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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 551

RIN 3206-AK89

#### Pay Administration Under the Fair Labor Standards Act

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final rule to amend the pay administration regulations issued under the Fair Labor Standards Act of 1938. These regulations apply to all employees in agencies who are under OPM's jurisdiction for FLSA purposes.

**DATES:** The regulations are effective October 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Georgeanna Emery by e-mail at [fedclass@opm.gov](mailto:fedclass@opm.gov), by telephone at 202-606-3600, or by fax at 202-606-4891.

**SUPPLEMENTARY INFORMATION:** On May 26, 2006, the Office of Personnel Management (OPM) published proposed regulations (71 FR 30301) to amend 5 CFR, part 551, subparts A, B, F and G. The changes were proposed to update and harmonize OPM's regulations with the Department of Labor's (DoL) regulations issued under the Fair Labor Standards Act of 1938 (referred to as "FLSA" or "the Act"). In addition, we provided in the proposed regulations a clearer understanding of coverage for executive, administrative, and professional employees by adding definitions and examples.

The 60-day comment period for the proposed regulations ended on July 25, 2006. During the period, OPM received comments from 11 Federal agencies, five labor organizations, and two individuals.

A number of the comments support OPM's adherence to and adoption of

DoL's language in our regulations and the increased ease of applying the FLSA to Federal employees. Commenters noted that the added explanatory materials improved clarity and reduced the potential for erroneous FLSA exemption determinations.

Respondents also identified areas of concern and provided specific recommendations to improve the proposed revisions. We addressed those comments and recommendations beginning with general and/or global comments, followed by a section-by-section discussion. We also made minor editorial corrections which do not affect the content of the regulations.

#### General Comments

One agency suggested we include a discussion in the preamble regarding OPM's expectations with regard to how the new regulations will impact coverage determinations properly made under the previous regulations.

As indicated in the proposed regulations, with the exception of the adoption of the revised criteria in the salary basis test, these changes update and clarify but do not fundamentally change the regulations in place as applied consistently with controlling case law. Therefore, we do not anticipate changes in the exemption status of the vast majority of Federal employees to whom the current regulations were properly applied.

The proposed regulations eliminated the 80 percent test as a basis for FLSA coverage. One labor organization commented that the 80 percent test should remain in the regulations as it permits all employees who perform significant amounts of non-exempt work to benefit from FLSA protection. An agency noted that a court or arbitrator often focuses on the amount of time an employee spends on exempt and closely related duties in determining if an employee is covered by FLSA regulations. That agency suggested we include a discussion highlighting the elimination of the 80 percent test requirement and emphasizing the potential importance of the amount of time an employee spends performing exempt functions to support an agency's exemption determination.

Controlling case law has made retention of the 80 percent requirement unsupported. Federal courts have found many employees to be exempt who spent less than 50 percent of their

time performing exempt work. *See, e.g., Jones v. Virginia Oil Co.*, 69 Fed. Appx. 633 (4th Cir. 2003) (management was found to be the "primary duty" of an employee who spent 75 to 80 percent of her time on basic line-worker tasks); *Murray v. Stuckey's, Inc.*, 939 F.2d 614 (8th Cir. 1991) (manager met the "primary duty" test despite spending 65 to 90 percent of his time in non-management duties); *Glefke v. K.F.C. Take Home Food Co.*, 1993 WL 521993 (E.D. Mich. 1993) (employee found exempt despite assertion that she spent less than 20 percent of time on managerial duties because "the percentage of time is not determinative of the primary duty question, rather, it is the collective weight of the four factors"); and *Stein v. J.C. Penney Co.*, 557 F. Supp. 398 (W.D. Tenn. 1983) (employee spending 70 to 80 percent of his time on non-managerial work held exempt because the "overall nature of the job" is determinative, not "the precise percentage of time involved in a particular type of work"). *See also, Horne v. Crown Central Petroleum, Inc.*, 775 F.Supp. 189 (D.S.C. 1991); *Donovan v. Burger King*, 672 F.2d 221 (1st Cir. 1982); *Donovan v. Burger King*, 675 F.2d 516 (2nd Cir. 1982).

One agency asked that we include a discussion regarding the appropriateness of reviewing the classification of a position in terms of title, series, and grade, if an FLSA review by a third party reveals new information that contradicts the current classification. While a third party review of an FLSA coverage determination may reveal questions regarding the classification of the employee's work, it is inappropriate to apply 5 U.S.C. chapters 51 and 53 requirements to the regulatory process for implementing 5 CFR part 551 for employees under OPM's FLSA jurisdiction, as these statutory requirements have no bearing on FLSA exemption determinations.

One agency recommended we revise the work aid, "How to make exemption status determinations under the Fair Labor Standards Act (FLSA)" to reflect changes made to the regulations. The work aid, now titled "Making an FLSA Exemption Status Determination—A Work Aid" is found on our Web site at <http://www.opm.gov/flsa> and will be updated once the final rule is issued.

One agency expressed concern that we italicized a term not defined in the regulations. In this final rule, all terms listed in the Definitions section at § 551.104 are italicized in the regulations.

### Subpart A—General Provisions

#### Section 551.101—General

One labor organization suggested that DoL's regulations appear to violate the letter or spirit of the FLSA, and while OPM's interpretation of the FLSA must be generally consistent with DoL's interpretation, OPM need not mirror DoL where doing so would violate the FLSA. We note that the commenter's concern is addressed in § 551.101(c). We also note that DoL's changes have gone through the Administrative Procedure Act (APA) review and comment process and now have the force of law. To the extent that OPM's regulations are consistent with DoL's regulations, OPM does not violate the FLSA; hence, the labor organization's comment is misplaced. We have provided examples to the extent we believe necessary to properly apply the regulations.

One agency recommended we add an explanation that the law does not require OPM's regulations to comply verbatim with DoL's administration of the Act. The agency maintains that doing so will alert Code of Federal Regulations users that while administration of the Act by OPM and DoL is similar in some aspects, marked differences remain. We believe the first sentence in § 551.101(c) addresses the agency's concern regarding marked differences: "OPM's administration of the Act must comply with the terms of the Act but the law does not require OPM's regulations to be identical to the Department of Labor's FLSA regulations."

One labor organization commented that this section fails to state why and when OPM regulations may diverge from DoL regulations, and that it also fails to clarify that OPM regulations cannot apply FLSA exemptions more broadly than DoL regulations. Citing a Court of Appeals ruling that OPM regulations could not make it more difficult for Federal employees to qualify for overtime than DoL regulations (*AFGE v. OPM*, 821 F.2d 761, 771 (D.C. Cir. 1987)), the commenter expressed the concern that OPM regulations can and should be more specific than DoL regulations in narrowly defining exemptions. We refer the commenter to *Billings v. U.S.*, 322 F.3d 1328 (Fed. Cir. 2003), which places the labor organization's concern in the appropriate context. As stated in

*Billings*, "AFGE stands for the unremarkable proposition that, under the same facts, an employee in federal employment should receive the same overtime compensation as an employee in the private sector. In this case, however, the appellants are not employed under the same facts applicable to the private sector. Appellants as federal employees, are subject to Title 5 suspensions not present in the private sector." We also note that the Court of Federal Claims in *Adams v. U.S.*, 40 Fed. Cl. 303 (1998) found OPM's regulation to be valid despite the fact it did not contain a salary-basis test and, therefore, was inconsistent with DoL regulations. Rather, the court held that OPM's regulation was a reasonable interpretation of the FLSA within the Federal sector.

#### Section 551.104—Definitions

We received a number of comments regarding the proposed changes we made to this section. Some respondents had concerns with particular definitions, while others commented on our decision to move terms from this section and place them where the concept is addressed in the regulation.

One agency recommended that in the definitions section, we earmark those definitions that have been removed and addressed as concepts in other sections of the provisions. Like DoL, we have moved these terms and concepts in order to streamline, update, and clarify these complex regulations, as well as reduce unnecessary duplication and redundancies. We provided such information in the proposed rules to alert current users to the change. Therefore, we decline to adopt the recommendation to cross-reference the location of terms in these final regulations.

In addition to the general concerns listed above, we received specific questions relating to the following definitions:

#### Customarily and Regularly

One agency suggested we clarify the definition to make clear that tasks occurring on a regular and recurring basis, even if they do not occur every workweek, meet the definition of the term *customarily and regularly*. We did not adopt this suggestion because we do not believe it adds to the understanding of the term.

One labor organization expressed the concern that changes in the definition weaken the protections of the FLSA by expanding the executive exemption criteria at § 551.205. They maintain that removing the phrase "day-to-day" from

the definition permits employees who only occasionally exercise executive discretion to meet the exemption criteria. These regulations expressly prohibit the interpretation put forward by the labor organization since the definition states that the "frequency must be greater than occasional" and " \* \* \* includes work normally and recurrently performed every workweek." We do not believe exemption criteria for executives will be expanded and decline to change the definition as requested.

#### Discretion and Independent Judgment

One agency was concerned that we removed the definition of this term when, in fact, we did not. Due to the extensive discussion regarding the administrative exemption, we placed the term with the administrative exemption criteria at § 551.206. We have included the term in alphabetical order in the definition section at § 551.104 with a cross reference to § 551.206.

#### Educational Establishment

One agency suggested we provide additional information regarding when a training facility will qualify as an *Educational establishment*. Training facilities vary widely within the Federal sector and are found in a number of different settings. These settings range from Department of Defense-operated primary and secondary schools and military technical training schools, to law enforcement training centers and adult training facilities operated by a variety of Federal agencies. Because of this wide variability in facilities, we do not believe further detailed discussion will add materially to a better understanding of the term.

#### Exempt Area

In accordance with information obtained from the Department of the Interior's Office of Insular Affairs, we have added the Commonwealth of the Northern Mariana Islands, a territory under the jurisdiction of the United States, to the list of exclusions from the definition of exempt areas.

#### FLSA Nonexempt

One agency commented that the terminology related to who is and who is not covered by the FLSA is confusing. The agency explained that if the term "FLSA exempt" means not covered by the provisions of the Act, then the term "FLSA nonexempt" means FLSA "not not covered." The agency recommended we replace the term "FLSA nonexempt" and insert a new term "FLSA covered." The commenter noted that exempt employees are exempt from the

overtime and minimum wage provisions of the Act. We note that exempt employees are covered by other provisions of the Act. We decline to adopt this recommendation since the proposed terminology is inconsistent with that used by the Department of Labor.

#### Formulate, Affect, Interpret, or Implement Management Policies or Operating Practices

One labor organization commented that our definition with respect to performing work involving management policies or operating procedures in relation to broad national goals expressed in statutes or Executive orders is "overboard," as virtually all Government employees endeavor to comply with broad national goals set by statute or Executive order. Consequently, the labor organization recommended we revise the definition to clarify that administrative work involves compliance only with management's operational policies. We agree with the labor organization's concern that administrative work involves compliance only with management's operational policies rather than compliance with substantive statutes; however, this issue is already addressed in § 551.206(b)(1) which directs the user to consider if an employee "has authority to formulate, affect, interpret, or implement management policies or operating practices." Therefore, we decline to revise this definition.

Two labor organizations stated that adding the words "interpret," "implement," and "operating practices," to the definition broadens the coverage of the term to be inconsistent with the Act. This definition is consistent with the current DoL definition and does not change the underlying meaning of the regulation; therefore, we decline to revise this definition.

#### Management

One labor organization suggested changes in the definition are problematic because the proposed definition eliminates the distinction between production and support services. We address this distinction in § 551.206, and we consider its placement there more appropriate than in the definition of *management*.

One labor organization suggested we amend the definition to clarify a team leader does not become exempt merely by apportioning work among the team members. They recommended we expressly state what the administrative provision indirectly says in describing

which leaders qualify for exemption. The labor organization asserts that, just as in the private sector (*see* 29 CFR 541.203(c)), team leaders are exempt administrators only if they perform such administration functions as "acquisitions, negotiating real estate transactions or collective bargaining agreements, designing and implementing productivity improvements" or similar work as specified in § 551.206(i). While we understand the labor organization's concern regarding the misreading of apportioning work, we must rely on the reader to understand that selected phrases of a definition must be read within the context of the entirety of the regulations, and the full intent of the definition must be applied. Therefore, we do not find the proposed expanded discussion to be necessary. Further, we do not agree with the commenter's characterization of § 551.206(i). Team leaders who lead major projects and who function as an extension of management for matters of significance to the employer are likely to meet the administrative exemption. Section 551.206(i) must be read in conjunction with § 551.206(b)(2) (i.e., an employee may carry out major assignments in conducting the operations of the organization), which does not limit exemption to leading staff functions.

#### Nonexempt Area

In accordance with information obtained from the Department of the Interior's Office of Insular Affairs, we have added the Commonwealth of the Northern Mariana Islands, a territory under the jurisdiction of the United States, to the list of nonexempt areas.

