates for the employee's current position of record and grade that corresponds to the step identified in paragraph (b)(2) of this section. This rate is the maximum payable GS rate or LEO special base rate the agency may pay the employee under this section.

(4) After setting the employee's GS or LEO special base rate within the rate range for the grade (not to exceed the maximum payable rate identified in paragraph (b)(3) of this section), the agency must determine the employee's payable rate of basic pay based on the employee's GS or LEO special base rate.

(c) *When highest previous rate is based on a GS employee's special rate.* When a GS employee is reassigned under the conditions described in § 531.222(c), the employee's former special rate in effect immediately before the reassignment may be used as the employee's highest previous rate. If the employee's former special rate schedule is being adjusted on the effective date of the employee's reassignment, the agency must determine what the employee's special rate would have been on that adjusted schedule (before any other simultaneous action) and treat the resulting special rate as the employee's former special rate in applying paragraph (c)(1) and (2) of this section. The agency must apply the maximum payable rate rule as follows:

(1) When the employee is assigned to an official worksite within the geographic boundaries of a formerly applicable special rate schedule, compare the former special rate to the rates of basic pay in the highest applicable rate range for the employee's current position of record and current official worksite. Identify the lowest step rate in that range that equals or exceeds the former special rate (or the maximum step rate, if the former special rate exceeds the range maximum). That step rate is the employee's maximum payable rate of basic pay.

(2) When the employee is assigned to an official worksite outside the geographic boundaries of the formerly applicable special rate schedule, determine the maximum payable rate as follows:

(i) Convert the former special rate to a corresponding rate (same step) in the current highest applicable rate range for the new official worksite based on the employee's position of record immediately before the reassignment.

(ii) If the rate resulting from the geographic conversion under paragraph (c)(2)(i) of this section is a special rate, that converted special rate is deemed to be the employee's former special rate

and highest previous rate in applying paragraph (c)(2)(iii) of this section. If the resulting rate is not a special rate, this paragraph (c) may not be used to determine the employee's maximum payable rate. Instead, paragraph (b) of this section must be used.

(iii) Compare the employee's highest previous rate (*i.e.*, the former special rate after the geographic conversion) with the rates on the current highest applicable rate range for the new official worksite based on the employee's position of record after the reassignment. Identify the lowest step rate in that range that equals or exceeds the highest previous rate (or the maximum step rate, if the highest previous rate exceeds the range maximum). That step rate is the employee's maximum payable rate of basic pay.

(3) After setting the employee's rate of basic pay in the highest applicable rate range (not to exceed the maximum payable rate), the agency must determine any underlying rate of basic pay to which the employee is entitled based on the employee's step rate.

(d) *When highest previous rate is based on a rate under a non-GS pay system.* When an employee's highest previous rate (as provided in § 531.222) is based on a rate of basic pay in a non-GS pay system, the agency must determine the maximum payable rate of basic pay that may be paid to the employee in his or her current GS position of record as follows:

(1) Compare the highest previous rate to the highest applicable rate range in effect at the time and place where the highest previous rate was earned. The highest applicable rate range is determined as if the employee held the current GS position of record (including grade in which pay is being set) at that time and place. Identify the lowest step rate in that range that was equal to or higher than the highest previous rate (or the maximum step rate if the highest previous rate exceeded the range maximum).

(2) Convert the step rate identified in paragraph (d)(1) of this section to a corresponding rate (same step) in the current highest applicable rate range for the employee's current GS position of record and official worksite. That step rate is the employee's maximum payable rate of basic pay.

(3) After setting the employee's rate of basic pay in the current highest applicable rate range (not to exceed the maximum payable rate), the agency must determine any underlying rate of basic pay to which the employee is entitled at the determined step rate.

§ 531.222 Rates of basic pay that may be used as the highest previous rate.

(a)(1) Subject to the conditions in this section and § 531.223, the highest previous rate used in applying § 531.221 is—

(i) The highest rate of basic pay previously received by an individual while employed in a civilian position in any part of the Federal Government (including service with the government of the District of Columbia for employees first employed by that government before October 1, 1987), without regard to whether the position was in the GS pay system; or

(ii) The highest rate of basic pay in effect when a GS employee held his or her highest GS grade and highest step within that grade.

(2) The highest previous rate must be a rate of basic pay received by an employee while serving—

(i) On a regular tour of duty under an appointment not limited to 90 days or less; or

(ii) For a continuous period of not less than 90 days under one or more appointments without a break in service.

(b) For periods of service as a GS employee, the highest previous rate may not be a special rate, except as provided in paragraph (c) of this section. If the highest previous rate is a locality rate, the underlying GS rate or an LEO special base rate associated with that locality rate must be used as the highest previous rate in applying § 531.221(b).

(c) An agency may use a GS employee's special rate established under 5 U.S.C. 5305 and 5 CFR part 530, subpart C, or 38 U.S.C. 7455 as the highest previous rate when all of the following conditions apply:

(1) The employee is reassigned to another position in the same agency at the same grade level;

(2) The special rate is the employee's rate of basic pay immediately before the reassignment; and

(3) An authorized agency official finds that the need for the services of the employee, and the employee's contribution to the program of the agency, will be greater in the position to which reassigned. An agency must make such determinations on a case-by-case basis. In each case, the agency must document the determination to use the special rate as an employee's highest previous rate in writing.

(d) When an agency is barred from using a special rate established under 5 U.S.C. 5305 and 5 CFR part 530, subpart C, or 38 U.S.C. 7455 as an employee's highest previous rate under § 531.223(g), the agency must consider a special rate employee's underlying GS rate (or LEO

special base rate, if applicable) in determining the employee's highest previous rate for the purpose of applying paragraph (b) of this section.

§ 531.223 Rates of basic pay that may not be used as the highest previous rate.

The highest previous rate may not be based on the following:

(a) A rate received under an appointment as an expert or consultant under 5 U.S.C. 3109;

(b) A rate received in a position to which the employee was temporarily promoted for less than 1 year, except upon permanent placement in a position at the same or higher grade;

(c) A rate received in a position from which the employee was reassigned or reduced in grade for failure to satisfactorily complete a probationary period as a supervisor or manager;

(d) A rate received by an individual while employed by the government of the District of Columbia who was first employed by that government on or after October 1, 1987;

(e) A rate received by an individual while employed by a Department of Defense or Coast Guard nonappropriated fund instrumentality;

(f) A rate received solely during a period of interim relief under 5 U.S.C. 7701(b)(2)(A);

(g) A special rate established under 5 U.S.C. 5305 and 5 CFR part 530, subpart C, or 38 U.S.C. 7455 (except as provided in § 531.222(c)); or

(h) A rate received under a void appointment or a rate otherwise contrary to applicable law or regulation.

Special Rules for GM Employees

§ 531.241 Retaining and losing GM status.

(a) An employee retains status as a GM employee (as defined in § 531.203) when detailed to any position or when reassigned to another GS position in which the employee continues to be a supervisor or management official (as defined in 5 U.S.C. 7103(a)(10) and (11)).

(b) An employee permanently loses status as a GM employee if he or she is promoted (including a temporary promotion), transferred, demoted, reassigned to a position in which the employee will no longer be a supervisor or management official, has a break in service of more than 3 days, or becomes entitled to a retained rate under 5 CFR part 536. (A retained grade is not considered in determining whether a GM employee has been reduced in grade. See 5 CFR 536.205.)

§ 531.242 Setting pay upon loss of GM status.

(a) On loss of status as a GM employee under § 531.241 (except as provided in

paragraph (b) of this section), an employee must receive his or her existing payable rate of basic pay, plus any of the following adjustments that may be applicable on the effective date of the loss of status, in the order specified:

(1) The amount of any annual adjustment in GS rates under 5 U.S.C. 5303, and the amount of any adjustment in locality payments or special rate supplements, to which the employee otherwise would be entitled on that date;

(2) The amount of any within-grade increase to which the employee otherwise would be entitled on that date under 5 U.S.C. 5335 and subpart D of this part;

(3) The amount resulting from a promotion effective on that date (consistent with § 531.243(c));

(4) In the case of an employee who loses GM status without a change of grade and whose GS rate falls between two steps of a GS grade, the amount of any increase needed to pay the employee the rate for the next higher step of that grade; and

(5) In the case of an employee whose resulting GS rate is below the minimum rate of a GS grade, the amount of any increase needed to pay the employee the minimum rate for that grade.

(b) For an employee who loses status as a GM employee as a result of a demotion, pay must be set as provided in § 531.215. A GM employee's off-step GS rate at the grade before demotion is not converted to a GS step rate before the demotion, but the employee must be placed on a GS step rate when pay is set in the lower grade.

§ 531.243 Promotion of a GM employee.

(a) Upon promotion, an employee's status as a GM employee ends, as provided in § 531.241(b).

(b) When an employee loses status as a GM employee because of a temporary promotion and is returned to the lower grade upon expiration or termination of the temporary promotion under § 531.215(c)(1), he or she will be deemed to have been placed at the lowest step rate that equals or exceeds the employee's former GS rate (as a GM employee) on the effective date of the temporary promotion, before applying any other step increases based on his or her service during the temporary promotion.

(c) A GM employee's GS rate is used as the existing rate of pay in applying the promotion rule in § 531.214. A GM employee's off-step GS rate in the grade before promotion is not converted to a GS step rate in applying the promotion rule, but the employee must be placed

on a GS step rate in the post-promotion grade.

§ 531.244 Adjusting a GM employee's rate at the time of an annual pay adjustment.

(a) On the effective date of an annual pay adjustment under 5 U.S.C. 5303 or similar authority, an agency must set the new GS rate for a GM employee as follows:

(1) For a GM employee whose rate of basic pay equals a regular GS step rate, set the employee's rate at the new step rate in the adjusted General Schedule that corresponds to the employee's grade and step as in effect immediately before the effective date of the pay adjustment.

(2) For a GM employee whose rate of basic pay is below the minimum rate of the GS rate range for the employee's grade, increase the existing GM rate by the same percentage as the annual pay adjustment for the GS rate range applicable to the employee's grade, with the result rounded to the nearest dollar (not to exceed the minimum rate of the range).

(3) For a GM employee whose rate of basic pay is between GS step rates, apply the following method:

Step A—Using the rates and ranges in effect immediately *before* the annual pay adjustment, find the difference between the GM employee's GS rate and the minimum rate of the GS rate range for the employee's grade.

Step B—Find the difference between the maximum rate and minimum rate of the GS rate range in effect immediately before the annual pay adjustment. (If the GS maximum rate was not payable because of the EX level V pay limitation in 5 U.S.C. 5303(f), use the uncapped maximum rate.)

Step C—Divide the result from step A by the result from step B. Carry this result to the seventh decimal place and truncate, rather than round, the result. This decimal factor represents the employee's relative position in the rate range.

Step D—Using rates and ranges in effect *after* the annual pay adjustment, find the difference between the maximum rate and minimum rate of the new GS rate range for the employee's grade. (If the GS maximum rate was not payable because of the EX level V pay limitation, use the uncapped maximum rate.)

Step E—Multiply the result from step D by the factor derived from step C.

