

Rules and Regulations

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206-AK91

Prevailing Rate Systems; Redefinition of the Adams-Denver, CO, Nonappropriated Fund Wage Area

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule to remove Adams County, CO, from the Adams-Denver, CO, Federal Wage System nonappropriated fund (NAF) wage area, redefine Arapahoe County, CO, from the area of application to the survey area, and change the Adams-Denver wage area's name to Arapahoe-Denver. These changes are necessary because the closure of Fitzsimons Army Medical Center in Adams County left the Adams-Denver survey area without a host activity to conduct local NAF wage surveys.

DATES: This rule is effective on December 14, 2005.

FOR FURTHER INFORMATION CONTACT:

Madeline Gonzalez, (202) 606-2838; e-mail pay-performance-policy@opm.gov; or FAX: (202) 606-4264.

SUPPLEMENTARY INFORMATION: On August 22, 2005, the Office of Personnel Management (OPM) issued a proposed rule (70 FR 48899) to remove Adams County, CO, from the Adams-Denver, CO, Federal Wage System nonappropriated fund wage area, redefine Arapahoe County, CO, from the area of application to the survey area, and change the Adams-Denver wage area's name to Arapahoe-Denver. The proposed rule had a 30-day comment period, during which OPM received no comments.

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 affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 532

Administrative practice and procedure, Freedom of information, Government employees, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,
Director.

■ Accordingly, the Office of Personnel Management is amending 5 CFR part 532 as follows:

PART 532—PREVAILING RATE SYSTEMS

■ 1. 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.

■ 2. In appendix D to subpart B, the wage area listing for the State of Colorado is amended by revising the listing for Adams-Denver to read as follows:

Appendix D to Subpart B of Part 532—Nonappropriated Fund Wage and Survey Areas

* * * * *

Colorado Arapahoe-Denver Survey Area

Colorado:
Arapahoe
Denver

Area of Application. Survey area plus:

Colorado:

Mesa

* * * * *

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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209-AA09

Additional Exemption for Mutual Funds and Unit Investment Trusts Under 18 U.S.C. 208(b)(2)

AGENCY: Office of Government Ethics (OGE).

ACTION: Interim rule amendment with request for comments.

SUMMARY: The Office of Government Ethics is issuing an interim rule amendment that permits Government employees to participate in certain particular matters of general applicability affecting mutual funds and unit investment trusts, notwithstanding the employees' disqualifying financial interest under 18 U.S.C. 208(a) arising from the ownership of mutual funds or unit investment trusts.

DATES: This interim regulation is effective November 14, 2005. Comments are invited and are due in writing by December 14, 2005.

ADDRESSES: You may submit comments, in writing, to OGE on this interim rule, identified by RIN 3209-AA09, by any of the following methods:

- E-Mail: usoge@oge.gov. Include the reference "Interim Rule Exemption Under 18 U.S.C. 208(b)(2)" in the subject line of the message.
- Fax: (202) 482-9237.
- Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Richard M. Thomas, Associate General Counsel.

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA09, for this rulemaking.

FOR FURTHER INFORMATION CONTACT:

Richard M. Thomas, Associate General Counsel, Office of Government Ethics; telephone: (202) 482-9300; TDD: (202) 482-9293; FAX: (202) 482-9237.

SUPPLEMENTARY INFORMATION: Section 208(a) of title 18 of the United States Code prohibits Government employees from participating in an official capacity in particular Government matters in which, to their knowledge, they or certain other persons specified in the statute have a financial interest, if the particular matter would have a direct and predictable effect on that interest.

Section 208(b)(2) of title 18 permits the Office of Government Ethics to promulgate regulations describing financial interests that are too remote or inconsequential to warrant disqualification pursuant to section 208(a).

On August 28, 1995, the Office of Government Ethics published its first interim rule, with request for comments, promulgating certain miscellaneous exemptions under section 208(b)(2). 60 FR 44705 (August 28, 1995). On December 18, 1996, the Office of Government Ethics published a comprehensive final rule, "Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)," codified at 5 CFR part 2640, which promulgated several additional exemptions and also adopted as final, with some modifications, the exemptions promulgated in the earlier interim rule. 61 FR 66829 (December 18, 1996) (final rule); 60 FR 47207 (September 11, 1995) (proposed rule). OGE subsequently has added and amended exemptions by interim rule, with request for comment, 65 FR 16511 (March 29, 2000) (adopted as final, 65 FR 47830 (August 4, 2000)), and (after a proposed rule, 65 FR 53942 (September 6, 2000)) by final rule, 67 FR 12443 (March 19, 2002).