#### Primary Duty

One agency recommended we add to this definition the requirement that a duty must occupy at least 25 percent of the employee's time. This definition, for the most part, is carried over from our previous regulation with specific requirements to ensure that users do not focus on a very small percentage of time when it would be highly unlikely that the duty would support the basis for primary duty. The definition is consistent with the discussion of the 80 percent test in the General Comments section of this preamble. Therefore, we decline to adopt this recommendation.

#### Recognized Organization Unit

One labor organization viewed the definition of *recognized organizational unit* as problematic because it suggests even a team leader with little actual supervisory function can be considered the lead of a recognized organizational

unit. The labor organization maintained the definition should clearly state that a *recognized organizational unit* does not consist of temporary units whose composition or purpose is constantly in flux. We believe the definition fully addresses these concerns. Again, we must rely on the user to understand that *recognized organizational unit* must be read in conjunction with the other criteria under the executive exemption at § 551.205 (i.e., a leader will not meet the executive exemption if that employee does not exercise the full range of management and work control responsibilities required to meet the requirements of this section).

#### Trainee

One agency recommended we further clarify the definition by supplementing it with additional work examples and illustrations. The agency believes the revised definition of "trainee" at paragraphs (1) through (5) implies application to certain employment categories/classifications operative in Federal service. We believe the definition makes clear that a student officially appointed to a Government position is not a trainee for purposes of the FLSA. The definition of *trainee* for purposes of the FLSA is materially different from the meaning of "trainee" for many purposes of title 5, U.S.C., and similar human resources statutes.

#### Worktime

One labor organization suggested that, assuming removal of the 80/20 test is warranted, OPM should delete as superfluous the § 551.104 definitions relating to "worktime." They also suggested we remove the word "worktime" from § 551.101(a), as that paragraph contains no substantive content, but merely refers to the FLSA's delineation of "administrative procedures by which covered worktime must be compensated." The labor organization maintains that OPM should replace the word "worktime" with the statutory phrase to refer to FLSA delineation of procedures for compensating "hours of work." The labor organization is of the opinion that such a change would harmonize with DoL's regulations. We made no substantive change in the definition of *worktime* itself because these regulations are intended to address FLSA coverage issues and not hours of work. Definitions relating to *worktime* are not used in defining *hours of work* but are used solely in determining FLSA exemption status; therefore, we decline to make this change.

**Subpart B—Exemptions and Exclusions**

We received several requests to move the sections on specific professional exemptions from the end of subpart B and place them directly following the professional exemption criteria in this section. Based on these comments, we have reordered the sections, and in this final rule, those sections formerly numbered §§ 551.214 through 551.216 in the proposed rule, containing information relating to specific professional exemptions, have been placed directly behind § 551.207 Professional exemption criteria and renumbered as §§ 551.208 through 551.210. The remaining sections have been renumbered accordingly.

*Section 551.201—Agency Authority*

One labor organization suggested this section (as well as § 551.202) would be strengthened if it emphasized reasonable doubt regarding exemption status should be resolved in favor of nonexemption. This concern is addressed by § 551.202(d) which states, “If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.”

*Section 551.202—General Principles*

We received several comments regarding revised paragraph (e), which clarifies that the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. The occupational or organizational title alone is not sufficient for an FLSA exemption status determination.

Three agencies commented on the requirement that the designation of an employee as FLSA exempt or nonexempt ultimately rests on the duties actually performed by the employee. We fully agree that the coverage determination must be based on the actual work performed by the employee. The protective nature and purpose of the FLSA requires agencies to assure such accuracy on a continuing basis. The same responsibility holds true for existing and newly established positions. While we appreciate the recommendations received to clarify this section, we have concluded that our statement at § 551.202(e) will make the requirements clear to those who apply these regulations; we do not believe any additional guidance is required.

One agency disagreed with our statement at § 551.202(e) that “established position descriptions and titles may assist in making initial FLSA exemption determinations” and saw no

need for further review if a position description accurately describes the duties performed by the employee. Additionally, the agency questioned how exemption status is determined for newly established unencumbered positions and questioned whether proposed duties should be used to make an FLSA coverage determination. Finally, the agency recommended adding to the end of this section, “on a regular and recurring basis over a period of more than 30 consecutive calendar days.” We understand the commenter’s concern about making an FLSA coverage determination on newly established positions. In such cases, the determination must be based on the description of work because no employee is actually performing the work. However, once an employee is placed in the position, the agency is responsible for ensuring that the FLSA designation is accurate and remains accurate, based upon the actual work performed by that employee. Thus, we decline to insert the proposed phrase.

One agency found the second sentence of § 551.202(f) difficult to understand. We did not propose changes to this section. The purpose of this section is to recognize that employees may perform a combination of exempt duties and may qualify for exemption. While one of the exemption criteria may not be met in its entirety, the work may meet another which serves as the basis for the exemption determination. To respond to the request for clarification and to further harmonize with DoL’s regulations at 29 CFR 541.708, we have amended § 551.202(f) to explain that an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption; i.e., work that is exempt under one section of this part will not defeat the exemption under any other section.

One labor organization had concerns with the first sentence of § 551.202(h) in the proposed rule which read: “Although it is normally feasible and more convenient to identify the exemption category, this is not essential.” They stated that while an employee’s primary duty may involve two categories which are intermingled and difficult to segregate, an employer always bears the burden of establishing the basis for an exempt classification. The labor organization maintained that OPM should adhere to the principle that employers must identify any and all exemption categories used to exempt a particular job. We did not propose a change to this section. The first sentence of § 551.202(h) accurately covers, for

example, the professional employee who may also meet the executive exemption. In this case it would not be necessary to identify which one of the two served as the specific basis for the exemption determination because both exemptions would apply. However, to clarify this concept, we have revised the first sentence to read, “Although it is normally feasible and more convenient to identify a single exemption category, this is not always appropriate.” We have also added a sentence at the end of § 551.202(h) to require that, “The agency is responsible for showing and documenting that the work as a whole clearly meets one or more of the exemption criteria.”

*Section 551.203—Salary-Based Nonexemption*

A number of commenters opposed our adoption of DoL’s \$23,660 minimum salary level test as a nonexemption threshold. One labor organization requested we provide a reasoned explanation for the change in our position after previously rejecting a salary test as ill-suited for use with the Government’s classification system. This labor organization, along with another labor organization, stated that OPM is not bound by law to adopt DoL’s approach to this issue, since Federal salaries are not impacted by the large retail sector that DoL must consider in making rules, and therefore, few Federal employees would benefit from this salary level test. OPM regulations governing the Federal sector must be as consistent as practicable with DoL’s regulations governing the private sector.

Many positions previously covered by the unitary general schedule (GS) system are now covered by alternative pay systems. The GS system to which our previous regulations were linked no longer covers large numbers of Federal employees under OPM’s FLSA jurisdiction. Further, it is contemplated that additional groups of Federal employees may be removed from coverage under the GS system in the future. Therefore, direct linkage to GS grade levels is of diminishing utility to the FLSA exemption determination process. Furthermore, concerns that lower graded nonsupervisory employees who meet the minimum salary level threshold will become exempt are misplaced. As noted in § 551.204(a), nonsupervisory clerical and lower-graded technical employees will remain nonexempt because they will not meet any of the exemption criteria.

When the FLSA was extended to the Federal sector in 1974, GS–5 and GS–6 supervisory positions exceeded the minimum salary level test. In December

1997, OPM issued subsequent regulations (*see* 62 FR 67238, December 23, 1997). At that time, all supervisory GS-5 and GS-6 positions still received annual salaries substantially higher than the minimum salary level test. These positions, and prevailing rate first-level supervisory positions, were also affected by the 80 percent test. These conditions made use of the minimum salary level test in 1974 and 1997 moot.

As discussed in the General Comments section of this preamble, we are no longer using the 80 percent test based on controlling case law. Also, DoL raised the minimum salary test to the point where some nonappropriated fund instrumentality positions might meet the executive exemption test, but would fail to meet the minimum salary threshold of \$23,660. In adopting the minimum salary test, these lower-salaried employees will continue to have their nonexempt status protected, thereby assuring a result consistent with DoL's regulations. The fact that a small number of positions are affected does not diminish our responsibility to ensure these employees receive any and all protections afforded by the Act and its implementing regulations. Nevertheless, we view this minimum salary threshold as transitory and believe it will likely become obsolete given the small number of employees potentially affected at the present time, and the likely continued rise in Federal salary rates.

One labor organization expressed concern regarding OPM's use of the annual figure that DoL adopted for the private sector without reference to salary data from the Federal sector. One agency suggested that rather than show a specific rate of basic pay due to changes in cost of living and impacts of inflation, we should refer users to a Web site for current thresholds. OPM regulations governing the Federal sector must be as consistent as practicable with DoL's regulations governing the private sector. Therefore, we decline to make any changes.

One agency suggested OPM use the term "total adjusted salary" or "adjusted basic pay" in place of "rate of basic pay" to clarify the rate of pay being used for comparison purposes. We have not adopted the suggested terms and will continue to use "rate of basic pay" which is defined in § 551.203(b) to include locality pay and certain similar supplements.

The same agency also recommended we provide an explanation at § 551.203(a)(3) as to why only a " \* \* \* professional in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.208," is not covered by

the salary-based nonexemption. We changed the language to be consistent with DoL's longstanding exclusion from the salary test of employees who hold a valid license or certificate permitting the practice of law or medicine, or any of their branches, and who are actually engaged in the practice thereof. This exclusion also applies to employees who hold the requisite degree for the general practice of medicine and who are engaged in an internship or residency program pursuant to the practice of a profession. *See* 29 CFR 541.600. We also note that such positions in the Federal Government receive compensation well in excess of the minimum salary level test.

#### *Section 551.204—Nonexemption of Certain Employees*

One labor organization suggested we remove the first word "certain" in § 551.204(a), as it is unnecessary and confuses the meaning of the section. We disagree. Removal of the word "certain" from this section would overly broaden the category of nonexempt nonsupervisory white-collar employees. For this reason, we have not adopted the suggestion.

One labor organization commented that the removal from the regulations of the statement that, "A supervisory employee in the Federal Wage System or in other comparable wage systems is exempt only if the employee is an executive employee....," expands the exemption, may even implicitly suggest that all supervisory employees should be exempt, and is contrary to the FLSA. The labor organization contends these regulations should include a passage regarding the nonexemption of FWS supervisory employees. We find that the inclusion of the suggested language would be superfluous. As stated in § 551.202(a), an employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets one or more of the exemption criteria. Therefore, agencies are obligated to fully apply the executive exemption criteria to all supervisory positions to determine if they are exempt.

One agency suggested we amend § 551.204(a)(2) to include language to address pay banding systems. The agency recommended we add a particular pay band level that, in their agency, is equivalent to the GS-9 level. This assumes most agencies will band grades in the same manner as the commenting agency. As agencies generally establish their own pay banding schemes, our regulations permit each agency to determine which of its bands is equivalent to a particular

level. For this reason, we have not adopted the suggestion.

#### *Section 551.205—Executive Exemption Criteria*

One agency noted that there is no mention of work-planning and assignment responsibilities, and only a small number of personnel authorities are mentioned. The agency suggested that in the final regulations, we provide language to: (1) Clarify the importance of work-planning and assignment responsibilities in meeting the exemption criteria; and (2) clarify whether the few personnel activities mentioned in § 551.205 are more critical to meeting the exemption criteria than are the others mentioned in the definition of the term "management" in § 551.104. The commenter noted that a floor is established by the specifics in § 551.205(a)(2). We note this floor is expansive and links back directly to the term "management" as noted in § 551.205(a) and defined in § 551.104, and is not limited to hiring, firing, advancement, and promotion, but also pertains to any other change of employee status. Therefore, while some employees covered by the executive exemption may not perform each and every activity listed under "management," there is an expectation that they will perform the functions listed under § 551.205(a)(2). We decline to make the suggested change.

One labor organization voiced concern that we removed the requirement for executives to regularly exercise discretion and independent judgment, or spend 80 percent of their time on "supervisory and closely related work." The labor organization requested we clarify that executives necessarily exercise the type of "discretion and independent judgment" that the role explicitly requires. As recognized by the labor organization in their comments, we have included in the definition of *primary duty* the requirement to exercise discretion and independent judgment, and the definition of *management* illustrates how this judgment is applied. This issue is adequately addressed in § 551.104 of this regulation; therefore, we have not made the requested change.

One agency commented that in § 551.205(a)(1), there may be situations where a supervisor, as a regular and recurring part of his or her job, may supervise only one employee. They further commented that the General Schedule Supervisory Guide (GSSG) does not require a minimum number of subordinates for a position to be classified as supervisory. As noted previously in this preamble, the

definition of “supervisor” for purposes of chapters 51 and 53 of title 5, U.S. Code, is separate and distinct from the definition for purposes of applying the FLSA.