Step F—Add the result from step E to the minimum rate of the employee's current GS rate range and round to the next higher whole dollar. The resulting rate is the GM employee's new GS rate (subject to the EX level V pay limitation).

§ 531.245 Computing locality rates and special rates for GM employees.

Locality rates and special rates are computed for GM employees in the same manner as locality rates and

special rates for other GS employees. The applicable locality payment or special rate supplement is added on top of the GM employee's GS rate.

§ 531.246 Within-grade increases for GM employees.

GM employees are entitled to within-grade increases as provided under subpart D of this part. A within-grade increase may not cause a GM employee's rate of basic pay to exceed the maximum rate of his or her grade. GM employees may receive quality step increases as provided in subpart E.

§ 531.247 Maximum payable rate rule for GM employees.

(a) A rate received by a GM employee may qualify as a highest previous rate under § 531.222.

(b) As provided in §§ 531.221(a) and 531.241(b), if an employee loses status as a GM employee because of a transfer, promotion, demotion, or reassignment to a position in which the employee will no longer be a supervisor or management official, and if the employing agency after the action chooses to apply the maximum payable rate rule, the agency must follow the rules in § 531.221.

(c) If an employee retains GM status after an action that allows application of the maximum payable rate rule in § 531.221 to set the employee's pay, the rules in § 531.221 must be applied in accordance with the following special provisions:

(1) In comparing the employee's highest previous rate to an applicable rate range for the grade in which pay is being set, do not identify the lowest step rate that equals or exceeds the highest previous rate. Instead, identify the rate in the rate range that equals the highest previous rate unless that highest previous rate is below the range minimum or above the range maximum. If the highest previous rate is below the range minimum, identify the minimum rate (step 1) of the grade. If the highest previous rate is above the range maximum, identify the maximum rate (step 10) of the grade.

(2) In applying § 531.221(b) for an employee whose highest previous rate is a GS rate, the highest previous rate must be compared to the GS rate range for the grade in which pay is currently being set, but which was in effect at the time the highest previous rate was earned. If the highest previous rate was earned while the current GS rate range was in effect, the rate identified under paragraph (c)(1) of this section is the maximum payable GS rate. Otherwise, based on the rate identified in paragraph (c)(1) of this section, the agency must

determine the corresponding rate in the current GS rate range for the grade in which pay is currently being set. That corresponding rate is the maximum payable GS rate. If the highest previous rate was above the range minimum and below the range maximum, the corresponding rate in the current GS rate range must be derived as follows:

Step 1—Find the difference between the employee's highest previous rate and the minimum rate for the GS rate range (for the employee's current grade) in effect at the time the highest previous rate was earned.

Step 2—Find the difference between the maximum rate and the minimum GS rate of the rate range identified in step 1. (If the GS maximum rate was not payable because of the EX level V pay limitation, use the uncapped maximum rate.)

Step 3—Divide the result from step 1 by the result from step 2. Carry this result to the seventh decimal place and truncate, rather than round, the result. This decimal factor represents the employee's relative position in the rate range.

Step 4—Using the current GS rate range (for the employee's current grade), find the difference between the maximum rate and the minimum rate. (If the GS maximum rate was not payable because of the EX level V pay limitation, use the uncapped maximum rate.)

Step 5—Multiply the result from step 4 by the factor derived from step 3.

Step 6—Add the result from step 5 to the minimum rate for the employee's current GS rate range and round to the next higher whole dollar. This rate is the maximum payable GS rate the agency may pay the employee (subject to the EX level V pay limitation).

(3) In applying § 531.221(c) for an employee whose highest previous rate is a special rate, the highest previous rate (after any geographic conversion) must be compared directly to the current highest applicable rate range for the employee's position of record and official worksite after reassignment. Thus, the rate identified under paragraph (c)(1) of this section is the maximum payable rate of basic pay.

Subpart C—[Removed and Reserved]

- 13. Remove and reserve subpart C, consisting of §§ 531.301 through 531.307.

Subpart D—Within-Grade Increases

- 14. Revise § 531.402 to read as follows:

§ 531.402 Employee coverage.

(a) Except as provided in paragraph (b) of this section, this subpart applies to employees who—

- (1) Are classified and paid under the General Schedule;
- (2) Occupy permanent positions; and
- (3) Are paid less than the maximum rate of their grade.

(b) This subpart does not apply to any employee who is appointed by the President, by and with the advice and consent of the Senate.

- 15. In § 531.403—
 - a. Amend the definition of *acceptable level of competence* by adding “(or designee)” after “head of the agency”;
 - b. Add in alphabetical order definitions of *General Schedule*, *GM employee*, *GS rate*, *law enforcement officer*, *LEO special base rate*, *promotion*, and *temporary promotion*;
 - c. Revise the definitions of *agency*, *employee*, *equivalent increase*, *next higher rate within the grade*, and *rate of basic pay*; and
 - d. Revise the introductory text and paragraph (2) of the definition of *within-grade increase*.

The additions and revisions read as follows:

§ 531.403 Definitions.

* * * * *

Agency means an agency with employees covered by this subpart, as provided in § 531.402.

* * * * *

Employee has the meaning given that term in 5 U.S.C. 2105, except that for the purpose of applying the provisions regarding equivalent increases and creditable service with respect to non-GS service, *employee* also includes—

(1) An individual employed by the U.S. Postal Service or the Postal Rate Commission who would be considered an employee under 5 U.S.C. 2105 but for the exclusion in section 2105(e); and

(2) An individual employed by a nonappropriated fund instrumentality for service that is creditable under § 531.406(b)(4).

Equivalent increase means an increase in an employee's rate of basic pay, or an opportunity for such an increase under a non-GS pay system, as described in § 531.407.

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. The term also refers to the pay schedule of GS rates established under 5 U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

GM employee has the meaning given that term in 5 CFR 531.203.

GS rate means a rate of basic pay within the General Schedule, excluding additional pay of any kind such as

locality payments under subpart F of this part and special rate supplements under 5 CFR part 530, subpart C, or 38 U.S.C. 7455. A rate payable to a GM employee is considered a GS rate.

Law enforcement officer or *LEO* has the meaning given that term in 5 CFR 550.103.

LEO special base rate means a special base rate established for GS law enforcement officers at grades GS-3 through GS-10 under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509, November 5, 1990, as amended) which is used in lieu of a GS rate.

Next higher rate within the grade for a GM employee means the rate of basic pay that exceeds the employee's existing rate of basic pay by one within-grade increase, not to exceed the maximum rate of the grade. For the purpose of this definition, a within-grade increase equals the dollar value of the GS within-grade increase for the applicable grade (excluding any locality payment, special rate supplement, or any other additional payment).

* * * * *

Promotion means an employee's movement from one grade or level to a higher grade or level while continuously employed (including such a movement in conjunction with a transfer).

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For an employee covered by the General Schedule, that *rate of basic pay* is the GS rate or, if applicable, an LEO special base rate.

* * * * *

Temporary promotion means a time-limited promotion with a not-to-exceed date or a specified term.

* * * * *

Within-grade increase is synonymous with the term “step increase” used in 5 U.S.C. 5335 and means—* * *

(2) For a GM employee whose rate does not equal a regular GS step rate (*i.e.*, an off-step rate), a periodic increase in an employee's rate of basic pay from the employee's current rate to the next higher rate within the grade (as defined in this section) consistent with section 4 of Public Law 103-89.

- 16. Revise § 531.407 to read as follows:

§ 531.407 Equivalent increase determinations.

(a) *GS employees*. For a GS employee, an equivalent increase is considered to occur at the time of any of the following personnel actions:

- (1) A within-grade increase, excluding a quality step increase granted under

subpart E of this part or an interim within-grade increase if that increase is later terminated under § 531.414;

(2) A promotion (permanent or temporary) to a higher grade, including the promotion of an employee receiving a retained rate under 5 CFR 359.705 or 5 CFR part 536 that does not result in a pay increase, but excluding—

(i) A temporary promotion if the employee is returned to the grade and step from which promoted (before any adjustment in the step (or rate) based on credit for service during the temporary promotion, as provided in § 531.215(c)); or

(ii) A promotion to a supervisory or managerial position when the employee does not satisfactorily complete a probationary period established under 5 U.S.C. 3321(a)(2) and is returned to a position at the lower grade and step or rate held by the employee before placement (before any adjustment in the step or rate based on credit for service during the probationary period, as provided in § 531.215(d));

(3) Application of the maximum payable rate rule in § 531.221 that results in a higher step rate within the employee's GS grade (or an increase for a GM employee to the next higher rate within the grade), except for application of that rule in a demotion to the extent that the employee's rate of basic pay after demotion does not exceed the lowest step rate that equals or exceeds the employee's rate of basic pay immediately before the demotion;

(4) Application of the superior qualifications and special needs pay-setting authority in § 531.212 that results in a higher step rate within the employee's GS grade (or an increase for a GM employee to the next higher rate within the grade); or

(5) Application of the qualifications pay authority in 5 U.S.C. 9814 to an employee of the National Aeronautics and Space Administration, when the employee fulfills the 1-year service requirement in the position for which qualifications pay was paid or in a successor position.

(b) *Non-GS employees who move to the GS pay system.* For an employee who performs service under a non-GS Federal pay system which is potentially creditable towards a GS within-grade increase waiting period, an equivalent increase is considered to occur at the time of any of the following personnel actions:

(1) A promotion to a higher grade or work level (unless the promotion is cancelled and the employee's rate of basic pay is redetermined as if the promotion had not occurred); or

(2) An opportunity to receive a within-level or within-range increase that results in forward movement in the applicable range of rates of basic pay, where "forward movement in the applicable range" means any kind of increase in the employee's rate of basic pay other than an increase that is directly and exclusively linked to—

(i) A general structural increase in the employee's basic pay schedule or rate range (including the adjustment of a range minimum or maximum); or

(ii) The employee's placement under a new basic pay schedule within the same pay system.

(c) *Locality rates and special rates.* Since locality rates under subpart F of this part and special rates under 5 CFR part 530, subpart C, and similar rates under other legal authority (e.g., 38 U.S.C. 7455) are not rates of basic pay for the purpose of this subpart, increases in pay resulting from an adjustment in an employee's locality payment or special rate supplement or from placement on a new locality rate or special rate schedule are not considered in making equivalent increase determinations.

Subpart F—Locality-Based Comparability Payments

■ 17. Revise § 531.601 to read as follows:

§ 531.601 Purpose.

This subpart contains Office of Personnel Management (OPM) regulations implementing 5 U.S.C. 5304, which authorizes locality payments in defined geographic areas for GS employees and other categories of employees to whom locality payments are extended. These regulations must be read together with 5 U.S.C. 5304.

■ 18. In § 531.602—

■ a. Revise the definitions of *General Schedule* and *scheduled annual rate of pay*;

■ b. Amend the definition of *employee* by removing the words "duty station" in both places it appears and adding in each place the words "worksites";

■ c. Remove the definitions of *locality rate of pay* and *official duty station*; and

■ d. Add in alphabetical order the definitions of *GM employee*, *GS rate*, *law enforcement officer*, *LEO special base rate*, *locality payment*, *locality pay percentage*, *locality rate*, *official worksite*, *position of record*, *rate range*, *retained rate*, *special rate*, *special rate schedule*, *special rate supplement*, *telework*, and *telework agreement*.