Among the exemptions OGE has promulgated are several that exempt certain financial interests in "mutual funds" and "unit investment trusts," as those terms are defined in § 2640.102(k) and (u). See 5 CFR 2640.201(a) (diversified mutual funds and unit investment trusts), 2640.102(b)(1) (non-sector holdings of sector mutual fund), 2640.201(b)(2) (\$50,000 de minimis interest in sector mutual funds). As a general matter, such investment funds historically have been thought to raise fewer significant conflict of interest concerns than other types of investments, for several reasons. As OGE has noted previously, typically "only a limited portion of the fund's assets [are] placed in the securities of any single issuer" and usually "an employee's interest in any one fund is only a small portion of the fund's total assets." 60 FR 47211 (September 11, 1995) (preamble to proposed rule). These popular investment vehicles are also subject to significant regulation by the Securities and Exchange Commission (SEC). In short, the risks and the expenses incident to such pooled investment vehicles generally pose fewer concerns that the financial interests will affect the integrity of the services of Government employees. Indeed, Congress itself has recognized

the diminished conflicts potential by including certain investment funds as one of the few types of "permitted property" under 26 U.S.C. 1043, which allows Government employees to defer recognition of capital gains from sales to comply with conflict of interest requirements as long as the proceeds of the sale are invested in permitted property. See 5 CFR part 2634, subpart J (Certificates of Divestiture).

All of these existing exemptions focus on employee interests arising from the "holdings" of the investment funds. This is not surprising, because common sense—as well as OGE's discussions with the SEC and other agencies—indicates that the principal determinant of mutual fund value is the performance of the underlying holdings.

Since these exemptions were promulgated, however, OGE has become aware that employees at certain agencies may work on particular matters of general applicability that do not have an effect on individual fund holdings, but instead may have an effect on the mutual funds or unit investment trusts themselves. The SEC, for example, is the primary Federal regulator of investment companies and investment advisers, and the agency has advised OGE that its employees must address a variety of issues, through rulemaking and other Commission action, such as oversight of mutual fund fees and expenses, brokerage arrangements, valuation and pricing, management conflicts of interest, structural changes to the boards to address independence, etc. Similarly, some employees of the Internal Revenue Service may participate in certain taxation issues affecting regulated investment companies, such as the tax treatment of certain expenses and dividends. Difficult questions have arisen concerning whether the participation in such matters is even covered by 18 U.S.C. 208. In some cases, for example, it may be difficult to determine when such policy matters have a direct and predictable effect on the employee's financial interest in a particular investment fund. In some cases, moreover, employees may not have understood adequately the limits of existing OGE exemptions, which do not actually cover any financial interests other than those arising from the effect of Government action on the underlying holdings of funds. Given the popularity of investment funds—the SEC, for example, has advised OGE that, along with 48.1% of all American households who are invested in mutual funds directly or indirectly (see the Investment Company Institute (ICI) 2005 Investment Company Fact Book, Part I, Section 4, available online at <http://www.ici.org>), a significant percentage of SEC employees own mutual fund shares—it is especially important to dispel any uncertainty concerning the application of section 208 to such interests.

Therefore, OGE is promulgating a new exemption, by adding a paragraph (d) to § 2640.201 of 5 CFR, that covers interests in mutual funds and unit investment trusts other than interests arising from the holdings of such vehicles. As this action is intended, in part, to clarify the application of section 208 to such interests, the promulgation of this exemption should not be construed as an indication that any particular activity in which an employee might have participated in the past necessarily should be viewed as a violation of section 208. Moreover, it is also important to remember that interests arising from the effect of Government matters on the underlying holdings of mutual funds and unit investment trusts will continue to be addressed by the other exemptions noted above.

The new exemption is limited to particular matters of general applicability, as defined in 5 CFR 2640.102(m). This would include, for example, rules and guidance documents that address all mutual funds or a class of investment companies. The exemption does not cover particular matters involving specific parties, as defined in 5 CFR 2640.102(l), such as cases or investigations focusing on a particular investment company. Where an employee would be called upon to participate in a particular matter involving specific parties, potential conflicts should be evaluated on a case-by-case basis and may be resolved, as appropriate, through recusal, divestiture, or an individual waiver under 18 U.S.C. 208(b).