One labor organization stated that the “scope of direction” element in § 551.205(a)(1) is too wide, and further commented that permitting exemption for employees who direct a mere two other persons far exceeds the purpose of the executive exemption. The labor organization contended that the proposed regulations more closely describe a group leader or working supervisor rather than an executive, and that a true executive position is one with a broader scope of control covering at least five full-time employees. We must reject the labor organization’s request to increase the number of employees directed, given that this language is substantively the same as the existing regulations and consistent with DoL’s regulatory language.

Regarding the term “particular weight” in § 551.205(b), one agency indicated it has a number of locations where supervisors direct the work of different groups of employees each day, because operations not only occur 24 hours per day, but also in several different stations within one location. Additionally, performance ratings may be created by a group of supervisors who together may have supervised each of the rated employees, but who may have not supervised the same group of employees on each workday and shift worked. The agency requested additional information regarding the impact on whether or not an employee can be an exempt executive if she or he supervises a variety of individuals over the course of the workweek and recommends personnel actions on the basis of consulting with other supervisors, all of whom also supervise the same group of employees on different days or shifts. We believe this issue is adequately addressed in § 551.104 under the term “recognized organizational unit” in paragraph (3). In addition, the general human resources practice of designating an official supervisor of record, with specific delegations of responsibility, facilitates the application of these FLSA requirements.

#### *Section 551.206—Administrative Exemption Criteria*

We received a number of questions and concerns from agencies and labor organizations regarding the interpretation and application of the administrative exemption criteria. Changes were made to this section largely to harmonize with DoL changes

in the description of administrative work and to add examples of specific types of work performed in the Federal Government.

One labor organization requested we insert the express comparison between staff service or support work as distinguished from production or line work. The labor organization maintains that we could avoid any confusion by reinserting language from the definition of *Management or general business functions or supporting service* in the prior regulations. We do not agree with the labor organization’s recommendation to reinsert language from the definition in the prior regulations. However, to further clarify the distinction between staff and line work, we revised § 551.206 by inserting “, as distinguished from production functions,” after the word “operations” in the first sentence.

One agency suggested we add language to define the minimum level of immediate guidelines and supervision needed to constitute discretion and independent judgment. We believe the examples in § 551.206(b) provide adequate context for applying the concept of discretion and independent judgment.

Two labor organizations had concerns with the concept of employees having the authority to formulate, affect, interpret, or implement management policies or operating practices. One of the labor organizations expressed concern that the application of § 551.206(b)(1) will exempt employees who should not be exempt, contending that many nonsupervisory white-collar employees perform work that requires them to implement or interpret management policies and operating practices with respect to mission-critical activities, yet their work is indisputably of a routine nature. One labor organization viewed the definition as being overly expansive. We believe the factors provided in § 551.206(b) provide adequate context for applying the concept of discretion and independent judgment. In addition, § 551.206(e) makes clear that work of a routine nature will not meet the administrative exemption. The terminology we adopted is consistent with DoL’s regulations (*see* 29 CFR 541.202(b)). We believe that when read and applied in the context of the regulations as a whole, the language is not overly broad. Therefore, we decline to modify our language.

One agency suggested we provide an example of an exempt Federal administrative employee who would be involved in performing exempt administrative work for the employing agency’s customers. We believe that

§ 551.206(h) already provides an adequate description of this type of exempt work. Therefore, we decline to accept this suggestion.

Two agencies suggested we clarify what constitutes “matters of significance” by adding language to clarify the scope and effect of the work and adding a definition of the term. We believe we have explained the intent of the Act by the examples provided throughout § 551.206. In this regard, we have aligned with DoL’s approach by describing relevant factors to consider in making the appropriate exemption determination.

One labor organization asserted that in trying to address duties performed by employees who support workers on the production side in § 551.206(h), we omitted the requisite language distinguishing administrative staff who provide operational support from nonexempt employees working on the production end. They contend that, as proposed, the paragraph creates confusion by referring to employees who support line managers without offering examples of nonexempt line or production duties. We agree with the comment and have added clarification at the end of § 551.206(h) by inserting examples of investigative work that may either be exempt or nonexempt depending on whether it is performed as a line or staff function.

One labor organization expressed concern that the proposed regulations at § 551.206(h) may weaken the line versus staff dichotomy and by doing so, may upset decades of court precedent regarding this feature of the administrative exemption. We do not agree with the labor organization’s concern, as our illustrations are consistent with case law. We reference *Piscione v. Ernst & Young*, 171 F.3d 527 (7th Cir. 1999) for discussion of when advisory and program development work that affects management policy and internal operations of client organizations is administratively exempt.

One agency commented that § 551.206 should provide information regarding OPM’s expectations about the coverage or exemption of those performing a supporting service under the revised regulations. The concept of administratively exempt work can be found at § 551.206(h).

Several commenters remarked that the guidance provided on team leaders in § 551.206(i) is unclear. One agency commented that where project examples are provided, the decision as to whether or not the team leader was exempt seemed to be based on the types of projects led, thereby necessitating a

decision on the relative worth of the projects, rather than on the team leader's responsibilities. One labor organization expressed concern that the examples provided are not found in DoL's regulations on team leaders, thereby making it difficult to ascertain precisely how or when these activities could be considered major projects. The labor organization suggested that, to avoid imposing an overly broad definition of "team leader," these examples should be removed or the provision should make clear that reviews or investigations do not constitute examples of major projects unless they involve the exercise of discretion and independent judgment. Another labor organization shared the concern that § 551.206(i) could drastically broaden the executive exemption, in that paragraph (i) appears to describe a working supervisor more closely than an administrator. The labor organization suggested removal of this paragraph from the regulations. To clarify the intent of § 551.206(i), we have added an example of a lead auditor who would meet the administrative exemption.

One labor organization commented that the definition of management/program analysts in § 551.206(l) seems to suggest that any employee who engages in the study of the operations of an organization or a program has a primary duty that is directly related to the management or general business operations of the employer. They suggest that OPM clarify that an employee must have as his or her primary duty the study of such operations, as well as the recommending of changes to operations. They further suggest OPM clarify that employees in this position do not necessarily meet the requirement that they exercise discretion and independent judgment on matters of significance. We do not believe these revisions are necessary, as § 551.206 makes clear what should be considered in determining an employee's primary duty. In addition, § 551.206(l) is to be applied within the entirety of the administrative exemption criteria, which are applicable only when the employee's work entails the exercise of discretion and independent judgment on matters of significance.

One agency recommended that OPM clarify what constitutes ordinary inspection work at § 551.206(n) and explain what the statement, "They have some leeway in the performance of their work but only within closely prescribed limits" means. We decline to add language, as we believe § 551.206(n) is sufficiently clear as written.

#### *Section 551.208—Learned Professionals*

As stated earlier in this preamble, we reordered subpart B of the final regulations. Consequently, § 551.208 in the final regulations corresponds to § 551.214 in the proposed regulations.

One labor organization expressed numerous concerns regarding our treatment of learned professionals. They suggest that the proposed regulations neglect to emphasize that, with rare exceptions, learned professionals must have advanced degrees to succeed in their field. This labor organization maintained that in explaining the impact of the word "customarily," the proposed regulations permit exemption of individuals who perform substantially the same work as degreed employees, without making clear how rarely employees attain such positions without advanced degrees. These proposed regulations are consistent with existing 5 CFR 551.207(a)(1). The work requires the application of knowledge customarily and characteristically acquired through education or training that meets the requirements for a bachelor's or higher degree. However, in an effort to address the labor organization's concerns, we have modified the language at § 551.208(a)(3) to emphasize the infrequency of employees attaining professional positions without advanced degrees.

The same labor organization expressed concern regarding § 551.208(b), maintaining it provides management with the ability to seek new learned professions whenever a school creates a new advanced degree. They requested this section be removed. Discussion of the expansion of professions in § 551.208(b) is consistent with 29 CFR 541.301(f); therefore, we decline to eliminate the section.

This labor organization also commented that the description of the accounting profession provided at § 551.208(e) is ambiguous and uses equivocating language. Our description is consistent with 29 CFR 541.301(e)(5); therefore, we decline to change the regulations.

One agency and two labor organizations raised concerns regarding misapplication of the engineering profession at § 551.208(f). One labor organization stated that the portion of § 551.208(f) concerning engineering technicians should be entirely removed. We have revised the language to clarify that engineering technicians infrequently perform exempt work.

One individual commented that, in the private sector, registered nurses paid on an hourly basis are nonexempt and therefore entitled to overtime pay under

FLSA. The commenter suggests if OPM considers registered nurses exempt based on meeting the duties requirement without considering the salary test, then Federal Registered nurses are at a disadvantage. In this regard, the individual objected to § 551.208(j) which reads, "Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption." We believe these concerns are misplaced. Section 551.208(j) must be read in conjunction with the salary-based nonexemption at § 551.203. Registered nurses paid on an hourly basis will not meet the annual pay basis requirements of § 551.203(a) because the exemption only applies to employees paid on an annual pay basis. Therefore, such employees will be nonexempt.

#### *Section 551.210—Computer Employees*

As stated earlier in this preamble, we reordered subpart B of the final regulations. Accordingly, § 551.210 in the final regulations corresponds to § 551.216 in the proposed regulations.

One agency recommended renaming this section "Information Technology employees" to remain consistent with how Federal classification standards refer to these positions. Section 13(a)(17) of the Act specifically addresses computer occupations, as do DoL's implementing regulations in 29 CFR part 541, subpart E. As noted previously in this preamble, Federal position classification and job grading laws and regulations do not control FLSA definitions. Therefore, we decline to accept this recommendation.

One agency and one labor organization found the intermingling of the computer exemption under sections 13(a)(1) and 13(a)(17) of the Act confusing. We believe that § 551.210 is sufficiently clear as written. Further, our description is consistent with 29 CFR 541.400; therefore, we decline to change the regulations.

One labor organization raised concerns regarding proposed § 551.210(d), where we state that certain employees meeting exemption under section 13(a)(17) of the Act may also have executive and administrative duties which qualify the employees for exemption under executive and administrative exemption rules as well. The labor organization maintained that it is unclear how these same employees could also have executive or administrative work as their primary duty, unless their computer functions completely overlap with executive or administrative work. They further maintained that if such overlapping of

duties occurred, the executive and administrative rules would add nothing to the designation of these employees as FLSA exempt or nonexempt. As discussed in connection with § 551.202(h), agencies are responsible for showing and documenting that an employee's work as a whole clearly meets one or more of the exemption criteria. We decline to change this language.

*Section 551.211—Effect of Performing Different Work or Duties for a Temporary Period of Time on FLSA Exemption Status*

As stated earlier, we reordered subpart B of the final regulations. As a result, § 551.211 in the final regulations corresponds to § 551.208 in the proposed regulations. We also renamed the section to more appropriately reflect the intent of § 551.211.

Several labor organizations raised the same concerns regarding the 30-day test that OPM addressed in the General Comments section of the 1997 regulations (*see* 62 FR 67238). We responded to this issue at that time, and our response remains the same. The 30-day test is well-established and has been unchanged in OPM regulation since January 1988. At that time, OPM made clear the extent of an agency's responsibilities regarding an employee who must temporarily perform work or duties that are not consistent with the primary or grade-controlling duty of his or her official position description.

Two agencies expressed concern with, and questioned the intent of, this section. One agency suggested that if a temporary assignment is expected to last beyond 30 days, the agency should, as good management practice, determine the exemption status of the employee at the beginning of the temporary assignment. This agency maintained that it is not practical or fair for an agency to pay an employee overtime under FLSA rules during the first 30 days of an assignment, while knowing that an exempt assignment will last beyond the 30 days, and then have to require the employee to repay the overtime. The other agency raised similar concerns. The intent of § 551.211(d) is to deal with situations where management is unclear regarding the duration of an assignment. We decline to amend this portion of the regulations.

*Section 551.213—Exemption of Employees Receiving Availability Pay*

As stated earlier in this preamble, we reordered subpart B of the final regulations. Consequently, § 551.213 in

the final regulations corresponds to § 551.210 in the proposed regulations.

At the request of an agency, we have amended § 551.213(a) to include the statutory provision under which employees are exempted from FLSA coverage by receiving availability pay.

The same agency commented that we should include a note in § 551.213(b) that positions formerly classified as pilots at the U.S. Customs Service are now identified at the U.S. Customs and Border Protection (CBP) as CBP Air Interdiction Agents, GS 1881. As the statutory requirements of 5 U.S.C. chapter 51 are not controlling in applying the FLSA, we decline to amend the regulations to cite specific position titles. We have changed the agency name in the regulations from U.S. Customs Service to U.S. Customs and Border Protection.

*Section 551.214—Statutory Exclusion*

As stated earlier, we reordered subpart B of the final regulations. Accordingly, § 551.214 in the final regulations corresponds to § 551.211 in the proposed regulations.