The additions and revisions read as follows:

§ 531.602 Definitions.

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. It also refers to the pay schedule of GS rates established under 5 U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

GM employee has the meaning given that term in 5 CFR 531.203.

GS rate means a rate of basic pay within the General Schedule, excluding any LEO special base rate and additional pay of any kind such as locality payments or special rate supplements. A rates payable to a GM employee is considered a GS rate.

* * * * *

Law enforcement officer or *LEO* has the meaning given that term in 5 CFR 550.103.

LEO special base rate means a special base rate established for GS law enforcement officers at grades GS-3 through GS-10 under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509, November 5, 1990, as amended) which is used in lieu of a GS rate.

* * * * *

Locality payment means a locality-based comparability payment payable under 5 U.S.C. 5304 and this subpart. An employee's locality payment is the difference between the employee's locality rate and the employee's scheduled annual rate of pay.

Locality pay percentage means the percentage authorized for a locality pay area under 5 U.S.C. 5304 or 5304a which is used to compute a locality payment (before applying any maximum pay limitations under § 531.606).

Locality rate means a scheduled annual rate of pay plus an applicable locality payment. An employee's locality rate is computed under § 531.604.

* * * * *

Official worksite means the official location of an employee's position of record as determined under § 531.605.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position

description, excluding any position to which the employee is temporarily detailed. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

Rate range or *range* means a range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate. A rate range may consist of GS rates, LEO special base rates, locality rates, special rates, or, for non-GS employees, similar rates under other legal authority.

Retained rate means a rate above the maximum rate of the rate range applicable to the employee which is payable under 5 CFR part 536 or similar legal authority.

Scheduled annual rate of pay means, as applicable—

- (1) The annual GS rate payable to an employee;
- (2) An annual LEO special base rate; or
- (3) For an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(D) for which the President (or designee) has authorized locality payments under 5 U.S.C. 5304(h)(2), the annual rate of pay fixed by law or administrative action, exclusive of any locality-based adjustments (including adjustments equivalent to local special rate supplements under 5 CFR part 530, subpart C) or additional pay of any other kind.

Special rate means a rate of pay within a special rate schedule established under 5 CFR part 530, subpart C, or a similar rate established under other legal authority (e.g., 38 U.S.C. 7455). The term *special rate* does not include an LEO special base rate.

Special rate schedule means a pay schedule established under 5 CFR part 530, subpart C, to provide higher rates of pay for specified categories of positions or employees at one or more grades or levels or a similar schedule established under other legal authority (e.g., 38 U.S.C. 7455).

Special rate supplement means the portion of a special rate paid above an employee's GS rate or equivalent rate of basic pay after applying any applicable pay limitation. For a law enforcement officer receiving an LEO special base rate who is also entitled to a special rate under 5 CFR part 530, subpart C, a special rate supplement increases the LEO's pay only to the extent that the

resulting special rate exceeds the LEO's rate of basic pay.

Telework means work performed by an employee at an alternative worksite instead of the location of the employee's assigned organization. Alternative worksites may include the employee's home, telecenter, satellite office, field installation, or other location.

Telework agreement means a formal oral or written agreement between a supervisor and an employee to permit the employee to work at an alternative worksite (*i.e.*, telework) instead of the location of the employee's assigned organization.

§ 531.603 [Amended]

- 19. In § 531.603, amend paragraph (a) by removing the words "duty stations" and adding in their place the word "worksites".
- 20. Revise § 531.604 to read as follows:

§ 531.604 Determining an employee's locality rate.

(a) An annual locality rate consists of a scheduled annual rate of pay plus an applicable locality payment (representing an annual dollar amount), as determined under paragraph (b) of this section.

(b) An agency determines an employee's locality rate by—

(1) Determining the employee's official worksite consistent with the rules in § 531.605;

(2) Determining the locality pay area in which the employee's official worksite is located, consistent with the locality pay areas established in § 531.603;

(3) Identifying the locality pay percentage in effect in the applicable locality pay area;

(4) Increasing the employee's scheduled annual rate of pay by the applicable locality pay percentage and rounding the result to the nearest whole dollar (counting 50 cents and over as the next higher dollar); and

(5) Applying any applicable limitation as described in § 531.606.

(c) A locality rate may be expressed as an hourly, daily, weekly, or biweekly rate, as provided in § 531.607.

- 21. Revise § 531.605 to read as follows:

§ 531.605 Determining an employee's official worksite.

(a) Except as otherwise provided in this section, the official worksite is the location of an employee's position of record where the employee regularly performs his or her duties or, if the employee's work involves regular travel or the employee's work location varies on a daily basis, where his or her work activities are based, as determined by

the employing agency. An agency must document an employee's official worksite on an employee's Notification of Personnel Action (Standard Form 50 or equivalent).

(b) For an employee who is relocated and authorized to receive relocation expenses under 5 U.S.C. chapter 57, subchapter II (or similar authority), the official worksite is the established worksite for the position in the area to which the employee has been relocated. For an employee authorized to receive relocation expenses under 5 U.S.C. 5737 in connection with an extended assignment resulting in a temporary change of station, the duty station associated with the extended assignment is the official worksite. (See 41 CFR 302–1.1.)

(c) For an employee whose assignment to a new worksite is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty at the new location, the official worksite in effect immediately before the assignment remains the official worksite through the date of separation.

(d)(1) For an employee covered by a telework agreement who is scheduled (while in duty status) to report at least once a week on a regular and recurring basis to the regular worksite for the employee's position of record, the regular worksite is the official worksite. However, for an employee whose work location varies on a daily basis, the employee need not report at least once a week to the established official worksite (where the employee's work activities are based) as long as the employee is performing work within the locality pay area for that worksite at least once a week on a regular and recurring basis. An agency must determine a telework employee's official worksite on a case-by-case basis.

(2) If an employee covered by a telework agreement does not meet the requirements of paragraph (d)(1) of this section, the employee's official worksite is the location of the employee's telework site.

(3) An authorized agency official may make a temporary exception to the requirements in paragraph (d)(1) and (2) of this section in appropriate situations, such as when an employee is recovering from an injury or medical condition that prevents the employee from commuting to the regular worksite.

(e) In applying paragraph (d)(1) of this section for the purpose of other location-based pay entitlements under other regulations that reference this section, the reference to a *locality pay area* is deemed to be a reference to the

applicable geographic area associated with the given pay entitlement. For example, for the purpose of special rates under 5 CFR part 530, subpart C, the reference to a *locality pay area* is deemed to be a reference to the geographic area covered by a special rate schedule.

■ 22. Revise § 531.606 to read as follows:

§ 531.606 Maximum limits on locality rates.

(a) Except as provided by paragraph (b) of this section, a locality rate may not exceed the rate of basic pay payable for level IV of the Executive Schedule.

(b)(1) A locality rate for an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(C) may not exceed the rate for level III of the Executive Schedule.

(2) A locality rate for an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(D) may not exceed—

(i) The rate for level IV of the Executive Schedule, when the maximum scheduled annual rate of pay (excluding any retained rate) for such positions is less than or equal to the maximum payable scheduled annual rate of pay for GS-15; or

(ii) The rate for level III of the Executive Schedule, when the maximum scheduled annual rate of pay (excluding any retained rate) for such positions exceeds the maximum payable scheduled annual rate of pay for GS-15, but is not more than the rate for level IV of the Executive Schedule.

(3) If initial application of paragraph (b)(2) of this section otherwise would reduce an employee's existing locality rate, the employee's locality rate is capped at the higher of—

(i) The amount of the employee's locality rate on the day before paragraph (b)(2) of this section was initially applied, or

(ii) The rate for level IV of the Executive Schedule.

(c) Paragraph (b) of this section does not apply to experts and consultants appointed under 5 U.S.C. 3109 if the pay for those experts and consultants is limited to the highest rate payable under 5 U.S.C. 5332 (*i.e.*, the unadjusted maximum GS-15 rate). Such experts and consultants are subject to the pay limitations established in 5 CFR 304.105.

(d) A portion of a locality payment that is not payable because of an applicable limitation is not considered in applying any other provision of law or regulation.

■ 23. Revise § 531.607 to read as follows:

§ 531.607 Computing hourly, daily, weekly, and biweekly locality rates.

(a) Apply the following methods to convert an annual locality rate to an hourly, daily, weekly, or biweekly rate:

(1) To derive an hourly rate, divide the annual locality rate by 2,087 and round to the nearest cent, counting one-half cent and over as the next higher cent.

Example:

Annual locality rate = \$50,000
Computation of hourly rate: $\$50,000 \div 2,087 = 23.957$ or \$23.96.

(2) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the employee's basic daily tour of duty.

Example:

Hourly rate = \$23.96
Daily hours = 8
Computation of daily rate: $\$23.96 \times 8 = \191.68

(3) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as applicable.

Example:

Hourly rate = \$23.96
Biweekly hours = 80
Computation of biweekly rate: $\$23.96 \times 80 = \$1,916.80$

(b) Notwithstanding paragraph (a) of this section, for a firefighter whose pay is computed under 5 U.S.C. 5545b, a firefighter hourly locality rate is computed using a divisor of 2,756 hours instead of 2,087, as prescribed in 5 CFR part 550, subpart M. Also, such a firefighter's weekly and biweekly locality rates must be based on the firefighter's extended tour of duty as prescribed in that subpart.

■ 24. Add a new § 531.608 to read as follows:

§ 531.608 Relationship of locality rates to other pay rates.

(a) An employee must receive the greatest of the following rates of pay, as applicable—

(1) The scheduled annual rate of pay payable to the employee;

(2) A locality rate under this subpart;

(3) A special rate under 5 CFR part 530, subpart C, or a similar rate under other legal authority (*e.g.*, 38 U.S.C. 7455); or

(4) A retained rate under 5 CFR part 536 or a similar rate under other legal authority.

(b) A GS employee receiving a special rate is entitled to any applicable locality payment on the same basis as any other GS employee. The locality payment is computed based on the employee's scheduled annual rate of pay, which excludes any special rate. The employee is entitled to the higher of the locality

rate or the corresponding special rate. As provided in 5 U.S.C. 5305(h) and 5 CFR 530.303(d), when an employee's locality rate exceeds a corresponding special rate, the employee's entitlement to the special rate is terminated.

■ 25. Add a new § 531.609 to read as follows:

§ 531.609 Adjusting or terminating locality rates.

(a) When an employee's official worksite is changed to a different locality pay area, the employee's entitlement to the locality rate for the new locality pay area begins on the effective date of the change in official worksite.

(b) A locality rate must be adjusted as of the effective date of any change in the applicable scheduled annual rate of pay or any change in the applicable locality percentage.

(c) Except as provided in paragraph (d) of this section, entitlement to a locality rate associated with a particular locality pay area under this subpart terminates on the date—

(1) An employee's official worksite is no longer in the locality pay area;

(2) An employee is no longer in a position covered by this subpart; or

(3) An employee separates from Federal service.