The limitation to matters of general applicability is an important part of the justification for this exemption. As in other areas, OGE has determined that the potential for financial interests in this area to affect the integrity of an employee's services is limited when the particular matter affects an entire industry or class of entities, rather than focusing on the interests and rights of a particular company or other party. See generally 60 FR 47210 ("The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters."). The exemption thus would not cover those particular

matters that may be thought to pose the most acute potential for conflict, such as a proceeding with respect to a specific fund in which the employee has invested. Moreover, from discussions with various agencies, OGE has concluded that the impact of rules and other matters of general applicability on an employee's financial interest in a particular investment company is not likely to be so significant as to call into question the employee's integrity: As mentioned above, the value of an investor's interest in a fund is more directly a function of the performance of the underlying holdings rather than the effect of Government regulations on the management of the fund. Additionally, any such interests are so widely shared among the American public that employees certainly would not have a peculiar stake in such matters.

This interim rule is being published after obtaining the concurrence of the Department of Justice pursuant to section 201(c) of Executive Order 12674. Also, as provided in section 402 of the Ethics in Government Act of 1978, as amended, 5 U.S.C. appendix, section 402, OGE has consulted with both the Department of Justice (as additionally required under 18 U.S.C. 208(d)(2)) and the Office of Personnel Management on this rule.

Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553 (b) and (d), as General Counsel of the Office of Government Ethics, I find that good cause exists for waiving the general requirements of notice of proposed rulemaking, opportunity for public comments, and 30-day delayed effective date for this interim rule amendment, and additionally that the 30-day delayed effective date does not apply because the rule grants or recognizes an exemption or relieves a restriction. These requirements are being waived because this rulemaking grants a new exemption under the applicable conflict of interest law, 18 U.S.C. 208. Moreover, delay in issuance of the rule would be contrary to the public interest because the interim rule clarifies the permissible limits of employees' official actions when certain of their financial interests may be affected, in view of questions of the type discussed above concerning the application of 18 U.S.C. 208 to employee participation in certain matters affecting mutual funds and unit investment trusts. Nonetheless, interested persons are invited to submit written comments to OGE on this interim rule, to be received on or before December 14, 2005. The Office of

Government Ethics will review all comments received and consider any modifications to this rule which appear warranted before adopting the final rule on this matter.

Regulatory Flexibility Act

As General Counsel of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this interim rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this interim regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this interim final rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this interim rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law at the same time this rulemaking document is sent to the Office of the Federal Register for publication in the **Federal Register**.

Executive Order 12866

In promulgating this interim rule amendment, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This interim rule has also been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to this interim amendment notes the legal basis and benefits of, as well as the need for, the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this amended regulation, since it only adds

to OGE's financial interests regulation a new regulatory exemption affecting certain matters of general applicability. Finally, this rulemaking is not economically significant under the Executive order and will not interfere with State, local or tribal governments.

Executive Order 12988

As General Counsel of the Office of Government Ethics, I have reviewed this interim amending regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2640

Conflict of interests, Government employees.

Approved: November 7, 2005.

Marilyn L. Glynn,

General Counsel, Office of Government Ethics.

■ Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2640 as follows:

PART 2640—INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL INTEREST)

■ 1. The authority citation for part 2640 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart B—Exemptions Pursuant to 18 U.S.C. 208(b)(2)

■ 2. Section 2640.201 is amended by adding a new paragraph (d) to read as follows:

§ 2640.201 Exemptions for interests in mutual funds, unit investments trusts, and employee benefit plans.

* * * * *

(d) *Matters affecting mutual funds and unit investment trusts.* In addition to participation in the particular matters affecting the holdings of mutual funds and unit investment trusts as permitted under paragraphs (a) and (b) of this section, an employee may participate in any particular matter of general applicability affecting a mutual fund or unit investment trust where the disqualifying financial interest arises because of the ownership of an interest

in the mutual fund or unit investment trust.

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FEDERAL RESERVE SYSTEM

12 CFR Part 201

[Regulation A]

Extensions of Credit by Federal Reserve Banks

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted final amendments to its Regulation A to reflect the Board's approval of an increase in the primary credit rate at each Federal Reserve Bank. The secondary credit rate at each Reserve Bank automatically increased by formula as a result of the Board's primary credit rate action.