One agency suggested that the regulations should cite the statutory and regulatory provisions regarding customs officers covered by 19 U.S.C. 267 rather than attempt to list all the covered titles. We agree and have amended the regulations to delete reference to specific titles.

*Section 551.215—Fire Protection Activities and 7(k) Coverage for FLSA Pay and Exemption Determinations*

As stated earlier, we reordered subpart B of the final regulations. Consequently, § 551.215 in the final regulations corresponds to § 551.212 in the proposed regulations.

We received numerous comments from a labor organization questioning and speculating on why we added this section. This labor organization expressed concern that the firefighter definition in 5 CFR 550.1302 will be altered by issuance of this regulation. They maintain the existing firefighter definition is adequate, and this rule may make interpretation of section 7(k) of the Act in the Federal sector more complex. In addition to this labor organization's comments, two agencies raised concerns regarding the effect of these regulations on wildland firefighters. These comments indicate that further clarification is required.

This section pertains to two distinct topics: fire protection activities and coverage under the section 7(k) provisions of the Act. The revised regulations continue OPM's longstanding policy that the section 7(k)

provisions are not automatically applied to all employees who perform fire protection activities. OPM rules provide that the section 7(k) provisions are applied only to employees receiving certain types of premium pay associated with extended tours of duty. For example, section 7(k) is applicable to a fire protection employee only if he or she receives annual premium pay under 5 U.S.C. 5545(c) (usually standby duty pay under (c)(1)) or firefighter's compensation under 5 U.S.C. 5545b. These premium payments apply to firefighters who have extended tours, usually including 24-hour shifts.

Wildland firefighters are not covered by the regulatory provisions for section 7(k) employees at § 551.541. This matter was clarified in the regulations in 1976, and wildland firefighters who do not receive the specific types of premium payments under §§ 551.501(a)(1) and (5) will continue to be covered by section 7(a) of the Act under these regulations. We have modified §§ 551.215(a) and 551.541(a) in the final regulations to better align it with this section of the regulation.

One labor organization provided a number of comments in response to the establishment of this section. The labor organization commented that OPM's inclusion of fire inspections among the list of fire protection activities at § 551.215(b) is confusing, suggesting it may lead to the erroneous conclusion that employees who solely perform fire inspections are engaged in fire protection activities under section 7(k). We note that the proper interpretation of § 551.215(b) is predicated upon reading it within the entirety of § 551.215. The labor organization's concern is best addressed by reading § 551.215(b) in conjunction with § 551.215(d)(2). Nevertheless, to clarify this section, we have changed § 551.215(b) by adding "by trained firefighters eligible for reassignment to fire control and suppression or prevention duties" in the clause dealing with inspections.

The labor organization commented that OPM is obligated at § 551.215(b) to comply with DoL's interpretation of the application of section 7(k) to emergency medical service (EMS) personnel as set forth in 29 CFR 553.215(b). The section cited in the labor organization's comment addresses ambulance and rescue service employees of public agencies subject to the Act prior to the 1974 amendments. We therefore assume this comment is misplaced and intended to reference 29 CFR 553.215(a). Our proposed and final regulations are consistent with the pertinent DoL regulations at 29 CFR



553.215(a); therefore, we decline to change this section.

This labor organization requested modification of § 551.215(c)(2) and (3) to include all the necessary requirements, for example, that the temporary employee be hired by a fire department, that he or she be trained in fire suppression, and that he or she actually perform fire suppression activities. This labor organization also suggested that OPM remove § 551.215(c)(4) entirely, maintaining the section neither complies with the FLSA nor conforms with DoL's interpretation of the FLSA. The labor organization referred to 29 U.S.C. 203(y), stating DoL's regulations define employees in fire protection activities. They further relied on *AFGE v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987) in asserting we must change our regulations "in a manner consistent with the Secretary of Labor's implementation of the Fair Labor Standards Act."

We agree that OPM's regulations should be consistent with the statutory definition of "employee in fire protection activities" in section 3(y) of the FLSA (29 U.S.C. 203(y)). We have modified proposed paragraphs (b), (c), and (d) of § 551.215 accordingly.

#### *Section 551.216—Law Enforcement Activities and 7(k) Coverage for FLSA Pay and Exemption Determinations*

As stated earlier, we reordered subpart B of the final regulations. As a result, § 551.216 in the final regulations corresponds to § 551.213 in the proposed regulations.

One labor organization and one agency objected to what they construed as applying section 7(k) to correctional officers and requested that the regulations explicitly state that such employees will not be subject to section 7(k) of the Act. This section of the regulations pertains to two distinct topics: law enforcement activities and coverage under section 7(k) provisions of the Act. The revised regulations continue OPM's longstanding policy that the section 7(k) provisions are not automatically applied to all employees who perform law enforcement activities. OPM rules provide that the section 7(k) provisions are applied to employees receiving certain types of premium pay. For example, section 7(k) is applicable to a law enforcement employee if he or she receives annual premium pay under 5 U.S.C. 5545(c)(1) for regularly scheduled standby duty, or under 5 U.S.C. 5545(c)(2) for substantial amounts of irregular, unscheduled overtime work which cannot be controlled administratively.

One agency objected to the differences between the definition of law enforcement activities for FLSA purposes, and the statutory definition of "law enforcement officer" (LEO) for retirement purposes in 5 U.S.C. chapters 83 and 84. The agency's objections emphasized that such a distinction undermines the long-standing determination that LEO retirement coverage extends to all employees who work within its correctional facilities. As discussed earlier, just as it is inappropriate to apply 5 U.S.C. chapters 51 and 53 definitions to terms used in the FLSA, the same holds true for the statutory definition of LEO in 5 U.S.C. chapters 83 and 84; that definition is not controlling in defining "law enforcement officers" for purposes of the FLSA.

One individual stated the partial listing of positions contained in §§ 551.216(c)(2) through (6) is misleading and will result in officers being inappropriately characterized as not qualifying. We note the examples provided are not exhaustive. They are meant to supplement, not take the place of, § 551.216(b). The use of these examples is consistent with DoL's regulations at 29 CFR 553.211(c). Therefore, we decline to adopt the suggestion to remove paragraphs (c)(2) through (6).

#### **Subpart E—Overtime Pay Provisions**

While not included in the proposed regulations, § 551.541 has been modified to align the language with new §§ 551.215(a) and 551.216(a), which now make clear that not all fire protection and law enforcement employees, respectively, are covered by section 7(k) of the Act. To avoid confusion, we have deleted from § 551.541(a) the language referring to employees not covered by section 7(k) so that § 551.541 deals solely with section 7(k) employees. Additionally, § 551.541(b) has been revised for continuity with § 551.541(a).

#### **Subpart F—Child Labor**

In the proposed regulations we added paragraph (c) to § 551.601 in order to define hazardous Federal fire protective activities for individuals under 18 years of age. No comments were received in response to this addition. We are adopting the proposed language as final.

#### **Subpart G—FLSA Claims and Compliance**

In this subpart of the proposed regulations, we clarified in § 551.702(c) that the claimant is responsible for retaining documentation to establish when a claim is received; in

§ 551.705(b) we corrected the reference from paragraph (b) to paragraph (c); and in § 551.707(a) we clarified that OPM may grant a request from a claimant to withdraw his or her claim. No comments were received in response to these revisions; therefore, we are adopting the proposed language as final.

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

The Office of Management and Budget has reviewed this rule in accordance with E.O. 12866.

#### *Regulatory Flexibility Act*

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

#### *Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)*

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### *E.O. 12988, Civil Justice Reform*

These regulations are consistent with the requirements of E.O. 12988. The regulations clearly specify the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

#### *E.O. 13132, Federalism*

OPM has determined these regulations will not have Federalism implications because they apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

#### *Unfunded Mandates*

These regulations will not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

#### **List of Subjects in 5 CFR Part 551**

Government employees, and Wages.

U.S. Office of Personnel Management.

**Linda M. Springer,**

*Director.*

■ Accordingly, OPM is amending 5 CFR part 551 as follows:

**PART 551—PAY ADMINISTRATION  
UNDER THE FAIR LABOR  
STANDARDS ACT**

■ 1. The authority citation for part 551 continues to read as follows:

**Authority:** 5 U.S.C. 5542(c); Sec. 4(f) of the *Fair Labor Standards Act of 1938*, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

■ 2. Revise subpart A to read as follows:

**Subpart A—General Provisions**

Sec.

- 551.101 General.
- 551.102 Authority and administration.
- 551.103 Coverage.
- 551.104 Definitions.

**Subpart A—General Provisions**

**§ 551.101 General.**

(a) The Fair Labor Standards Act of 1938, as amended (referred to as “the Act” or “FLSA”), provides minimum standards for both wages and overtime entitlements, and administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions and prescribes penalties for the commission of specifically prohibited acts.

(b) This part contains the regulations, criteria, and conditions set forth by the Office of Personnel Management (OPM) as prescribed by the Act, supplements and implements the Act, and must be read in conjunction with it.

(c) OPM’s administration of the Act must comply with the terms of the Act but the law does not require OPM’s regulations to mirror the Department of Labor’s FLSA regulations. OPM’s administration of the Act must be consistent with the Department of Labor’s administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act. For example, while OPM’s executive, administrative, and professional exemption criteria are consistent with the Department of Labor’s exemption criteria, OPM does not apply the highly compensated employee criteria in 29 CFR 541.601 to determine FLSA exemption status.

**§ 551.102 Authority and administration.**

Section 3(e)(2) of the Act authorizes the application of the provisions of the Act to any person employed by the Government of the United States, as specified in that section.

(a) *Office of Personnel Management.* Section 4(f) of the Act authorizes the Office of Personnel Management (OPM) to administer the provisions of the Act. OPM is the administrator of the provisions of the Act with respect to any person employed by an agency, except as specified in paragraphs (b), (c), and (d) of this section.

(b) *The Equal Employment Opportunity Commission* administers the equal pay provisions contained in section 6(d) of the Act.

(c) *The Department of Labor* administers the Act for the government of the District of Columbia and the following United States Government entities:

- (1) The Library of Congress;
- (2) The United States Postal Service;
- (3) The Postal Rate Commission; and
- (4) The Tennessee Valley Authority.

(d) *Office of Compliance.* The Congressional Accountability Act of 1995, as amended, sections 1301 *et seq.* of title 2, United States Code, extends rights and protections of the FLSA to employees of the following United States Government entities, and assigns certain administrative responsibilities to the Office of Compliance:

- (1) The United States House of Representatives;
- (2) The United States Senate;
- (3) The Capitol Guide Service;
- (4) The Capitol Police;
- (5) The Congressional Budget Office;
- (6) The Office of the Architect of the Capitol;
- (7) The Office of the Attending Physician; and
- (8) The Office of Compliance.

**§ 551.103 Coverage.**

(a) *Covered.* Any employee of an agency who is not specifically excluded by another statute is covered by the Act. This includes any person who is:

- (1) Defined as an employee in section 2105 of title 5, United States Code;
- (2) A civilian employee appointed under other appropriate authority; or
- (3) Suffered or permitted to work by an agency whether or not formally appointed.

(b) *Not covered.* The following persons are not covered by the Act:

- (1) A person appointed under appropriate authority without compensation;
- (2) A trainee;
- (3) A volunteer; or
- (4) A member of the Uniformed Services.

**§ 551.104 Definitions.**

In this part—  
*Act* or *FLSA* means the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 *et seq.*).

*Administrative employee* means an employee who meets the administrative exemption criteria in § 551.206.

*Agency* means any instrumentality of the United States Government, or any constituent element thereof acting directly or indirectly as an employer, as this term is defined in section 3(d) of the Act and in this section, but does not include the entities of the United States Government listed in § 551.102(c) for which the Department of Labor administers the Act or § 551.102(d)(1) through (8), whose employees are covered by the Congressional Accountability Act of 1995, as amended, which makes applicable the rights and protections of the FLSA and assigns certain administrative responsibilities to the Office of Compliance.

*Claim* means a written allegation regarding a current or former employee concerning the employee’s FLSA exemption status determination or entitlement to minimum wage or overtime pay for work performed under the Act. The term *claim* is used generically in subpart G and includes complaints under the child labor provisions of the Act.

*Claim period* means the time during which the cause or basis of the claim occurred.

*Claimant* means any party who files an FLSA claim.

*Customarily and regularly* means a frequency which must be greater than occasional but which may be less than constant. Tasks or work performed customarily and regularly includes work normally and recurrently performed every workweek. It does not include isolated or one-time tasks.