(d) In the event of a change in the geographic coverage of a locality pay area as a result of the addition by OMB of a new area(s) to the definition of an MSA or CSA or as the result of any change made by the President's Pay Agent in the definition of a locality pay area, the effective date of any change in an employee's entitlement to a locality rate under this subpart is the first day of the first pay period beginning on or after January 1 of the next calendar year. Any area removed by OMB from coverage within an MSA or CSA that serves as the basis for defining a locality pay area must be reviewed by the Federal Salary Council and the President's Pay Agent before a decision is made regarding the locality pay status of that area.

(e) As provided in § 531.205, when an employee becomes covered by one or more different pay schedule(s) because the employee is stationed at a new official worksite in a different geographic location, the employee's pay (including a locality rate) must first be converted to the applicable pay schedule(s) in the new location before applying any other pay action (other than a general pay adjustment).

■ 26. Add a new § 531.610 to read as follows:

§ 531.610 Treatment of locality rate as basic pay.

A locality rate is considered to be an employee's rate of basic pay for the purpose of computing or applying—

- (a) Retirement deductions, contributions, and benefits under 5 U.S.C. chapters 83 and 84;
- (b) Life insurance premiums and benefits under 5 U.S.C. chapter 87;
- (c) Premium pay under 5 U.S.C. chapter 55, subchapter V, and 5 CFR part 550, subparts A and I (including the computation of limitations on premium pay);
- (d) Severance pay under 5 U.S.C. 5595 and 5 CFR part 550, subpart G;
- (e) Advances in pay under 5 U.S.C. 5524a and 5 CFR part 550, subpart B;
- (f) Post differentials under 5 U.S.C. 5925(a) and danger pay allowances under 5 U.S.C. 5928 for an employee temporarily working in a foreign area for which the Department of State has established a danger pay allowance, when the employee's official worksite is located in a locality pay area;
- (g) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment incentives under 5 U.S.C. chapter 57, subchapter IV, and 5 CFR part 575;
- (h) Performance-based cash awards under 5 U.S.C. 4505a and 5 CFR part 451, subpart A, when such awards are computed as a percentage of an employee's rate of basic pay;
- (i) GS pay administration provisions (e.g., GS promotion provisions) to the extent provided in subpart B of this part;
- (j) Pay administration provisions for prevailing rate employees which consider rates of basic pay under the GS pay system in setting pay (except as otherwise provided in 5 CFR part 532), subject to the requirement that, if the employee's actual locality rate would not apply at the official worksite for the prevailing rate position, that locality rate must be converted to a corresponding rate on the locality rate schedule for that official worksite;
- (k) Lump-sum payments for accumulated and annual leave under 5 CFR part 550, subpart L;
- (l) Grade and pay retention under 5 U.S.C. chapter 53, subchapter VI, to the extent provided by 5 CFR part 536;
- (m) Other provisions as specified in other statute or OPM regulations; and
- (n) Payments or benefits equivalent to those listed in this section under other legal authority, as determined by the head of the agency or other authorized official responsible for administering such payments or benefits.

■ 27. Add a new § 531.611 to read as follows:

§ 531.611 Miscellaneous provisions.

(a) A locality rate may be paid only for those hours for which an employee is in a pay status.

(b) Payment of, or an increase in, a locality rate is not an equivalent increase in pay within the meaning of 5 U.S.C. 5335. (See § 531.407(c).)

(c) A locality rate is included in an employee's *total remuneration*, as defined in 5 CFR 551.511(b), and *straight time rate of pay*, as defined in 5 CFR 551.512(b), for the purpose of overtime pay computations under the Fair Labor Standards Act of 1938, as amended.

(d) A reduction or termination of a locality rate under § 531.609 is not an adverse action for the purpose of 5 CFR part 752, subpart D, or an action under 5 CFR 930.214.

Subpart F—[Amended]

- 28. In addition to the preceding amendments to 5 CFR part 531, subpart F (§§ 531.601 through 531.611), remove the words "locality rate of pay" and add in their place the words "locality rate" throughout the subpart, as amended.

Subpart G—[Removed and Reserved]

- 29. Remove and reserve subpart G, consisting of §§ 531.701 through 531.705.

PART 532—PREVAILING RATE SYSTEMS

- 30. The authority citation for part 532 continues to read as follows:

Authority: 5 U.S.C. 5343, 5346; § 532.707 also issued under 5 U.S.C. 552.

Subpart B—Prevailing Rate Determinations

- 31. In § 532.415, amend paragraph (c) by removing the reference "5 CFR 536.104(a)(3)" and adding in its place "5 CFR 536.301(a)(8)".

PART 534—PAY UNDER OTHER SYSTEMS

- 32. The authority citation for part 534 is revised to read as follows:

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125 of the National Defense Authorization Act for FY 2004, Pub. L. 108-136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207).

Subpart D—Pay and Performance Awards Under the Senior Executive Service

- 33. In § 534.403, amend paragraph (b) by removing the reference "5 CFR

536.104" and adding in its place "5 CFR part 536, subpart C".

- 34. In § 534.404, amend paragraph (h)(2) by removing the reference "5 CFR 536.104" and adding in its place "5 CFR part 536, subpart C".

PART 536—GRADE AND PAY RETENTION

- 35. Revise the authority citation for part 536 to read as follows:

Authority: 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Pub. L. 103-89, 107 Stat. 981; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502; § 536.308 also issued under section 301(d)(2) of the Federal Workforce Flexibility Act of 2004, Pub. L. 108-411, 118 Stat. 2305.

- 36. Revise subparts A and B to read as follows:

Subpart A—General Provisions

Sec.

- 536.101 Purpose.
- 536.102 Coverage.
- 536.103 Definitions.
- 536.104 Reasonable offer.
- 536.105 Comparing grades under different pay systems.

§ 536.101 Purpose.

This part contains OPM regulations for the administration of grade and pay retention. This part supplements and implements the provisions of 5 U.S.C. 5361–5366 and must be read together with those sections of law. Under 5 U.S.C. 5362, an employee under a covered pay system who is placed in a lower grade (e.g., as a result of a reduction in force or when his or her position is reduced in grade as a result of a reclassification) is entitled to retain the grade held immediately before the reduction for a period of 2 years under the circumstances prescribed in this part. Under 5 U.S.C. 5363, an employee whose rate of basic pay otherwise would be reduced as a result of a management action is entitled to retain his or her rate of basic pay under the circumstances prescribed in this part.

§ 536.102 Coverage.

(a) Subject to the exclusions in paragraphs (b) through (e) of this section, this part covers any employee who, at the time this part is applied—

- (1) Is in a covered pay system; or
- (2) Is moving to a position under a covered pay system from a position not under a covered pay system, as long as the individual was an *employee* as defined in 5 CFR 536.103 while serving in the position in a noncovered pay system.

(b) An agency may not provide grade or pay retention under this part to an employee who—

(1) Is reduced in grade or pay for personal cause or at the employee's request;

(2) Was employed on a temporary or term basis immediately before the action causing the reduction in grade or pay;

(3) Does not satisfactorily complete the probationary period prescribed by 5 U.S.C. 3321(a)(2), and, as a result, is removed from a supervisory or managerial position;

(4) Is entitled to receive a saved rate of basic pay under 5 U.S.C. 3594(c) and 5 CFR 359.705 because of removal from the Senior Executive Service and placement in a civil service position (other than a Senior Executive Service position) under 5 U.S.C. 3594(b)(2);

(5) Moves from an Executive Schedule position paid under 5 U.S.C. chapter 53, subchapter II, or a position whose rate of pay is fixed by law at a rate equal to a rate for the Executive Schedule;

(6) Moves between positions not under a covered pay system or from a position under a covered pay system to a position not under a covered pay system;

(7) Moves to a nonappropriated fund position as described in 5 U.S.C. 2105(c) (except a position occupied by a prevailing rate employee); or

(8) Moves from a nonappropriated fund position as described in 5 U.S.C. 2105(c) (except a position occupied by a prevailing rate employee) to a position in a covered pay system, unless covered by § 536.302(a).

(c) An agency may not provide grade or pay retention under this part based on the grade or rate of basic pay held by the employee during a temporary promotion or temporary reassignment. However, a temporary promotion or temporary reassignment does not affect an employee's preexisting entitlement to grade or pay retention.

(d) An agency may not provide grade retention under subpart B of this part to an employee who moves from a position not under a covered pay system to a position under a covered pay system.

(e) An employee loses eligibility for or entitlement to grade or pay retention under the conditions specified in §§ 536.207, 536.208, and 536.308.

§ 536.103 Definitions.

For the purpose of this part:

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

Covered pay system means a covered pay schedule as defined in 5 U.S.C. 5361(5)—i.e., the General Schedule pay

system established under 5 U.S.C. chapter 53, subchapter III; a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV; or a special occupational pay system established under 5 U.S.C. chapter 53, subchapter IX. The various prevailing rate systems under 5 U.S.C. chapter 53, subchapter IV, are considered separate systems if they have separate job grading structures.

Employed on a temporary or term basis means employment under an appointment having a definite time limitation or designated as temporary or term.

Employee has the meaning given that term in 5 U.S.C. 2105, except that *employee* also includes—

(1) An individual employed by the U.S. Postal Service or the Postal Rate Commission who would be considered an employee under 5 U.S.C. 2105 but for the exclusion in section 2105(e); and

(2) An individual employed by a Department of Defense or Coast Guard nonappropriated fund instrumentality (as described in 5 U.S.C. 2105(c)) who is moved without a break in service of more than 3 days from employment in such an instrumentality to a position under a covered pay system in the same agency.

FEPCA means the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509, November 5, 1990, as amended).

General Schedule or *GS* means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. This term also refers to the pay schedule established under 5 U.S.C. 5332.

Highest applicable rate range means the rate range applicable to an employee based on a given position of record and official worksite that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates under 5 U.S.C. 5305 may exceed an applicable locality rate range under 5 U.S.C. 5304 for General Schedule employees. In certain circumstances, the *highest applicable rate range* may consist of two types of pay rates from different pay schedules—e.g., a range where special rates are higher in the lower portion of the range and locality rates are higher in the higher portion of the range.

Management action means an action (not for personal cause) by an agency official not initiated or requested by an employee which may adversely affect the employee's grade or rate of basic pay. However, an employee's placement in or transfer to a position under a formal employee development program established by an agency for recruitment

and employee advancement purposes (e.g., Career Intern Program) is considered a management action even though the employee initiates or requests such placement or transfer.

Official worksite means the official location of the employee's position of record as determined under the rules of the applicable pay system (e.g., 5 CFR 531.605 for General Schedule employees). *Official worksite* is synonymous with the term “official duty station” as used in 5 U.S.C. 5363(c).

OPM means the Office of Personnel Management.

Payable rate means the highest rate of basic pay to which an employee is entitled based on the employee's position of record, official worksite, and step (or relative position in range for a GM employee) or, if applicable, a retained rate.