DATES: The amendments in this final rule are effective November 14, 2005. The rate changes for primary and secondary credit were effective on the dates specified in 12 CFR 201.51, as amended.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Johnson, Secretary of the Board (202/452-3259); for users of Telecommunication Devices for the Deaf (TDD) only, contact 202/263-4869.

SUPPLEMENTARY INFORMATION: The Federal Reserve Banks make primary and secondary credit available to depository institutions as a backup source of funding on a short-term basis, usually overnight. The primary and secondary credit rates are the interest rates that the twelve Federal Reserve Banks charge for extensions of credit under these programs. In accordance with the Federal Reserve Act, the primary and secondary credit rates are established by the boards of directors of the Federal Reserve Banks, subject to the review and determination of the Board.

The Board approved requests by the Reserve Banks to increase by 25 basis points the primary credit rate in effect at each of the twelve Federal Reserve Banks, thereby increasing from 4.75 percent to 5.00 percent the rate that each Reserve Bank charges for extensions of primary credit. As a result of the Board's action on the primary credit rate, the rate that each Reserve Bank charges for extensions of secondary credit automatically increased from 5.25 percent to 5.50 percent under the secondary credit rate formula. The final amendments to Regulation A reflect these rate changes.

The 25-basis-point increase in the primary credit rate was associated with a similar increase in the target for the federal funds rate (from 3.75 percent to 4.00 percent) approved by the Federal Open Market Committee (Committee) and announced at the same time. A press release announcing these actions indicated that:

Elevated energy prices and hurricane-related disruptions in economic activity have temporarily depressed output and employment. However, monetary policy accommodation, coupled with robust underlying growth in productivity, is providing ongoing support to economic activity that will likely be augmented by planned rebuilding in the hurricane-affected areas. The cumulative rise in energy and other costs has the potential to add to inflation pressures; however, core inflation has been relatively low in recent months and longer-term inflation expectations remain contained.

The Committee perceives that, with appropriate monetary policy action, the upside and downside risks to the attainment of both sustainable growth and price stability should be kept roughly equal. With underlying inflation expected to be contained, the Committee believes that policy accommodation can be removed at a pace that is likely to be measured. Nonetheless, the Committee will respond to changes in economic prospects as needed to fulfill its obligation to maintain price stability.

Regulatory Flexibility Act Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Board certifies that the new primary and secondary

credit rates will not have a significantly adverse economic impact on a substantial number of small entities because the final rule does not impose any additional requirements on entities affected by the regulation.

Administrative Procedure Act

The Board did not follow the provisions of 5 U.S.C. 553(b) relating to notice and public participation in connection with the adoption of these amendments because the Board for good cause determined that delaying implementation of the new primary and secondary credit rates in order to allow notice and public comment would be unnecessary and contrary to the public interest in fostering price stability and sustainable economic growth. For these same reasons, the Board also has not provided 30 days prior notice of the effective date of the rule under section 553(d).

12 CFR Chapter II

List of Subjects in 12 CFR Part 201

Banks, Banking, Federal Reserve System, Reporting and recordkeeping.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR Chapter II to read as follows:

PART 201—EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS (REGULATION A)

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 12 U.S.C. 248(i)–(j), 343 *et seq.*, 347a, 347b, 347c, 348 *et seq.*, 357, 374, 374a, and 461.

■ 2. In § 201.51, paragraphs (a) and (b) are revised to read as follows:

§ 201.51 Interest rates applicable to credit extended by a Federal Reserve Bank.¹

(a) **Primary credit.** The interest rates for primary credit provided to depository institutions under § 201.4(a) are:

Federal Reserve Bank	Rate	Effective
Boston	5.00	November 1, 2005.
New York	5.00	November 1, 2005.
Philadelphia	5.00	November 1, 2005.
Cleveland	5.00	November 1, 2005.
Richmond	5.00	November 1, 2005.
Atlanta	5.00	November 1, 2005.
Chicago	5.00	November 1, 2005.
St. Louis	5.00	November 2, 2005.

¹ The primary, secondary, and seasonal credit rates described in this section apply to both

advances and discounts made under the primary,

secondary, and seasonal credit programs, respectively.