*Directly and closely related* means work that is directly and closely related to the performance of exempt work which is also considered exempt work. The phrase *directly and closely related* means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. *Directly and closely related* work may include typically nonexempt tasks that arise out of and are integral to exempt duties. Those nonexempt tasks must be performed by the exempt employee to perform his or her exempt work. Work *directly and closely related* to the performance of exempt duties may also include recordkeeping; maintaining various records pertaining to workload or employee performance; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work which both workers and supervisors are required to perform

is considered to be closely related to the primary duty of the position (for example, physical training during tours of duty for firefighting and law enforcement personnel) and is exempt work. Work is not *directly and closely* related if the work is remotely related or completely unrelated to exempt duties. The following examples illustrate the type of work that is and is not normally considered as *directly and closely related* to exempt work:

(1) Work is closely related to exempt supervisory work when it contributes to the effective supervision of subordinate workers, or the smooth functioning of the unit supervised, or both. A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(2) Depending upon the nature of an organization, a supervisor who sets up a machine may be engaged in exempt work. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. In such cases, setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive employee and is directly and closely related to the executive employee's responsibility for the subordinates' work performance and for the adequacy of the final product. In addition, performing setup work that requires special skills typically is not performed by production employees in the occupation, and does not approach the volume that would justify hiring a specially trained employee to perform. Such closely related work may include performing infrequently recurring or one-time tasks which are impractical to delegate, because they would disrupt normal operations or take longer to explain than to perform. Under such circumstances, it is exempt work.

(3) A management analyst may take extensive notes recording the flow of work and materials through an organization; the analyst may personally use a computer to type a report and create a proposed table of organization.

Standing alone, or separated from the primary duty, such note-taking and typing would not be exempt. However, because this work is necessary for analyzing the data and making recommendations (which is exempt work), it is directly and closely related to exempt work.

(4) A traffic manager in charge of planning an organization's transportation function, including identifying the most economical and quickest routes for shipping material to and from the activity, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to material, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(5) An example of work directly and closely related to exempt professional duties is a chemist performing nonexempt tasks such as cleaning a test tube in the middle of an original experiment, even though such tasks can be assigned to laboratory assistants.

(6) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

*Educational establishment* means a nursery school, an elementary or secondary school system, an institution of higher education, other educational institutions, and in certain circumstances, training facilities. The term *other educational establishment* includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary, or higher.

*Emergency* means a temporary condition that poses a direct threat to human life or safety, serious damage to property, or serious disruption to the operations of an activity, as determined by the employing agency.

*Employ* means to engage a person in an activity that is for the benefit of an agency, including any hours of work that are suffered or permitted.

*Employee* means a person who is employed—

(1) As a civilian in an Executive agency, as defined in section 105 of title 5, United States Code;

(2) As a civilian in a military department, as defined in section 102 of title 5, United States Code;

(3) In a nonappropriated fund instrumentality of an Executive agency or a military department;

(4) In a unit of the judicial branch of the Government that has positions in the competitive service; or

(5) In the Government Printing Office. *Employer*, as defined in section 3(d) of the Act, means any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

*Executive employee* means an employee who meets the executive exemption criteria in § 551.205.

*Exempt area* means any foreign country, or any territory under the jurisdiction of the United States, other than the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Commonwealth of the Northern Mariana Islands;
- (9) Midway Atoll;
- (10) Wake Island;
- (11) Johnston Island; and
- (12) Palmyra.

*Filed* means a claim has been properly submitted by the claimant. The claimant must deliver the claim to the appropriate office within the agency or OPM, whichever is deciding the FLSA claim. The claim must be postmarked or date-stamped in order to establish the time of delivery.

*FLSA exempt* means not covered by the minimum wage and overtime provisions of the Act.

*FLSA exemption status* means an employee's designation as either FLSA exempt or FLSA nonexempt from the minimum wage and overtime provisions of the Act.

*FLSA nonexempt* means covered by the minimum wage and overtime provisions of the Act.

*FLSA overtime pay* means overtime pay under this part.

*FLSA pay claim* means a claim concerning an employee's entitlement to minimum wage or overtime pay for work performed under the Act.

*Formulate, affect, interpret, or implement management policies or operating practices* means perform work that involves management policies or operating practices which range from

specific objectives and practices of a small field office to broad national goals expressed in statutes or Executive orders. Employees performing such work make policy decisions or participate indirectly through developing or recommending proposals that are acted on by others. The work of employees who significantly affect the execution of management policies involves obtaining compliance with such policies by other individuals or organizations, within or outside of the Federal Government, or making significant determinations furthering the operation of programs and accomplishment of program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (that is, planning, developing, promoting, coordinating, controlling, or evaluating operating programs of the employing organization or of other organizations subject to regulation or other controls).

*Hours of work* means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency. Hours of work are creditable for the purpose of determining overtime pay under subpart D of this part. Section 551.401 of subpart D further explains this term. However, whether time is credited as hours of work is determined by considering many factors, such as the rules in subparts D and E of this part, provisions of law, Comptroller General decisions, OPM decisions and policy guidance, agency policy, negotiated agreements, the rules in part 550 of this chapter (for hours of work for travel), and the rules in part 410 of this chapter (for hours of work for training).

*Management* means performing activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or financial records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and

controlling the budget; and monitoring or implementing legal compliance measures.

*Nonexempt area* means any of the following locations:

- (1) A State of the United States;
- (2) The District of Columbia;
- (3) Puerto Rico;
- (4) The U.S. Virgin Islands;
- (5) Outer Continental Shelf Lands as defined in the Outer Continental Shelf Lands Act (67 Stat. 462);
- (6) American Samoa;
- (7) Guam;
- (8) Commonwealth of the Northern Mariana Islands;
- (9) Midway Atoll;
- (10) Wake Island;
- (11) Johnston Island; and
- (12) Palmyra.

*Official position* means the position to which the employee is officially assigned by means of a personnel action authorized by the agency.

*Perform work in connection with an emergency* means perform work that is directly related to resolving or coping with an emergency, or its immediate aftermath, as determined by the employing agency.

*Preserve the claim period* means establish the period of possible entitlement to back pay by filing a written claim. The date the agency or OPM receives the claim preserves the claim period and is the date that determines the period of possible entitlement to back pay.

*Primary duty* typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of an employee's work (alternative primary duty) may be credited as the primary duty for exemption purposes provided that duty:

- (1) Constitutes a substantial, regular part of the work assigned and performed;
- (2) Is the reason for the existence of the position; and
- (3) Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in § 551.206, and the significance of the decisions made.

*Professional employee* means an employee who meets the professional exemption criteria in § 551.207.

*Reckless disregard of the requirements of the Act* means failure to make adequate inquiry into whether conduct is in compliance with the Act.

*Recognized organizational unit* means an established and defined organizational entity which has regularly assigned employees and for

which a supervisor is responsible for planning and accomplishing a continuing workload. This distinguishes supervisors from leaders of temporary groups formed to perform assignments of limited duration.

(1) The term *recognized organizational unit* is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A recognized organizational unit must have a permanent status and a continuing function. For example, a large human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and recruitment and placement, each of which has a permanent status and function.

(2) A recognized organizational unit may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized organizational unit with a continuing function in the organization.

(3) Continuity of the same subordinates is not essential to the existence of a recognized organizational unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized organizational units, if other factors are present that indicate the employee is in charge of a recognized organizational unit with a continuing function.

*Statute of limitations* means the time frame within which an FLSA pay claim must be filed, starting from the date the right accrued. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations, except in cases of willful violation where the statute of limitations is 3 years.

*Suffered or permitted work* means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

*Title 5 overtime pay*, for the purpose of § 551.211, means overtime pay under part 550 of this chapter.

*Trainee* means a person who does not meet the definition of "employee" in this section and who is assigned or attached to a Federal activity primarily for training. A person who attends a training program under the following conditions is considered a trainee and is

not a Federal employee for purposes of the Act:

(1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;

(2) The training is for the benefit of the individual;

(3) The trainee does not displace regular employees, but is supervised by them;

(4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;

(5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and

(6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

*Two or more other employees* means the equivalent of two or more full-time employees. For the purpose of this definition, an employee is equal to a full-time equivalent (FTE). For example, one full-time and two half-time employees are equivalent to two full-time employees.

*Volunteer* means a person who does not meet the definition of *employee* in this section and who volunteers or donates his or her service, the primary benefit of which accrues to the performer of the service or to someone other than the agency. Under such circumstances there is neither an expressed nor an implied compensation agreement. Services performed by such a volunteer include personal services that, if left unperformed, would not necessitate the assignment of an employee to perform them.

*Willful violation* means a violation in circumstances where the agency knew that its conduct was prohibited by the Act or showed reckless disregard of the requirements of the Act. All of the facts and circumstances surrounding the violation are taken into account in determining whether a violation was willful.

*Workday* means the period between the commencement of the principal activities that an employee is engaged to perform on a given day and the cessation of the principal activities for that day. The term is further explained in § 551.411.

*Worktime*, for the purpose of determining FLSA exemption status, means time spent actually performing work. This excludes periods of time during which an employee performs no

work, such as standby time, sleep time, meal periods, and paid leave.

*Worktime in a representative workweek* means the average worktime over a period long enough to even out normal fluctuations in workloads and is representative of the job as a whole.

*Workweek* means a fixed and recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of a day. For employees subject to part 610 of this chapter, the workweek must be the same as the administrative workweek defined in § 610.102 of this chapter.

*Workweek basis* means the unit of time used as the basis for applying overtime standards under the Act and, for employees under flexible or compressed work schedules, under 5 U.S.C. 6121(6) or (7). The Act takes a single workweek as its standard (except for employees engaged in fire protection or law enforcement activities under section 7(k) of the Act) and does not permit the averaging of hours over two or more weeks, except for employees engaged in fire protection or law enforcement activities under section 7(k) of the Act.

■ 3. Revise subpart B to read as follows:

#### Subpart B—Exemptions and Exclusions

Sec.

- 551.201 Agency authority.
- 551.202 General principles.
- 551.203 Salary-based nonexemption.
- 551.204 Nonexemption of certain employees.
- 551.205 Executive exemption criteria.
- 551.206 Administrative exemption criteria.
- 551.207 Professional exemption criteria.
- 551.208 Learned professionals.
- 551.209 Creative professionals.
- 551.210 Computer employees.
- 551.211 Effect of performing different work or duties for a temporary period of time on FLSA exemption status.
- 551.212 Foreign exemption criteria.
- 551.213 Exemption of employees receiving availability pay.
- 551.214 Statutory exclusion.
- 551.215 Fire protection activities and 7(k) coverage for FLSA pay and exemption determinations.
- 551.216 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.

#### Subpart B—Exemptions and Exclusions

##### § 551.201 Agency authority.

The employing agency must review and make a determination on each employee's exemption status.

##### § 551.202 General principles.

In all exemption determinations, the agency must observe the following principles:

(a) Each employee is presumed to be FLSA nonexempt unless the employing agency correctly determines that the employee clearly meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM. The agency must designate an employee FLSA exempt when the agency correctly determines that the employee meets the requirements of one or more of the exemptions of this subpart and such supplemental interpretations or instructions issued by OPM.

(b) Exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption.

(c) The burden of proof rests with the agency that asserts the exemption.

(d) An employee who clearly meets the criteria for exemption must be designated FLSA exempt. If there is a reasonable doubt as to whether an employee meets the criteria for exemption, the employee will be designated FLSA nonexempt.

(e) While established position descriptions and titles may assist in making initial FLSA exemption determinations, the designation of an employee as FLSA exempt or nonexempt must ultimately rest on the duties actually performed by the employee.

(f) Although separate criteria are provided for the exemption of executive, administrative, and professional employees, those categories are not mutually exclusive. Employees who perform a combination of exempt duties set forth in this regulation may also qualify for exemption. For example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption, i.e., work that is exempt under one section of this part will not defeat the exemption under any other section.

(g) Failure to meet the criteria for exemption under what might appear to be the most obvious criteria does not preclude exemption under another category. For example, an engineering technician who fails to meet the professional exemption criteria may be performing exempt administrative work, or an administrative officer who fails to meet the administrative criteria may be performing exempt executive work.

(h) Although it is normally feasible and more convenient to identify a single exemption category, this is not always

appropriate. An exemption may be based on a combination of functions, no one of which constitutes the primary duty, or the employee's primary duty may involve two categories which are intermingled and difficult to segregate. This does not preclude designating an employee FLSA exempt, provided the work as a whole clearly meets the other exemption criteria. The agency is responsible for showing and documenting that the work as a whole clearly meets one or more of the exemption criteria.

#### **§ 551.203 Salary-based nonexemption.**

(a) An employee, including a supervisory employee, whose annual rate of basic pay is less than \$23,660 is nonexempt, unless:

(1) The employee is subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status); or

(2) The employee is subject to § 551.212 (Foreign exemption criteria); or

(3) The employee is a professional engaged in the practice of law or medicine as prescribed in paragraphs (c) and (d) of § 551.208.

(b) For the purpose of this section, "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, such as premium payments, differentials, and allowances.