Pay schedule means a set of rate ranges established under a single authority—i.e., the General Schedule, a law enforcement officer special base rate schedule (for grades GS-3 through 10) under section 403 of FEPCA; a prevailing rate schedule (including a special schedule or special rate schedule) under 5 U.S.C. chapter 53, subchapter IV; a locality rate schedule under 5 U.S.C. 5304 based on GS rates; a locality rate schedule under 5 U.S.C. 5304 based on law enforcement officer special base rates (for grades GS-3 through 10); or a special rate schedule under 5 U.S.C. 5305 or similar authority. A pay schedule applies to or covers a defined category of employees based on established coverage conditions (e.g., official worksite, occupation). A pay schedule is considered to apply to or cover an employee who meets the established coverage conditions even when a rate under that schedule is not currently payable to the employee because of a higher pay entitlement under another pay schedule.

Position of record means an employee's official position (defined by grade or level, occupational series, employing agency, law enforcement officer status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and the current position description, excluding any position to which an employee is temporarily detailed. A retained grade is considered to be part of an employee's position of record even though the actual grade of the employee's position is a lower grade, except as provided in § 536.205(b). For

an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

Prevailing rate employee has the meaning given that term in 5 U.S.C. 5342(a)(2) and refers to an employee in a position covered by a prevailing rate system or schedule established under 5 U.S.C. chapter 53, subchapter IV.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions, including a General Schedule rate under 5 U.S.C. 5332; a law enforcement officer special base rate under section 403 of FEPCA; a special rate under 5 CFR part 530, subpart C, or similar payment under other legal authority; a locality rate under 5 CFR part 531, subpart F, or similar payment under other legal authority; a prevailing rate under 5 U.S.C. 5343; or a retained rate under this part, but excluding additional pay of any other kind (such as premium payments, differentials, and allowances).

Rate range or range means the range of rates of basic pay for a grade within an established pay schedule, excluding any retained rate.

Reasonable offer means an offer that meets the conditions in § 536.104.

Reduced in grade or pay at the employee's request means a reduction in grade or rate of basic pay that is initiated by the employee for his or her benefit, convenience, or personal advantage. A reduction in grade or pay that is caused or influenced by a management action is not considered to be at an employee's request, except that the voluntary reduction in grade or pay of an employee in response to a management action directly related to personal cause is considered to be at the employee's request.

Reduced in grade or pay for personal cause means a reduction in grade or rate of basic pay based on the conduct, character, or unacceptable performance of an employee. In situations in which an employee is reduced in grade or pay for inability to perform the duties of his or her position because of a medical or physical condition beyond the employee's control, the reduction in grade is not considered to be for personal cause.

Reorganization means the planned elimination, addition, redistribution, or restructuring of functions or duties

either wholly within an agency or between agencies.

Representative rate means—

(1) For the purpose of comparing grades that are under different covered pay systems under § 536.105 and after applying any applicable geographic conversion under § 536.105(b) for positions with different official worksites—

(i) The highest rate of basic pay that applies to the fourth step of the grade for a position covered by the General Schedule; and

(ii) The highest rate of basic pay that applies to the second step of the grade of a position under a regular prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, or, in the case of a prevailing rate position with a single rate, the single rate of basic pay for that position; and

(2) For the purpose of comparing grades or levels of work in making reasonable offer determinations when one of the grades or levels of work is not under a covered pay system and after applying any applicable geographic conversion rules under § 536.105(b) for positions with different official worksites—

(i) The maximum payable rate of basic pay that applies to the grade of a position covered by the General Schedule;

(ii) The maximum payable rate of basic pay that applies to the grade of a position under a regular prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, or in the case of a prevailing rate position with a single rate, the single rate of basic pay for that position; and

(iii) The maximum payable rate of basic pay that applies to the grade or level of work in the case of a position not covered by paragraph (2)(i) or (ii) of this definition. In the case of a position with a single rate under such a schedule, the single rate of basic pay for that position is the representative rate.

Retained rate means a rate above the maximum rate of the employee's highest applicable rate range that is payable under subpart C of this part.

Temporary promotion means a promotion that has a definite time limitation or is otherwise designated as temporary when the affected employee is informed in advance.

Temporary reassignment means a reassignment that has a definite time limitation or is otherwise designated as temporary when the affected employee is informed in advance.

Where different pay schedules apply means, in the context of applying the geographic conversion rule, that an employee's official worksite is changed

to a new location that would cause the employee to lose or gain coverage under a location-based pay schedule if the employee were to remain in the same position of record.

§ 536.104 Reasonable offer.

(a) For the purpose of determining whether grade retention eligibility or entitlement must be terminated under § 536.207 or 536.208, the offer of a position is a reasonable offer if the position's grade is equal to or higher than the retained grade and if all the conditions in paragraph (c) of this section are met. If the offered position is in a different pay system, § 536.105 must be applied to determine whether the grade of the offered position is equal to or greater than the retained grade.

(b) For the purpose of determining whether pay retention eligibility or entitlement must be terminated under § 536.308, the offer of a position is a reasonable offer if the employee's rate of basic pay in the position would be equal to or greater than the rate to which the employee is or would be entitled under the pay retention provisions and if all the conditions in paragraph (c) of this section are met.

(c) An offer of a position must meet the following additional conditions to qualify as a reasonable offer:

(1) The offer must be in writing and must include an official position description of the offered position;

(2) The offer must inform the employee that entitlement to grade or pay retention will terminate if the offer is declined and that the employee may appeal the reasonableness of the offer as provided in § 536.402;

(3) The offered position must be of equal or greater tenure than the employee's position before the action resulting in the grade or pay retention entitlement;

(4) The offered position must be full-time, unless the employee's position immediately before the action resulting in entitlement to grade or pay retention was less than full-time, in which case the offered position must have a work schedule providing for no fewer hours of work per week or per pay period than the position held before the action; and

(5) The offered position must be in the same commuting area as the employee's position immediately before the offer, unless the employee is subject to a mobility agreement or a published agency policy that requires employee mobility.

§ 536.105 Comparing grades under different pay systems.

(a) *General.* An agency must compare the representative rates (as defined in

§ 536.103) of the applicable grades to determine whether a grade of a position is equal to, higher than, or lower than the grade of another position when—

(1) Determining eligibility for grade retention upon movement from a position under a covered pay system to a lower-graded position under a different covered pay system (including determinations under § 536.203 that involve different covered pay systems);

(2) Determining whether grade retention eligibility is lost or grade retention is terminated when an employee is placed in a lower-graded position under a different covered pay system and the action is taken for personal cause or at the employee's request;

(3) Determining whether grade retention eligibility is lost or grade retention is terminated based on movement to a position under a different covered pay system with an equal or higher grade;

(4) Determining whether grade retention eligibility is lost or grade retention is terminated based on declination of a reasonable offer of a position under a different pay system with an equal or higher grade; and

(5) Determining whether pay retention eligibility is lost or a retained rate is terminated when an employee is placed in a lower-graded position under a different covered pay system and the action is taken for personal cause or at the employee's request.

(b) *Geographic conversion.* When comparing positions under paragraph (a) of this section which are stationed in different geographic locations where different pay schedules apply, the representative rate of the employee's existing position of record (as in effect before the movement to a position in a different pay system) must be determined as if the official worksite of that position of record were the same as the official worksite of the new or offered position of record. Geographic conversion is not necessary for the purpose of comparing grades if an employee is being moved to (or given a reasonable offer of) a position under the same covered pay system (*i.e.*, same grading structure).

Subpart B—Grade Retention

Sec.

536.201 Mandatory grade retention.

536.202 Optional grade retention.

536.203 Additional eligibility requirements for grade retention.

536.204 Period of grade retention.

536.205 Applicability of retained grade.

536.206 Determining an employee's rate of basic pay under grade retention.

536.207 Loss of eligibility for grade retention.

536.208 Termination of grade retention.

§ 536.201 Mandatory grade retention.

(a) Subject to the requirements in this section and in §§ 536.102 and 536.203, an agency must provide grade retention to an employee who moves from a position under a covered pay system to a lower-graded position under a covered pay system as a result of—

- (1) Reduction in force procedures, or
- (2) A reclassification process.

(b) An agency must apply § 536.105 in determining whether a position under a different covered pay system is a lower-graded position.

(c) An employee's movement to a lower-graded position is considered to be the result of reduction in force procedures when the employee has received a specific reduction in force notice and—

(1) The employee is placed in the position offered in the notice; or

(2) The employee is placed in a position other than that offered in the notice but in the same agency, if the position was offered in writing and at the initiative of management.

(d) An employee's movement to a lower-graded position is considered to be the result of a reclassification process when—

(1) The employee remains in his or her position after it is reclassified; or

(2) The employee is placed in a different position in the same agency before the effective date of the reclassification action, if the position was offered in writing and at the initiative of management after the employee received a specific written notice that the position would be reclassified to a lower grade.

(e) Notwithstanding paragraph (a) of this section, an agency must provide grade retention to an employee who moves without a break in service of more than 3 days from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a position under a covered pay system in the same agency.

§ 536.202 Optional grade retention.

(a) Subject to the requirements in §§ 536.102 and 536.203, an authorized agency official may provide grade retention to an employee moving from a position under a covered pay system to a lower-graded position under a covered pay system when—

(1) Management announces a reorganization or reclassification decision in writing (including a general notice or a specific notice) that may or would affect the employee; and

(2) The employee moves to a lower-graded position (either at the

employee's initiative or in response to a management-initiated offer) on or before the date the announced reorganization or reclassification is effected.

(b) An agency must apply § 536.105 in determining whether a position under a different covered pay system is a lower-graded position.

(c) When an employee is offered a position with grade retention under this section in anticipation of a reduction in grade, the agency must inform the employee in writing that acceptance of the position is not required and that declination of the offer will not affect the employee's entitlement to grade retention under § 536.201 if the agency actually moves the employee to the lower-graded position.

(d) Notwithstanding paragraph (a) of this section, an agency may provide grade retention to an employee who is moved without a break in service of more than 3 days from a position in a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a position under a covered pay system in the same agency.

§ 536.203 Additional eligibility requirements for grade retention.

(a) An employee is eligible for grade retention under § 536.201(a)(1) only if the employee has served for at least 52 consecutive weeks in one or more positions under a covered pay system at one or more grades higher than the grade of the position in which the employee is being placed. Such service is deemed to include service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard (as defined in 5 U.S.C. 2105(c)) who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(b) An employee is eligible for grade retention under § 536.201(a)(2) based on a reclassification of his or her position only if, immediately before the reduction in grade, that position was classified at the existing grade or a higher grade for a continuous period of at least 1 year.

(c) An employee is eligible for grade retention under § 536.202 only if, immediately before being placed in the lower grade, the employee has served for at least 52 consecutive weeks in one or more positions under a covered pay system at one or more grades higher than that lower grade. Such service is deemed to include service performed by an employee of a nonappropriated fund instrumentality of the Department of

Defense or the Coast Guard (as defined in 5 U.S.C. 2105(c)) who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(d) Eligibility for grade retention under § 536.201 or 536.202 ceases under the conditions specified in § 536.207.

§ 536.204 Period of grade retention.

(a) Unless grade retention is terminated under § 536.208, an employee is entitled to retain the grade held immediately before the action that provides entitlement to grade retention for 2 years beginning on the date the employee is placed in the lower-graded position.

(b) During the 2-year period of grade retention, if an agency further reduces an employee in grade under circumstances also entitling the employee to grade retention, the employee must continue to retain the previous retained grade for the remainder of the first 2-year period. At the end of the first 2-year period, the employee is entitled to retain the grade of the position from which the second reduction in grade was made for 2 years following the effective date of the second reduction in grade.

(c) Notwithstanding § 536.207(a)(1), grade retention continues to apply to an employee serving under an interim appointment made under 5 CFR 772.102 for the duration of the original 2-year grade retention period if the employee's grade was retained under this part in the appointment immediately preceding the interim appointment.

§ 536.205 Applicability of retained grade.

(a) Except as provided in paragraph (b) of this section, an agency must treat an employee's retained grade as the employee's grade for all purposes, including pay and pay administration, premium pay, retirement, life insurance, and eligibility for training. If the employee's actual position of record is under a different covered pay system than the covered pay system associated with the retained grade, the agency also must treat the employee as being under the covered pay system associated with the retained grade for the same purposes.

(b) An agency may not use an employee's retained grade—

(1) In any reduction in force procedure;

(2) To determine whether an employee has been reduced in grade for the purpose of terminating grade or pay retention (*i.e.*, based on personal cause or at the employee's request);

(3) To determine whether an employee retains status as a GM employee (as defined in 5 CFR 531.203); or

(4) To determine whether an employee is exempt or nonexempt from the Fair Labor Standards Act of 1938, as amended.

§ 536.206 Determining an employee's rate of basic pay under grade retention.

(a) *General.* (1) When an employee becomes entitled to grade retention or becomes covered by one or more different pay schedules (because of a change in the employee's position of record, a change in the employee's official worksite, or the establishment of a new pay schedule) during a period of grade retention, the agency must apply the rules in this section to determine the employee's rate of basic pay.

(2) This section does not apply to an employee whose entitlement to grade retention is terminated under one of the conditions in § 536.208. (See § 536.208(d).)

(b) *Preexisting rate within a range.* If an employee is entitled to a rate of basic pay within the applicable rate range before the action resulting in application of this section, the employee is entitled to the rate(s) of basic pay in the applicable pay schedule(s) for the employee's position of record after the action (including the retained grade) which correspond to the employee's grade and step (or rate) immediately before the action. The employee's payable rate is the corresponding rate in the highest applicable rate range for the employee's position of record after the action (including the retained grade). If an employee's rate of basic pay otherwise would be reduced because of placement under a lower-paying pay schedule (excluding any reduction that results from a geographic conversion), the employee would be eligible for pay retention under subpart C of this part to the same extent as other employees holding the same position of record whose actual grade is the same as the employee's retained grade.

(c) *Preexisting retained or saved rate.* (1) If an employee is entitled to a retained rate immediately before the action resulting in application of this section, the agency must determine the employee's payable rate of basic pay under §§ 536.303 and 536.304.

(2) If an employee is entitled to a saved rate under 5 CFR 359.705, the agency must determine the employee's payable rate of basic pay under that section.

(d) *Order of processing pay actions.* When an action resulting in application of this section takes effect on the same

effective date as other pay actions that affect an employee's rate of basic pay (e.g., within-grade increase), the actions will be processed in the order prescribed in the rules governing the covered pay system of the employee's position of record (e.g., 5 CFR 531.206 for GS positions and 5 CFR 532.413 for Federal Wage System positions).

§ 536.207 Loss of eligibility for grade retention.

(a) Eligibility for grade retention as a result of an entitlement under § 536.201 ceases if any of the following conditions occurs at any time after the employee receives written notice of the reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) The employee has a break in service of 1 workday or more;

(2) The employee is reduced in grade for personal cause or at the employee's request (based on the actual grade of the employee's position rather than the employee's retained grade and, when a movement to a different covered pay system is involved, a comparison of representative rates under § 536.105);

(3) The employee moves to a position under a covered pay system with a grade that is equal to or higher than the retained grade (as determined under § 536.105), excluding a temporary promotion;

(4) The employee declines a reasonable offer of a position with a grade equal to or higher than the retained grade (as determined under §§ 536.104 and 536.105);

(5) The employee elects in writing to terminate the benefits of grade retention; or

(6) The employee moves to a position not under a covered pay system.

(b) Eligibility for grade retention as a result of entitlement under § 536.202 ceases if any of the following conditions occurs at any time after management informs the employee of an impending reorganization or reclassification that will or could result in a reduction in grade, but before the commencement of the 2-year period of grade retention:

(1) Any of the conditions listed in paragraph (a) of this section except that an employee's request for placement in a lower-graded position, in lieu of displacing another employee at his or her grade under reduction in force procedures, is not a declination of a reasonable offer for grade retention purposes; or

(2) The employee fails to enroll in, or to comply with reasonable written requirements established to assure full consideration under, a program providing priority consideration for placement.

(c) If an employee loses eligibility for grade retention under this section, the employee's rate of basic pay must be set in accordance with the pay-setting rules and pay rates applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). An employee is not eligible for pay retention under subpart C of this part based on an action that provided eligibility for grade retention if the employee elects to terminate mandatory eligibility for grade retention under paragraph (a)(5) of this section.

§ 536.208 Termination of grade retention.

(a) Grade retention under § 536.201 terminates if any of the conditions listed in § 536.207(a) occurs after commencement of the 2-year period of grade retention.

(b) Grade retention under § 536.202 terminates if any of the conditions listed in § 536.207(b) occurs after the commencement of the 2-year period of grade retention.

(c) Termination of grade retention benefits takes effect—

(1) At the end of the day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of last day of the pay period in which the employee—

(i) Declines a reasonable offer; (ii) Elects to terminate grade retention benefits; or

(iii) Fails to enroll in, or comply with reasonable written requirements established to assure full consideration under, a program providing priority consideration for placement.

(d) If an employee's entitlement to grade retention terminates under this section, the employee's rate of basic pay must be set in accordance with the pay-setting rules and pay rates applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). An employee is not entitled to pay retention under subpart C of this part based on a reduction in basic pay resulting from waiver of the employee's grade retention entitlement under § 536.207(a)(5).

■ 37. Redesignate subpart C as subpart D; revise the title of redesigned subpart D to read “Appeals and Miscellaneous Provisions”; remove §§ 536.305, 536.306, and 536.308; and redesignate §§ 536.301, 536.302, 536.303, 536.304, and 536.307 as §§ 536.401, 536.402, 536.403, 536.404, and 536.405, respectively.

■ 38. In newly redesignated subpart D— ■ a. In newly redesignated § 536.403, remove “§ 536.304” and add in its place “§ 536.404”; and

- b. In newly redesignated § 536.405(b), remove “§ 297.204(c)” and add in its place “§ 297.205”.
- 39. Add a new subpart C to read as follows:

Subpart C—Pay Retention

Sec.

- 536.301 Mandatory pay retention.
- 536.302 Optional pay retention.
- 536.303 Geographic conversion.
- 536.304 Determining an employee's pay retention entitlement.
- 536.305 Adjusting an employee's retained rate when a pay schedule is adjusted.
- 536.306 Limitation on retained rates.
- 536.307 Treatment of a retained rate as basic pay for other purposes.
- 536.308 Loss of eligibility for or termination of pay retention.
- 536.309 Converting retained rates on May 1, 2005.

§ 536.301 Mandatory pay retention.

(a) Subject to the requirements in § 536.102 and this section, an agency must provide pay retention to an employee in a position under a covered pay system whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as a result of—

(1) The expiration of the 2-year period of grade retention under subpart B of this part;

(2) A reduction in force or reclassification action that places an employee in a lower-graded position when the employee does not meet the eligibility requirements for grade retention under subpart B of this part;

(3) A management action that places an employee in a non-special rate position or in a lower-paid special rate position from a special rate position;

(4) A management action that places an employee under a different pay schedule;

(5) A management action that places an employee in a formal employee development program generally utilized Governmentwide, such as upward mobility, apprenticeship, and career intern programs;

(6) The application of the promotion rule for GS employees under 5 U.S.C. 5334(b) and 5 CFR 531.214 when the employee's payable rate of basic pay after promotion exceeds the maximum rate of the highest applicable rate range;

(7) The application of the promotion rule for prevailing rate employees under 5 CFR 532.407 when the employee's payable rate of basic pay after promotion exceeds the maximum scheduled rate of the grade, as described in 5 CFR 532.407(b);

(8) A reduction or elimination of scheduled rates, special schedules, or special rate schedules, excluding—

- (i) A statutory reduction in scheduled rates of pay under the General Schedule, including a reduction authorized under 5 U.S.C. 5303(b); or
- (ii) A statutory reduction in a prevailing rate schedule established under 5 U.S.C. chapter 53, subchapter IV, and 5 CFR part 532.

(b) If an employee's official worksite changes in conjunction with an action that may entitle the employee to pay retention under paragraph (a) of this section, the agency must apply the geographic conversion rule in § 536.303(a) before determining whether an employee's rate of basic pay otherwise would be reduced.

(c) An employee is considered “placed” under paragraph (a)(2), (3), (4), and (5) of this section only when the employee remains in a position in the same agency. Optional pay retention under § 536.302 may apply when an employee transfers to a different agency as a result of a reduction in force or reclassification action or is selected by a different agency to fill a position under a formal employee development program, if all other qualifying conditions are met.

(d) Eligibility for pay retention under this section ceases under the conditions specified in § 536.308.

§ 536.302 Optional pay retention.

(a) Subject to the requirements in § 536.102 and this section, an authorized agency official may provide pay retention to an employee not entitled to pay retention under § 536.301, but whose payable rate of basic pay otherwise would be reduced (after application of any applicable geographic conversion under § 536.303(a)) as the result of a management action. This includes a management action to move an employee's position, without a break in service of more than 3 days, from a Department of Defense or Coast Guard nonappropriated fund instrumentality (as defined in 5 U.S.C. 2105(c)) to a position under a covered pay system in the same agency.

(b) If an employee's official worksite changes in conjunction with an action that may entitle the employee to pay retention under paragraph (a) of this section, the agency must apply the geographic conversion rule in § 536.303(a) before determining whether an employee's rate of basic pay otherwise would be reduced.

(c) Eligibility for pay retention under this section ceases under the conditions specified in § 536.308.

§ 536.303 Geographic conversion.

(a) *Geographic conversion at time of action that may provide initial entitlement to pay retention.* If, in conjunction with a pay action that may entitle the employee to pay retention under §§ 536.301 or 536.302, an employee's official worksite is changed to a new location where different pay schedules apply, the agency must convert the employee's rate(s) of basic pay to the applicable pay schedule(s) in the new location before applying the pay retention rules in this subpart or any other simultaneous pay action (other than a general pay adjustment). The agency must identify the highest applicable rate range that would apply to the employee's position of record before the pay action as if that position were stationed at the new official worksite and determine the employee's converted payable rate of basic pay based on the step (or rate) in that range that corresponds to the employee's step (or rate) before the pay action. A reduction in an employee's payable rate of basic pay resulting from this geographic conversion is not a basis for entitlement to pay retention. The pay retention rules in this subpart must be applied as if the employee's payable rate of basic pay after geographic conversion is the employee's existing payable rate of basic pay in effect immediately before the action.