#### **§ 551.204 Nonexemption of certain employees.**

(a) Certain nonsupervisory white-collar employees are FLSA nonexempt (unless the employees are subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status) or § 551.212 (Foreign exemption criteria)) because they do not fit any of the exemption categories. They include:

(1) Employees in equipment operating and protective occupations, and most clerical occupations;

(2) Employees performing technician work in positions properly classified below GS-9 (or the equivalent level in other white-collar pay systems) and many, but not all, of those positions properly classified at GS-9 or above (or the equivalent level in other white-collar pay systems); and

(3) Employees at any grade, or equivalent level, in occupations

requiring highly specialized, technical skills and knowledge that can be acquired only through prolonged job training and experience, such as in the Air Traffic Control series, or in the Aircraft Operations series unless such employees are performing predominantly administrative functions rather than the technical work of the occupation.

(b) Nonsupervisory employees in the Federal Wage System or in other comparable wage systems are nonexempt, unless the employees are subject to § 551.211 (Effect of performing different work or duties for a temporary period of time on FLSA exemption status) or § 551.212 (Foreign exemption criteria).

#### **§ 551.205 Executive exemption criteria.**

(a) An *executive employee* is an employee whose primary duty is management (as defined in § 551.104) of a Federal agency or any subdivision thereof (including the lowest recognized organizational unit with a continuing function) and who:

(1) *Customarily and regularly directs* the work of two or more other employees. However, an employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement. In addition, hours worked by an employee cannot be credited more than once for different executives. This takes into consideration those organizations that use matrix management, i.e., a system of "shared" leadership, where supervision cuts across product and service lines in terms of accessing activities and advising top management on business operations, but where the supervisor/leader does not have the operating authority over all employees. Thus, a shared responsibility for the supervision of the same two employees in the same recognized organizational unit does not satisfy this requirement. However, a full-time employee who works 4 hours for one supervisor and 4 hours for a different supervisor will be credited as a half-time employee for both supervisors; and

(2) Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees, are given particular weight.

(b) *Particular weight.* Criteria to determine whether an employee's suggestions and recommendations are given particular weight by higher-level management include, but are not limited to: whether it is part of the

employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. Particular weight does not include consideration of an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have particular weight even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

#### **§ 551.206 Administrative exemption criteria.**

An *administrative employee* is an employee whose primary duty is the performance of office or non-manual work directly related to the management or general business operations, as distinguished from production functions, of the employer or the employer's customers and whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase *discretion and independent judgment* must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to, whether the employee:

(1) Has authority to formulate, affect, interpret, or implement management policies or operating practices;

(2) Carries out major assignments in conducting the operations of the organization;

(3) Performs work that affects the organization's operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the organization;

(4) Has authority to commit the employer in matters that have significant financial impact;

(5) Has authority to waive or deviate from established policies and procedures without prior approval;

(6) Has authority to negotiate and bind the organization on significant matters;

(7) Provides consultation or expert advice to management;

(8) Is involved in planning long- or short-term organizational objectives;

(9) Investigates and resolves matters of significance on behalf of management; and

(10) Represents the organization in handling complaints, arbitrating disputes, or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, an employee can exercise discretion and independent judgment even if the employee's decisions or recommendations are reviewed at a higher level. Thus, the term *discretion and independent judgment* does not require that decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.

(d) An organization's workload may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures, or specific standards described in manuals or other sources.

(f) The use of manuals, guidelines, or other established procedures containing or relating to highly technical, scientific, legal, financial, or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption.

Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exemption status. However, employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances will be nonexempt.

(g) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

(h) Employees in certain occupations typically assist and support line managers and assume facets of the overall management function. Neither the location of the work nor the number of employees performing the same or similar work turns such work into a production function. For example, independent agencies or agency components often provide centralized human resources, information systems, procurement and acquisition, or financial management services as support services to other agencies or agency components. However, this does not change the inherent administrative nature of the work performed to line or production work. Similarly, employees who develop, interpret, and oversee agency or Governmentwide policy are performing management support functions. Some of these activities may be performed by employees who would otherwise qualify under another exemption.

Depending upon the purpose of the work and the organizational context, work in certain occupations may be either exempt or nonexempt. For example, criminal investigators who perform work directly related to the internal management of the agency and typically would be expected to provide recommendations of great significance based on the analysis of investigative findings would likely be considered as performing a staff function. In contrast,

the performance of investigative and inspectional work to confirm whether specific regulatory requirements have been met for an investigative/inspectional component of any agency would likely be considered as performing a line rather than a staff function.

(i) An employee who leads a team of other employees assigned to complete major projects (such as acquisitions; negotiating real estate transactions or collective bargaining agreements; designing and implementing productivity improvements; oversight, compliance, or program reviews; investigations) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team. An example is a lead auditor who oversees an audit team in an auditing agency and who is assigned responsibility for leading a major audit requiring the use of substantial agency resources. This auditor is responsible for proposing the parameters of the audit and developing a plan of action and milestones to accomplish the audit. Included in the plan are the methodologies to be used, the staff and other resources required to conduct the audit, proposed staff member assignments, etc. When conducting the audit, the lead auditor makes on-site decisions and/or proposes major changes to managers on matters of significance in accomplishing the audit, including deviations from established policies and practices of the agency.

(j) An executive assistant or administrative assistant to a high level manager or senior executive generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(k) Human resources employees who formulate, interpret or implement human resources management policies generally meet the duties requirements for the administrative exemption. In addition, when interviewing and screening functions are performed by the human resources employee who makes the hiring decision or makes recommendations for hiring from a pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(l) Management analysts who study the operations of an organization and propose changes in the organization, program analysts who study program

operations and propose changes to the program, and other management advisors generally meet the duties requirements for the administrative exemption.

(m) Acquisition employees with authority to bind the organization to significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with higher management officials when making a commitment.

(n) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

#### **§ 551.207 Professional exemption criteria.**

To qualify for the professional exemption, an employee's primary duty must be the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. Learned professionals, creative professionals, and computer employees are described in §§ 551.208, 551.209, and 551.210, respectively.

#### **§ 551.208 Learned professionals.**

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. The work must include the following three elements:

(1) The employee must perform work requiring advanced knowledge. Work requiring advanced knowledge is predominantly intellectual in character and includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level;

(2) The advanced knowledge must be in a field of science or learning which includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction which restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is appropriate for employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. For example, the learned professional exemption is appropriate in unusual cases where a lawyer has not gone to law school, or a chemist does not possess a degree in chemistry. However, the learned professional exemption is not applicable to occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical, or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The position of Engineering Technician is an example of such an occupation where the employee collects, observes, tests and records factual scientific data within the oversight of professional engineers, and performs work using knowledge acquired through on-the-job and classroom training rather than by acquiring the knowledge through prolonged academic study.

(b) *Expansion of professional exemption.* The areas in which the professional exemption may be applicable are expanding. As knowledge

is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in this section also may be created in the future. Such organizations may develop similar, specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

(c) *Practice of law.* (1) This exemption applies to an employee in a professional legal position requiring admission to the bar and involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services; preparing interpretive and administrative orders, rules, or regulations; drafting, negotiating, or examining contracts or other legal documents; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials.

(2) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(d) *Practice of medicine.* (1) An employee who holds a valid license or certificate permitting the practice of medicine or any of its branches and is actually engaged in the practice of the profession is exempt. The exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors, including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(2) An employee who holds the required academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession is exempt. Employees engaged in internship or resident



programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(3) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(e) *Accounting*. Certified public accountants generally meet the duties requirements for the learned professional exemption. An employee performing similar professional work in a position with a positive educational requirement and requiring the application of accounting theories, concepts, principles, and standards may qualify as an exempt learned professional. However, accounting clerks and technicians and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(f) *Engineering*. Engineers generally meet the duties requirements for the learned professional exemption. Professional engineering work typically involves the application of a knowledge of such engineering fundamentals as the strength and strain analysis of engineering materials and structures, the physical and chemical characteristics of engineering materials such as elastic limits, maximum unit stresses, coefficients of expansion, workability, hardness, tendency to fatigue, resistance to corrosion, engineering adaptability, and engineering methods of construction and processing. Exempt professional engineering work includes equivalent work performed in any of the specialized branches of engineering (e.g., electrical, mechanical, or materials engineering). On unusual occasions, engineering technicians performing work comparable to that performed by professional engineers on the basis of advanced knowledge may also be exempt. In such instances, the employee actually is performing the work of an occupation that generally requires a specialized academic degree and is performing substantially the same work as the degreed employee, but has gained the same advanced knowledge through a combination of work experience and intellectual instruction which has provided both theoretical and practical knowledge of the specialty, including knowledge of related disciplines and of new developments in the field.

(g) *Architecture*. Architects generally meet the duties requirements for the learned professional exemption. Professional architectural work typically

requires knowledge of architectural principles, theories, concepts, methods, and techniques; a creative and artistic sense; and an understanding and skill to use pertinent aspects of the construction industry, as well as engineering and the physical sciences related to the design and construction of new, or the improvement of existing, buildings.

(h) *Teachers*. A teacher is any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.

(1) A teacher performs exempt work when serving, for example, as a regular academic teacher; teacher of kindergarten or nursery school pupils; teacher of gifted or disabled children; teacher of skilled and semi-skilled trades and occupations; teacher engaged in automobile driving instruction; aircraft flight instructor; home economics teacher; or vocal or instrumental music instructor. A faculty member who is engaged as a teacher but also spends a considerable amount of time in extracurricular activities such as coaching athletic teams or acting as a moderator or advisor in such areas as drama, speech, debate, or journalism is engaged in teaching. Such activities are a recognized part of an educational establishment's responsibility in contributing to the educational development of the student. An instructor in an institution of higher education or another educational establishment whose primary duty is teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge is also an exempt teacher.

(2) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (e.g., permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by appropriate certifying entities. However, a teacher's certificate is not generally necessary for post-secondary educational establishments.

(3) Exempt teachers do not include teachers of skilled and semi-skilled trade, craft, and laboring occupations when the paramount knowledge is the knowledge of and the ability to perform the trade, craft, or laboring occupation. Conversely, if the primary requirement of the post-secondary education instructor is the ability to instruct, as

opposed to knowledge of and ability to perform a trade, craft, or laboring occupation, then the position may be exempt.

(4) Section 551.203 (Salary-based nonexemption) does not apply to the employees described in this section.

(i) *Medical technologists*. Registered or certified medical technologists who have successfully completed 3 academic years of pre-professional study in an accredited college or university, plus a 4th year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association, generally meet the duties requirements for the learned professional exemption.

(j) *Nurses*. Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(k) *Dental hygienists*. Dental hygienists who have successfully completed 4 academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(l) *Physician assistants*. Physician assistants who have successfully completed 4 academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants, generally meet the duties requirements for the learned professional exemption.

(m) *Paralegals*. Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced, specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general 4-year advanced degrees, most specialized paralegal programs are 2-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is applicable to paralegals who possess advanced, specialized

degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. In addition, a paralegal who fails to meet the professional exemption criteria may be performing exempt administrative work, e.g., overseeing a full range of support services for a large legal office.

**§ 551.209 Creative professionals.**

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical, or physical work. The work performed must be "in a recognized field of artistic or creative endeavor," including such fields as music, writing, acting, and the graphic arts. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality, or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality, or talent exercised by the employee. Determination of exempt creative professional status must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; and writers who choose their own subjects and hand in a finished piece of work to their employers. This requirement generally is not met by a person who is employed as a retoucher of photographs, since such work is not properly described as creative in character.

(b) Federal employees engaged in the work of newspapers, magazines, television, or other media are not exempt creative professionals if they only collect, organize, and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. For example, employees who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Employees also do not qualify as exempt creative professionals if their work product is subject to substantial control by the organization. However, when the work requires invention, imagination, originality, or talent, as

opposed to work which depends primarily on intelligence, diligence, and accuracy, such employees may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns, or other commentary; or acting as a narrator or commentator. Work that does not fully meet the creative professional exemption criteria does not preclude exemption under another exemption category. For example, public affairs work under control of the organization that does not meet the creative professional exemption may meet the administrative exemption.

**§ 551.210 Computer employees.**

(a) Computer systems analysts, computer programmers, software engineers, or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The exemption in section 13(a)(1) of the Act applies to any computer employee whose annual remuneration exceeds the salary-based nonexemption prescribed in § 551.203. The exemption in section 13(a)(17) applies to any computer employee compensated on an hourly basis at a rate of basic pay (as defined in § 551.203(b)) not less than \$27.63 an hour. In addition, these exemptions apply only to computer employees whose primary duties consist of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) *Computer manufacture and repair.* The exemption for employees in computer occupations does not include employees engaged in the manufacture

or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations as identified in paragraph (b) of this section, are also not exempt computer professionals.