(b) *Geographic conversion when a retained rate employee's official worksite is changed.* When an employee is receiving a retained rate and the employee's official worksite is changed to a new location where different pay schedules apply, the agency must apply the following rules (after applying any simultaneous general pay adjustment under § 536.305) to derive the converted retained rate that will be used as the existing retained rate in determining the employee's pay retention entitlement in the new position of record and at the new official worksite:

(1) Identify the maximum rate for the highest applicable rate range that applies to the employee's former position of record based on the former official worksite;

(2) Identify the maximum rate for the highest applicable rate range that would apply to the employee's former position of record if the employee were stationed at the official worksite for the new position of record;

(3) Divide the maximum rate identified in paragraph (b)(2) of this section by the maximum rate identified in paragraph (b)(1) of this section and round the result to the fourth decimal place; and

(4) Multiply the factor resulting from paragraph (b)(3) of this section by the employee's former retained rate and round to the nearest whole dollar (for an annual rate) or the nearest whole cent (for an hourly rate) to derive the employee's converted retained rate at the new official worksite.

§ 536.304 Determining an employee's pay retention entitlement.

(a) *General.* (1) When an employee becomes entitled to pay retention under § 536.301 or 536.302 or undergoes a change in his or her position of record or pay schedule while receiving a retained rate (when the terminating conditions for pay retention under § 536.308 do not apply), the agency must determine the employee's pay retention entitlement following the rules in this section.

(2) Any general pay adjustment (including a retained rate adjustment under § 536.305) that takes effect on the same date as an action described in paragraph (a)(1) of this section must be processed first, before any other pay action and before applying the rules in paragraphs (a)(3), (a)(4), (b), or (c) of this section, as applicable.

(3) If the location of an employee's official worksite changes in conjunction with an action that may provide initial entitlement to pay retention, the agency must apply the geographic conversion rule under § 536.303(a) before applying the rules in paragraph (b) of this section. The converted rate of basic pay must be treated as the employee's existing payable rate of basic pay in applying those rules.

(4) If the location of an employee's official worksite changes while he or she is receiving a retained rate, the agency must apply the geographic conversion rule under § 536.303(b) before applying the rules in paragraph (c) of this section. The converted retained rate must be treated as the employee's existing retained rate in applying those rules.

(5) When an employee's pay retention entitlement is established or redetermined under this section on the same effective date as other pay actions that affect an employee's rate of basic pay, the actions must be processed in the order prescribed under the rules governing the covered pay system of the employee's position of record (e.g., 5 CFR 531.206 for GS positions and 5 CFR 532.413 for Federal Wage System positions).

(6) In applying this section, an agency must convert an employee's existing annual rate of pay to an hourly rate of pay if the employee's new position is under a pay system that uses only

hourly rates. An agency must convert an employee's existing hourly rate of pay to an annual rate of pay if the employee's new position is under a pay system that uses annual rates of pay.

(b) *Determining initial pay retention entitlement.* When an employee becomes entitled to pay retention under § 536.301 or 536.302, the agency must determine the employee's pay retention entitlement under the following rules (subject to the requirements in paragraph (a) of this section):

(1) If an employee's existing payable rate of basic pay is less than or equal to the maximum rate of the highest applicable rate range for the grade of the employee's position of record immediately after the event causing the pay retention entitlement, the employee is entitled to the lowest rate of basic pay in such rate range that equals or exceeds the employee's existing payable rate of basic pay. If an employee's payable rate of basic pay is set at or below the maximum rate of the highest applicable rate range, pay retention under this subpart ceases to apply to the employee.

(2) If the employee's existing payable rate of basic pay is greater than the maximum rate of the highest applicable rate range for the grade of the employee's position immediately after the event causing the pay retention entitlement, the employee is entitled to a retained rate equal to the employee's existing payable rate of basic pay, subject to the limitations in paragraph (b)(3) of this section.

(3) A newly established retained rate may not exceed—

(i) 150 percent of the maximum payable rate of basic pay of the highest applicable rate range for the grade of the employee's position of record; or

(ii) The Executive Level IV maximum rate limitation established under § 536.306.

(4) In applying this section for an employee who becomes eligible for pay retention while serving on a temporary promotion or temporary reassignment, the agency must use the rate of basic pay the employee would have received if the temporary promotion or temporary reassignment had not occurred.

(c) *Redetermining pay retention entitlement at time of change in position or pay schedule.* When an employee receiving a retained rate undergoes a change in position or pay schedule that results in a new highest applicable rate range (and when the terminating conditions for pay retention under § 536.308(a)(1), (3), (4), and (5) do not apply), the agency must determine the employee's pay retention entitlement under the following rules (subject to the

requirements in paragraph (a) of this section:

(1) If the employee's grade and pay system are not changing and if the employee's existing retained rate is less than or equal to the maximum rate of the highest applicable rate range for the employee's position of record immediately after the position or schedule change, the employee is entitled to the maximum rate of the highest applicable rate range, and pay retention ceases to apply.

(2) If the employee's grade and pay system are not changing and if the employee's existing retained rate is greater than the maximum rate on the highest applicable rate range for the employee's position of record immediately after the position or schedule change, the employee continues to be entitled to the existing retained rate.

(3) If the employee's pay system is not changing but the employee is being promoted to a higher-graded position, the agency must apply the applicable promotion rules to determine the employee's payable rate of basic pay (e.g., the rules in 5 CFR 531.214(d)(5) for GS positions and 5 CFR 532.407 for Federal Wage System positions). When the resulting rate is equal to or greater than the existing retained rate, pay retention ceases to apply. When the resulting rate is less than the existing retained rate, the employee continues to be entitled to the existing retained rate.

(4) If the employee is moving to a position under a different covered pay system whose grade has a higher representative rate, the agency must apply the applicable pay administration rules to determine the employee's payable rate of basic pay (e.g., part 531, subpart B, for GS positions and part 532 for Federal Wage System provisions). When the resulting rate is equal to or greater than the existing retained rate, pay retention ceases to apply to the employee. When the resulting rate is less than the existing retained rate, the employee continues to be entitled to the existing retained rate.

(5) In applying this section to a retained rate employee who receives a temporary promotion or temporary reassignment, the temporary promotion or temporary reassignment is not a basis for permanently terminating an employee's pay retention entitlement. When the temporary promotion or temporary reassignment ends, the employee's pay retention entitlement will be determined as if the employee had not received the temporary promotion or temporary reassignment.

(6) Notwithstanding § 536.308(a)(1), an agency must continue a retained rate

entitlement for an employee serving under an interim appointment made under 5 CFR 772.102 if the employee's pay was retained under this subpart under the appointment immediately preceding the interim appointment.

§ 536.305 Adjusting an employee's retained rate when a pay schedule is adjusted.

(a)(1) Except as otherwise provided in this section, when the maximum rate of the highest applicable rate range for an employee's position of record is increased while the employee is receiving a retained rate, the employee is entitled to 50 percent of the amount of the increase in that maximum rate, subject to the maximum rate limitation in § 536.306. This 50-percent adjustment rule applies only when the maximum rate increases are attributable to the adjustment of the employee's existing pay schedule or the establishment of a new pay schedule that covers the employee's existing position of record.

(2) As provided in 5 CFR 531.206, a retained rate adjustment under paragraph (a)(1) of this section is a general pay adjustment that must be applied before any geographic conversion under § 536.303(b) or any other simultaneous pay action. The retained rate adjustment under paragraph (a)(1) of this section must be determined based on the employee's position of record and official worksite as in effect immediately before the effective date of the adjustment.

(3) Consistent with 5 U.S.C. 5363(c), a change in the maximum rate of the highest applicable rate range based on a change in the employee's official worksite is not considered in applying paragraph (a)(1) of this section. The employee's new retained rate must be determined under the geographic conversion rule in § 536.303(b).

(4) Paragraph (a)(1) of this section does not apply to an increase in an employee's highest applicable rate range that results from a change in the employee's position of record. Such an increase is not attributable to an adjustment in the pay schedule applicable to the employee's position and thus is not an increase as described in 5 U.S.C. 5363(b)(2)(B).

(b) When a pay schedule adjustment causes an employee's retained rate (after any adjustment under this section) to become equal to or lower than the maximum rate of the highest applicable rate range for the grade of the employee's position, the employee is entitled to the maximum rate of the highest applicable rate range, and pay retention ceases to apply.

§ 536.306 Limitation on retained rates.

(a) A retained rate may not at any time exceed the rate payable for level IV of the Executive Schedule.

(b) When an employee's retained rate is limited under this section, an agency may not apply this subpart or the provisions of any other law or regulation to the rate of basic pay the employee would have received but for this limitation.

§ 536.307 Treatment of a retained rate as basic pay for other purposes.

(a) A retained rate is considered to be an employee's rate of basic pay for the purpose of computing or applying—

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapters 83 and 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, and 5 CFR part 532 and part 550, subparts A and I;

(4) Severance pay under 5 U.S.C. 5595 and 5 CFR part 550, subpart G;

(5) Post differentials under 5 U.S.C. 5925 and danger pay allowances under 5 U.S.C. 5928;

(6) Nonforeign area cost-of-living allowances and post differentials under 5 U.S.C. 5941(a) and 5 CFR part 591, subpart B;

(7) Lump-sum payments for accumulated and annual leave under 5 CFR part 550, subpart L;

(8) General Schedule pay administration provisions (e.g., promotion increases) to the extent provided in 5 CFR part 531, subpart B;

(9) Pay administration provisions for prevailing rate employees to the extent provided in 5 CFR part 532;

(10) Other provisions as specified in other statutes or OPM regulations; and

(11) Payments and benefits equivalent to those listed in this section under other legal authorities, as determined by the head of the agency or other authorized official responsible for administering such payments or benefits.

(b) For the purpose of applying other laws and regulations not listed in paragraph (a) of this section to an employee receiving a retained rate, the employee's rate of basic pay is deemed to be the applicable maximum rate of basic pay for the employee's position of record (e.g., the maximum rate of basic pay for a locality rate range or special rate range, as applicable, for the purpose of computing a percentage-based award under 5 CFR 451.104(g)).

§ 536.308 Loss of eligibility for or termination of pay retention.

(a) Eligibility for pay retention ceases if any of the following conditions occurs at any time after the employee has received written notification that the employee's pay will be reduced, and entitlement to pay retention terminates if any of the following conditions occurs after the commencement of pay retention:

(1) The employee has a break in service of 1 workday or more;

(2) The employee is entitled to a rate of basic pay under a covered pay system which is equal to or greater than the employee's retained rate (after applying any applicable geographic conversion under paragraph (b) of this section), excluding a rate resulting from a temporary promotion or temporary reassignment;

(3) The employee declines a reasonable offer (as determined under § 536.104) of a position in which the employee's rate of basic pay would be equal to or greater than the employee's retained rate (after applying any applicable geographic conversion under paragraph (b) of this section);

(4) The employee is reduced in grade for personal cause or at the employee's request (based on the actual grade of the employee's position rather than the employee's retained grade and, when a movement to a different covered pay system is involved, a comparison of representative rates under § 536.105); or

(5) The employee moves to a position not under a covered pay system.

(b) When the rate comparison required by paragraph (a)(2) or (3) of this section involves a new or offered position that is located in a different geographic area where different pay schedules would apply to the employee's existing position of record, the agency must convert the employee's existing retained rate using the geographic conversion rules in

§ 536.303(b) before making the rate comparison. The converted retained rate must be compared to the payable rate of basic pay for the new or offered position in determining whether the rate of basic pay for an offered position is equal to or higher than the employee's retained rate.

(c) Termination of pay retention benefits takes effect—

(1) At the end of the day before placement if the termination is the result of the employee's placement in another position; or

(2) At the end of the last day of the pay period in which the employee declines a reasonable offer.

(d) If an employee's eligibility for pay retention ceases or entitlement to pay

retention terminates under this section, the employee's rate of basic pay must be set using the pay-setting rules applicable to the employee's position of record (e.g., 5 CFR part 531, subpart B, for GS positions). However, when an employee's retained rate is terminated under paragraph (a)(2) or (3) of this section and the employee's grade is unchanged, the employee's payable rate of basic pay may not be set below the maximum rate of the highest applicable rate range.

§ 536.309 Converting retained rates on May 1, 2005.

(a) Consistent with section 301(d)(2) of Public Law 108-411, an agency must convert an employee's retained rate or similar rate, as described in paragraph (b) of this section, to a retained rate under this subpart on May 1, 2005. The new retained rate must equal the retained rate in effect on April 30, 2005, as adjusted to include any applicable locality payment under 5 U.S.C. 5304 or similar provision of law.

(b) This section applies to an employee under a covered pay system who, on April 30, 2005, was receiving—

(1) A retained rate under 5 U.S.C. 5363;

(2) A rate paid under the authority of 5 U.S.C. 5334(b) or 5 U.S.C. 5362 which was greater than the maximum rate of basic pay payable for the grade of the employee's position of record; or

(3) A continued rate of pay under 5 CFR part 531, subpart C or G (as contained in the January 1, 2005, edition of title 5, Code of Federal Regulations, parts 1 to 699) which was greater than the maximum rate of basic pay payable for the grade of the employee's position.

(c) The conversion rules in this section must be applied before any simultaneous pay action that takes effect on May 1, 2005.

PART 550—PAY ADMINISTRATION (GENERAL)**Subpart A—Premium Pay**

■ 40. The authority citation for subpart A of part 550 is revised 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); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

■ 41. In § 550.103, revise the definition of *rate of basic pay* 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; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind.

Subpart B—Advances in Pay

■ 42. The authority citation for subpart B of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5524a, 5545a(h)(2)(B); E.O. 12748, 3 CFR, 1992 Comp., p. 316.

■ 43. In § 550.202, revise the definition of *rate of basic pay* to read as follows:

§ 550.202 Definitions

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, excluding additional pay of any kind except the following, as applicable:

(1) Any locality payment under 5 CFR part 531, subpart F; special rate under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

(2) Annual premium pay under 5 U.S.C. 5545(c) or availability pay under 5 U.S.C. 5545a;

(3) Straight-time pay for regular overtime hours for firefighters under 5 U.S.C. 5545b (as provided in § 550.1305(b)); and

(4) Night differential for prevailing rate employees under 5 U.S.C. 5343(f).

Subpart G—Severance Pay

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

Authority: 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964-1965 Comp., p. 357.

■ 45. In § 550.703, amend the definition of *representative rate* by removing the reference “5 CFR 536.102” and adding in its place “5 CFR 536.103”, and revise the definition of *rate of basic pay* to read as follows:

§ 550.703 Definitions

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, excluding additional pay of any kind except the following, as applicable:

(1) Any locality payment under 5 CFR part 531, subpart F; special rate under

5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

(2) Annual premium pay under 5 U.S.C. 5545(c) or availability pay under 5 U.S.C. 5545a;

(3) Straight-time pay for regular overtime hours for firefighters under 5 U.S.C. 5545b (as provided in § 550.1305(b)); and

(4) Night differential for prevailing rate employees under 5 U.S.C. 5343(f).

* * * * *

Subpart L—Lump-Sum Payment for Accumulated and Accrued Annual Leave

■ 46. The authority citation for subpart L continues to read as follows:

Authority: 5 U.S.C. 5553, 6306, and 6311.

■ 47. In § 550.1202, revise the definition of *rate of basic pay* to read as follows:

§ 550.1202 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; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind.

* * * * *

■ 48. In § 550.1205, revise paragraph (b)(1) to read as follows:

§ 550.1205 Calculating a lump-sum payment.

* * * * *

(b) * * *

(1) An employee's rate of basic pay (as defined in § 550.1202);

* * * * *

Subpart M—Firefighter Pay

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

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

§ 550.1305 Treatment as basic pay.

■ 50. In § 550.1305, amend paragraph (e) by removing the reference “§ 531.606(b) of this chapter” and adding in its place “5 CFR 531.610”.

PART 591—ALLOWANCES AND DIFFERENTIALS

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

■ 51. The authority citation for subpart B of part 591 continues to read as follows:

Authority: 5 U.S.C. 5941; E.O. 10000, 3 CFR, 1943–1948 Comp., p. 792; and E.O. 12510, 3 CFR, 1985 Comp., p. 338.

■ 52. In § 591.201, remove the definition of *official duty station*, add in alphabetical order the definitions of *official worksite* and *position of record*, and revise the definition of *rate of basic pay* to read as follows:

§ 591.201 Definitions.

* * * * *

Official worksite means the official location of an employee's position of record as determined under 5 CFR 531.605.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, law enforcement officer status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and the current position description, excluding any position to which the employee is temporarily detailed. For an employee whose change in official position is followed within 3 workdays by a reduction in force resulting in the employee's separation before he or she is required to report for duty in the new position, the position of record in effect immediately before the position change is deemed to remain the position of record through the date of separation.

* * * * *

Rate of basic pay means the rate of pay fixed by statute for the position held by an individual, including any supplement included as part of basic pay under this subpart by law or regulation (e.g., a special rate supplement under 5 CFR part 530, subpart C), before any deductions and exclusive of additional pay of any other kind, such as overtime pay, night differential, extra pay for work on holidays, or other allowances and differentials. For firefighters covered by 5 U.S.C. 5545b, straight-time pay for regular overtime hours is basic pay, as provided in § 550.1305(b) of this chapter.

* * * * *

Subpart B [Amended]

■ 53. In addition to the amendments set forth above, in 5 CFR part 591, subpart B, remove the words “official duty station” and “duty station” and add in their place the words “official worksite” throughout the subpart, as amended.

PART 630—ABSENCE AND LEAVE

■ 54. The authority citation for part 630 is revised to read as follows:

Authority: 5 U.S.C. 6311; § 630.301 also issued under Pub. L. 103–356, 108 Stat. 3410 and Pub. L. 108–411, 118 Stat. 2312; § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102–484, 106 Stat. 2722, and Pub. L. 103–337, 108 Stat. 2663; subpart D also issued under Pub. L. 103–329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100–566, 102 Stat. 2834, and Pub. L. 103–103, 107 Stat. 1022; subpart K also issued under Pub. L. 105–18, 111 Stat. 158; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103–3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 102–25, 105 Stat. 92.

Subpart L—Family and Medical Leave

■ 55. In § 630.1204, revise paragraph (d)(1) to read as follows:

§ 630.1204 Intermittent leave or reduced leave schedule.

* * * * *

(d) * * *

(1) An equivalent grade or pay level, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

* * * * *

■ 56. In § 630.1208, revise paragraph (b)(2) to read as follows:

§ 630.1208 Protection of employment and benefits.

* * * * *

(b) * * *

(2) An equivalent grade or pay level, including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority;

* * * * *

PART 831—RETIREMENT

- 57. The authority citation for part 831 continues to read as follows:

Authority: 5 U.S.C. 8347; Sec. 831.102 also issued under 5 U.S.C. 8334; Sec. 831.106 also issued under 5 U.S.C. 552a; Sec. 831.108 also issued under 5 U.S.C. 8336(d)(2); Sec. 831.114 also issued under 5 U.S.C. 8336(d)(2), and section 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Sec. 831.201(b)(1) also issued under 5 U.S.C. 8347(g); Sec. 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); Sec. 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; Sec. 831.201(g) also issued under sections 7(b) and 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.201(i) also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 831.205 also issued under section 2207 of Pub. L. 106–265, 114 Stat. 784; Sec. 831.301 also issued under section 2203 of Pub. L. 106–265, 114 Stat. 780; Sec. 831.303 also issued under 5 U.S.C. 8334(d)(2) and section 2203 of Pub. L. 106–235, 114 Stat. 780; Sec. 831.502 also issued under 5 U.S.C. 8337; Sec. 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp. p. 317; Sec. 831.663 also issued under sections 8339(j) and (k)(2); Secs. 831.663 and 831.664

also issued under section 11004(c)(2) of Pub. L. 103–66, 107 Stat. 412; Sec. 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; Sec. 831.912 also issued under Appendix C to Pub. L. 106–554, 114 Stat. 2763A–125; subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; Sec. 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

Subpart E—Eligibility for Retirement**§ 831.503 [Amended]**

- 58. In § 831.503, amend paragraph (b)(3)(iv) by removing the reference “§ 536.102” and adding in its place “§ 536.103”.

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

- 59. The authority citation for part 842 continues to read as follows:

Authority: 5 U.S.C. 8461(g); Secs. 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); Sec. 842.104 also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); Sec. 842.106 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat.

1321–102; Sec. 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251, and section 7(b) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.108 also issued under section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 1313(b)(5) of Pub. L. 107–296, 116 Stat. 2135; Secs. 842.604 and 842.611 also issued under 5 U.S.C. 8417; Sec. 842.607 also issued under 5 U.S.C. 8416 and 8417; Sec. 842.614 also issued under 5 U.S.C. 8419; Sec. 842.615 also issued under 5 U.S.C. 8418; Sec. 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; Sec. 842.707 also issued under section 6001 of Pub. L. 100–203, 101 Stat. 1300; Sec. 842.708 also issued under section 4005 of Pub. L. 101–239, 103 Stat. 2106 and section 7001 of Pub. L. 101–508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104; Sec. 842.810 also issued under section 636 of Appendix C to Pub. L. 106–554 at 114 Stat. 2763A–164.

Subpart B—Eligibility**§ 842.206 [Amended]**

- 60. In § 842.206, amend paragraph (c)(3)(iv) by removing the reference “§ 536.102” and adding in its place “§ 536.103”.

[FR Doc. 05–10793 Filed 5–26–05; 9:37 am]

BILLING CODE 6325–39–P