(d) *Executive and administrative computer employees.* Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under this subpart. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the organization or the organization's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized organizational unit, and whose recommendations regarding the hiring, firing, advancement, promotion, or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption. Alternatively, a senior or lead computer programmer who leads a team of other employees assigned to complete a major project that is directly related to the management or general business operations of the employer or the employer's customers generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

**§ 551.211 Effect of performing different work or duties for a temporary period of time on FLSA exemption status.**

(a) *Applicability.* Performing different work or duties for a temporary period of time may affect an employee's exemption status.

(1) *When applicable.* This section applies only when an employee must perform work or duties that are not consistent with the employee's primary duties for an extended period, that is, for more than 30 consecutive calendar

days—the “30-day test.” The period of performing different work or duties may or may not involve a different geographic duty location. The exemption status of an employee temporarily performing different work or duties must be determined as described in this section.

(2) *When not applicable.* This section does not apply when an employee is detailed to an identical additional position as the employee’s position or to a position at the same level with the same basic duties and exemption status as the employee’s position.

(b) An agency generally may not change an employee’s exemption status based on a snapshot of the employee’s duties during a particular week, unless the week involves emergency work under paragraph (f) of this section. An agency must:

(1) Assess an employee’s temporary work or duties over a reasonable period of time (the 30-day test), compare them with the primary duties upon which the employee’s exemption status is based, and determine the employee’s exemption status as described in §§ 551.203 through 551.210; and

(2) Ensure that it does not avoid reassessing, and perhaps changing, an employee’s exemption status by breaking up periods of temporary work or duties with periods of having the employee perform his or her regular work or duties. For example, an agency may not assign exempt employees to perform nonexempt work or duties for 29 consecutive calendar days, return them to their exempt duties for two or three days, then assign them again to perform nonexempt work for another 29 days.

(c) Aggregation of more than 30 nonconsecutive calendar days over an extended period does not meet the 30-day test and may not be used to change an employee’s exemption status. For example, if an exempt employee performs nonexempt duties 4 days in one week, 2 days in the following week, and so on over a period of weeks or months, the days of nonexempt work may not be aggregated for the purpose of changing the employee’s exemption status.

(d) *Effect on nonexempt employees.* (1) A nonexempt employee who must temporarily perform work or duties that are different from the employee’s primary duties remains nonexempt for the entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee’s primary duties for the period of temporary work are exempt as defined in this part.

(2) If a nonexempt employee becomes exempt under the criteria in paragraph (d)(1) of this section:

(i) The employee must be considered exempt for the entire period of temporary work or duties; and

(ii) If the employee received FLSA overtime pay for work performed during the first 30 calendar days of the temporary work or duties, the agency must recalculate the employee’s total pay retroactive to the beginning of that period because the employee is no longer entitled to the FLSA overtime pay received but may be owed title 5 overtime pay, or its equivalent.

(e) *Effect on exempt employees.* (1) An exempt employee who must temporarily perform work or duties that are different from the employee’s primary duties remains exempt for the entire period of temporary work or duties unless both of the following conditions are met:

(i) The period of temporary work or duties exceeds 30 consecutive calendar days; and

(ii) The employee’s primary duties for the period of temporary work are not exempt as defined in this part.

(2) If an exempt employee becomes nonexempt under the criteria in paragraph (e)(1) of this section:

(i) The employee must be considered nonexempt for the entire period of temporary work or duties; and

(ii) If the employee received title 5 overtime pay, or its equivalent, for work performed during the first 30 consecutive calendar days of the temporary work or duties, the agency must recalculate the employee’s total pay retroactive to the beginning of that period because the employee may no longer be entitled to some or all of the title 5, or equivalent, overtime pay received but may be owed FLSA overtime pay.

(f) *Emergency situation.* Notwithstanding any other provision of this section, and regardless of an employee’s grade or equivalent level, the agency may determine that an emergency situation exists that directly threatens human life or safety, serious damage to property, or serious disruption to the operations of an activity, and there is no recourse other than to assign qualified employees to temporarily perform work or duties in connection with the emergency. In such a designated emergency:

(1) *Nonexempt employee.* A nonexempt employee remains nonexempt whether the employee

performs nonexempt work or exempt work during the emergency; and

(2) *Exempt employee.* The exemption status of an exempt employee must be determined on a workweek basis. The exemption status determination of exempt employees will result in the employee either remaining exempt or becoming nonexempt for that workweek, as described in paragraphs (f)(2)(i) and (f)(2)(ii) of this section.

(i) *Remain exempt.* An exempt employee remains exempt for any workweek in which the employee’s primary duties for the period of emergency work are exempt as defined in this part.

(ii) *Become nonexempt.* An exempt employee becomes nonexempt for any workweek in which the employee’s primary duties for the period of emergency work are nonexempt as defined in this part.

#### § 551.212 Foreign exemption criteria.

*Foreign exemption* means a provision of the Act under which the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area.

(a) *Application.* When the foreign exemption applies, the minimum wage, overtime, and child labor provisions of the Act do not apply to any employee who spends all hours of work in a given workweek in an exempt area. When an employee meets one of the two criteria in paragraph (b) of this section, the foreign exemption applies until the employee spends any hours of work in any nonexempt area as defined in § 551.104.

(b) *Foreign exemption applies.* If an employee meets one of the two following criteria, the employee is subject to the foreign exemption of the Act and the minimum wage, overtime, and child labor provisions of the Act do not apply:

(1) The employee is permanently stationed in an exempt area and spends all hours of work in a given workweek in one or more exempt areas; or

(2) The employee is not permanently stationed in an exempt area, but spends all hours of work in a given workweek in one or more exempt areas.

(c) *Foreign exemption does not apply.* For any given workweek, the minimum wage, overtime, and child labor provisions of the Act apply to an employee permanently stationed in an exempt area who spends any hours of work in any nonexempt area. For that workweek, the employee is not subject to the foreign exemption, and the agency must determine the exemption

status of such an employee as described in paragraphs (c)(1) and (c)(2) of this section. The foreign exemption does not resume until the employee again meets one of the criteria in paragraph (b) of this section.

(1) *Same duties.* If the duties performed during that workweek are consistent with the primary duties of the employee's official position, the agency must designate the employee the same FLSA exemption status as if the employee were permanently stationed in any nonexempt area.

(2) *Different duties.* If the duties performed during that workweek are not consistent with the primary duties of the employee's official position:

(i) The agency must first designate the employee the same FLSA exemption status as the employee would have been designated based on the duties included in the employee's official position if the employee was permanently stationed in any nonexempt area; and

(ii) The agency must determine the employee's exemption status for that workweek by applying § 551.211.

(d) *Resumption of foreign exemption.* When an employee returns to any exempt area from performing any hours of work in any nonexempt area, the employee is not subject to the foreign exemption until the employee meets one of the criteria in paragraph (b) of this section.

#### **§ 551.213 Exemption of employees receiving availability pay.**

The following employees are exempt from the hours of work and overtime pay provisions of the Act:

(a) A criminal investigator receiving availability pay under § 550.181(a) of this chapter, as provided in 29 U.S.C. 213(a)(16));

(b) A pilot employed by U.S. Customs and Border Protection or its successor who is a law enforcement officer as defined in section 5541(3) of title 5, United States Code, and who receives availability pay under section 5545a(i) of title 5, United States Code.

#### **§ 551.214 Statutory exclusion.**

A customs officer who receives overtime pay under subsection (a) or premium pay under subsection (b) of 19 U.S.C. 267 and under 19 CFR 24.16 for time worked may not receive pay or other compensation for that work under any other provision of law.

#### **§ 551.215 Fire protection activities and 7(k) coverage for FLSA pay and exemption determinations.**

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of fire

protection employees based on appropriate factors, such as the type of premium payments they receive (see § 551.501(a)(1) and (5) and § 551.541).

(b) *Fire protection activities.* Fire protection activities involve the performance of functions directly concerned with the response to and the control and extinguishment of fires; or performance of inspection of facilities and equipment for the primary purpose of reducing or eliminating fire hazards by trained firefighters eligible for reassignment to fire control and suppression or prevention duties; or provision of the primary (i.e., the first called) rescue and ambulance service in connection with fire protection functions.

(c) *Engaged in fire protection activities.* (1) An employee (including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker) is considered engaged in fire protection activities for the purpose of determining possible application of section 7(k) of the Act as provided for in § 551.501(a)(1) and (5) and § 551.541 if the employee:

(i) Is trained in fire suppression, has authority and responsibility to engage in fire suppression, and is employed by an organization with fire suppression as a primary mission; and

(ii) Is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

(2) Subject to the requirements of paragraph (c)(1) of this section, the following types of employees are engaged in fire protection activities for the purpose of determining possible application of section 7(k) of the Act:

(i) Employees in positions properly classified in the Fire Protection and Prevention series, including any qualified firefighter who is assigned to perform support functions (e.g., communications or dispatching functions, equipment maintenance or repair) or who is transferred to an administrative or supervisory position within the fire protection activity, except when such administrative or supervisory work exempts the employee under executive, administrative, and professional considerations;

(ii) Employees in positions properly classified in other series, such as Forestry Technician, for whom fire protection functions constitute substantially full-time assignments throughout the year, or for the duration of a specified fire season within the year;

(iii) Temporary employees hired solely to perform fire suppression work on an as-needed basis;

(iv) Members of rescue and ambulance crews with fire suppression training, authority, and responsibility, who are part of a fire suppression organization, as described in paragraph (c)(1)(i) of this section; and

(v) Any other employee in any workweek in which the employee performs fire control or suppression work for 80 percent or more of the total hours worked.

(d) *Not engaged in fire protection activities.* Examples of types of employees who are not engaged in fire protection activities for the purpose of applying section 7(k) of the Act (as provided for in § 551.501(a)(1) and (5) and § 551.541) include the following:

(1) Professional engineers, engineering technicians, and similar employees involved in fire protection research or in the design and development of fire protection and prevention equipment and materials;

(2) Employees who perform functions that support fire protection activities but who are *not* trained, qualified firefighters eligible for reassignment to fire control and suppression or prevention duties. Supporting functions (such as maintenance of fire apparatus, equipment, alarm systems, etc., or communications and dispatching work or preparation of records and reports) are included when performed by firefighters but are *not* included when performed by mechanics, communications systems and radio operators, clerks, or other employees;

(3) Employees whose primary duties are *not* related to fire protection but who perform fire control or suppression work on an as needed basis, *provided* that the fire control or suppression work constitutes less than 80 percent of the employees' hours of work within any workweek; and

(4) Employees on rescue and ambulance crews who:

(i) Are not trained in fire suppression;

(ii) Do not have fire suppression authority and responsibility; or

(iii) Are employed by an organization, such as a hospital, that does not have fire suppression as a primary mission.

#### **§ 551.216 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.**

(a) The Office of Personnel Management may determine that the provisions of section 7(k) of the Act apply to certain categories of law enforcement employees based on appropriate factors, such as the type of premium payments they receive (see § 551.501(a)(1) and (5) and § 551.541).

(b) *Law enforcement activities.* Law enforcement activities involve work directly and primarily concerned with:

(1) Patrol and control functions that include patrolling an area to enforce law and order and to protect the lives, property, and civil rights of individuals through the prevention and detection of criminal acts; responding to complaints, violations, accidents, and emergencies; investigating for clues at the scene of a crime, interviewing witnesses, and evaluating evidence to locate suspects; and apprehending and arresting persons suspected of, or wanted for, criminal violations under a statutorily prescribed arrest authority;

(2) Executing the orders of a Federal court, including serving civil writs and criminal warrants issued by Federal courts; tracing and arresting persons wanted by warrants; and seizing and disposing of property under court orders;

(3) Planning and conducting investigations relating to alleged or suspected violations of criminal laws, including the arrest of suspected or wanted persons under a statutorily prescribed arrest authority;

(4) Security functions in a correctional institution involving direct custody and safeguarding of inmates charged with or convicted of violations of criminal laws; or

(5) Rescue and ambulance functions that provide the primary (i.e., the first called) service in connection with law enforcement activities described above.

(c) *Engaged in law enforcement activities.* The following employees are engaged in law enforcement activities for the purpose of determining possible application of section 7(k) of the Act as provided for in § 551.501(a)(1) and (5) and § 551.541:

(1) Employees in positions properly classified in the Police series, and employees in positions that would be otherwise classifiable in that series if covered by classification criteria of chapter 51 of title 5, U.S. Code;

(2) Employees in positions properly classified as Border Patrol Agents, Customs Patrol Officers, and other employees whose primary duties involve similar patrol and control functions performed for the purpose of detecting and apprehending persons suspected of violating criminal laws;

(3) Employees in positions properly classified in the U.S. Marshal series;

(4) Employees in positions properly classified in the Criminal Investigating series, and other employees performing criminal investigation as their primary duty, except as provided for in § 551.213 (Exemption of employees receiving availability pay);

(5) Employees in positions properly classified in the Correctional Officer series, Guard series, or other series, whose primary duty is to maintain custody of inmates of a correctional institution; and

(6) Employees on rescue and ambulance crews that provide the primary service in connection with law enforcement functions, provided that crew members have received intensive training in specialized rescue and first aid procedures applicable to law enforcement emergencies (e.g., gunshot wounds, riot and accident victims) and the crew responds to actual or potential law enforcement emergencies on a regular and recurring basis.

(d) *Not engaged in law enforcement activities.* The following employees are not engaged in law enforcement activities for the purpose of pay under section 7(k) of the Act as provided for in § 551.501(a)(1) and (5) and § 551.541:

(1) Employees whose primary duties concern the protection of Government property from hazards such as sabotage, espionage, theft, fire, or accidental or willful damage and in so doing, control the movement of persons and protect the lives and property of persons on Government property (e.g., guards or other employees performing similar functions);

(2) Employees who perform work concerned with the determination of the applicability of or compliance with laws and regulations when the duties primarily involve:

(i) Examining or inspecting products, premises, property, or papers of persons or firms to enforce or obtain compliance with laws and regulations (e.g., immigration and customs examining or inspecting; mine safety and health examining or inspecting; alcohol, tobacco and firearms examining or inspecting; plant protection and quarantine examining or inspecting); or

(ii) Planning and conducting investigations covering the character, practices, suitability or qualifications of persons or organizations seeking, claiming or receiving Federal benefits, permits, or employment (e.g., general investigations work);

(3) Employees who work within correctional institutions but who do not have direct custody and safeguarding of inmates as their primary duty; and

(4) Members of rescue or ambulance crews that provide those services in connection with law enforcement activities only in unusual situations (e.g., when the primary crews are unavailable or when an emergency situation requires more crews than can be provided by the primary service).

■ 4. Amend § 551.541 of subpart E by revising paragraphs (a) and (b) to read as follows:

**Subpart E—Overtime Pay Provisions**

**§ 551.541 Employees engaged in fire protection activities or law enforcement activities.**

(a) An employee engaged in fire protection activities or law enforcement activities (as described in §§ 551.215 and 551.216, respectively) who receives compensation for those activities under 5 U.S.C. 5545(c)(1) or (2) or 5545b, or does not meet the definition of “employee” in 5 U.S.C. 5541(2) for the purposes of 5 U.S.C. 5542, 5543, and 5544, is subject to section 7(k) of the Act and this section. (See § 551.501(a)(1) and (5)). Such an employee shall be paid at a rate equal to one and one-half times the employee’s hourly regular rate of pay for those hours in a tour of duty which exceed the overtime standard for a work period specified in section 7(k) of the Act.

(b) The tour of duty of an employee covered by paragraph (a) of this section shall include all time the employee is on duty. Meal periods and sleep periods are included in the tour of duty except as otherwise provided in §§ 551.411(c) and 551.432(b).

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■ 5. Add paragraph (c) to § 551.601 to read as follows:

**Subpart F—Child Labor**

**§ 551.601 Minimum age standards.**

\* \* \* \* \*

(c) All work in fire suppression is deemed hazardous for the employment of individuals under 18 years of age. All work in fire protection and prevention is particularly hazardous for the employment of individuals between 16 and 18 years of age, except the following:

(1) Work in offices or in repair or maintenance shops without exposure to hazardous materials;

(2) Work in the construction, operation, repair, or maintenance of living and administrative quarters in firefighting camps without exposure to hazardous materials;

(3) Work in forest protection, such as clearing fire trails or roads, piling and burning slash, maintaining firefighting equipment, or acting as fire lookout or fire patrolman away from the actual logging operations, provided that this provision shall not apply to the felling or bucking of timber, the collecting or transporting of logs, the operation of power-driven machinery, the handling or use of explosives, and work on trestles;

(4) Work in the clean-up service outside of a structure after a fire has been declared by the fire official in charge to be under control; and

(5) Work assisting in the administration of first aid.

■ 6. Revise subpart G to read as follows:

**Subpart G—FLSA Claims and Compliance**

Sec.

- 551.701 Applicability.
- 551.702 Time limits.
- 551.703 Avenues of review.
- 551.704 Claimant's representative.
- 551.705 Filing an FLSA claim.
- 551.706 Responsibilities.
- 551.707 Withdrawal or cancellation of an FLSA claim.
- 551.708 Finality and effect of OPM FLSA claim decision.
- 551.709 Availability of information.
- 551.710 Where to file an FLSA claim with OPM.

**Subpart G—FLSA Claims and Compliance**

**§ 551.701 Applicability.**

(a) *Applicable.* This subpart applies to *FLSA exemption status determination claims*, FLSA pay claims for minimum wage or overtime pay for work performed under the Act, and complaints arising under the child labor provisions of the Act.

(b) *Not applicable.* This subpart does not apply to claims or complaints arising under the equal pay provisions of the Act. The equal pay provisions of the Act are administered by the Equal Employment Opportunity Commission.

**§ 551.702 Time limits.**

(a) *Claims.* A claimant may at any time file a complaint under the child labor provisions of the Act or an FLSA claim challenging the correctness of his or her FLSA exemption status determination. A claimant may also file an FLSA claim concerning his or her entitlement to minimum wage or overtime pay for work performed under the Act; however, time limits apply to FLSA pay claims. All FLSA pay claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations (3 years for willful violations).

(b) *Statute of limitations.* An FLSA pay claim filed on or after June 30, 1994, is subject to the statute of limitations contained in the Portal-to-Portal Act of 1947, as amended (section 255a of title 29, United States Code), which imposes a 2-year statute of limitations, except in cases of a willful violation where the statute of limitations is 3 years. In deciding a claim, a determination must be made as to whether the cause or basis of the claim was the result of a willful violation on the part of the agency.

(c) *Preserving the claim period.* A claimant or a claimant's designated representative may preserve the claim period by submitting a written claim either to the agency employing the claimant during the claim period or to OPM. The date the agency or OPM receives the claim is the date that determines the period of possible entitlement to back pay. The claimant is responsible for proving when the claim was received by the agency or OPM and for retaining documentation to establish when the claim was received by the agency or OPM, such as by filing the claim using certified, return receipt mail, or by requesting that the agency or OPM provide written acknowledgment of receipt of the claim. If a claim for back pay is established, the claimant will be entitled to pay for a period of up to 2 years (3 years for a willful violation) back from the date the claim was received.

**§ 551.703 Avenues of review.**

(a) *Negotiated grievance procedure (NGP) as exclusive administrative remedy.* If at any time during the claim period, a claimant was a member of a bargaining unit covered by a collective bargaining agreement that did not specifically exclude matters under the Act from the scope of the NGP, the claimant must use that NGP as the exclusive administrative remedy for all claims under the Act. There is no right to further administrative review by the agency or by OPM. The remaining sections in this subpart (that is, §§ 551.704 through 551.710) do not apply to such employees.

(b) *Non-NGP administrative review by agency or OPM.* A claimant may file a claim with the agency employing the claimant during the claim period or with OPM, but not both simultaneously, regarding matters arising under the Act if, during the entire claim period, the claimant:

- (1) Was not a member of a bargaining unit, or
- (2) Was a member of a bargaining unit not covered by a collective bargaining agreement, or
- (3) Was a member of a bargaining unit covered by a collective bargaining agreement that specifically excluded matters under the Act from the scope of the NGP.

(c) *Judicial review.* Nothing in this subpart limits the right of a claimant to bring an action in an appropriate United States court. Filing a claim with an agency or with OPM does not satisfy the statute of limitations governing FLSA claims filed in court. OPM will not decide an FLSA claim that is in litigation.

**§ 551.704 Claimant's representative.**

A claimant may designate a representative to assist in preparing or presenting a claim. The claimant must designate the representative in writing. A representative may not participate in OPM interviews unless specifically requested to do so by OPM. An agency may disallow a claimant's representative who is a Federal employee in any of the following circumstances:

(a) When the individual's activities as a representative would cause a conflict of interest or position;

(b) When the designated representative cannot be released from his or her official duties because of the priority needs of the Government; or

(c) When the release of the designated representative would give rise to unreasonable costs to the Government.

**§ 551.705 Filing an FLSA claim.**

(a) *Filing an FLSA claim.* A claimant may file an FLSA claim with either the agency employing the claimant during the claim period or with OPM, but a claimant cannot pursue the same claim with both at the same time. OPM encourages a claimant to obtain a decision on the claim from the agency before filing the claim with OPM. However, this is a matter of personal discretion and a claimant is not required to do this; a claimant may use either avenue. A claimant who receives an unfavorable decision on a claim from the agency may still file the claim with OPM. However, a claimant may not file the claim with the agency after receiving an unfavorable decision from OPM. An OPM decision on a claim is final and is not subject to further administrative review.

(b) *FLSA claim filed with agency.* An FLSA claim filed with an agency should be made according to appropriate agency procedures. At the request of the claimant, the agency may forward the claim to OPM on the claimant's behalf. The claimant is responsible for ensuring that OPM receives all the information requested in paragraph (c) of this section.

(c) *FLSA claim filed with OPM.* An FLSA claim filed with OPM must be made in writing and must be signed by the claimant or the claimant's representative. Relevant information may be submitted to OPM at any time following the initial submission of a claim to OPM and prior to OPM's decision on the claim. The claim must include the following:

- (1) The identity of the claimant (see § 551.706(a)(2) regarding requesting confidentiality) and any designated representative, the agency employing

the claimant during the claim period, the position (job title, series, and grade, or equivalent level) occupied by the claimant during the claim period, and the current mailing address, commercial telephone number, and facsimile machine number, if available, of the claimant and any designated representative;

(2) A description of the nature of the claim and the specific issues or incidents giving rise to the claim, including the time period covered by the claim;

(3) A description of actions taken by the claimant to resolve the claim within the agency and the results of any actions taken;

(4) A copy of any relevant decision or written response by the agency;

(5) Evidence available to the claimant or the claimant's designated representative which supports the claim, including the identity, commercial telephone number, and location of other individuals who may be able to provide information relating to the claim;

(6) The remedy sought by the claimant;

(7) Evidence, if available, that the claim period was preserved in accordance with § 551.702. The date the claim is received by the agency or OPM becomes the date on which the claim period is preserved;

(8) A statement from the claimant that he or she was or was not a member of a collective bargaining unit at any time during the claim period;

(9) If the claimant was a member of a bargaining unit, a statement from the claimant that he or she was or was not covered by a negotiated grievance procedure at any time during the claim period, and if covered, whether that procedure specifically excluded the claim from the scope of the negotiated grievance procedure;

(10) A statement from the claimant that he or she has or has not filed an action in an appropriate United States court; and

(11) Any other information that the claimant believes OPM should consider.

#### § 551.706 Responsibilities.

(a) *Claimant*—(1) *Providing information to OPM*. For all FLSA claims, the claimant or claimant's designated representative must provide any additional information requested by OPM within 15 workdays after the date of the request, unless the claimant or the claimant's representative requests additional time and OPM grants a longer period of time in which to provide the requested information. The disclosure of information by a claimant is voluntary.

However, OPM may be unable to render a decision on a claim without the information requested. In such a case, the claim will be cancelled without further action being taken by OPM. In the case of an FLSA pay claim, it is the claimant's responsibility to provide evidence that the claim period was preserved in accordance with § 551.702 and of the liability of the agency and the claimant's right to payment.

(2) *Requesting confidentiality*. If the claimant wishes the claim to be treated confidentially, the claim must specifically request that the identity of the claimant not be revealed to the agency. Witnesses or other sources may also request confidentiality. OPM will make every effort to conduct its investigation in a way to maintain confidentiality. If OPM is unable to obtain sufficient information to render a decision and preserve the requested confidentiality, OPM will notify the claimant that the claim will be cancelled with no further action by OPM unless the claimant voluntarily provides written authorization for his or her name to be revealed.

(b) *Agency*. (1) In *FLSA exemption status determination claims*, the burden of proof rests with the agency that asserts the FLSA exemption.

(2) The agency must provide the claimant with a written acknowledgment of the date the claim was received.

(3) Upon a claimant's request, and subject to any Privacy Act requirements, an agency must provide a claimant with information relevant to the claim.

(4) The agency must provide any information requested by OPM within 15 workdays after the date of the request, unless the agency requests additional time and OPM grants a longer period of time in which to provide the requested information.

#### § 551.707 Withdrawal or cancellation of an FLSA claim.

(a) *Withdrawal*. OPM may grant a request from the claimant or claimant's representative to withdraw an FLSA claim at any time before OPM issues its decision. The claimant or the claimant's representative must submit the request in writing to OPM.

(b) *Cancellation*. OPM may, at its discretion, cancel an FLSA claim if the claimant or the claimant's representative fails to provide requested information within 15 workdays after the date of the request, unless the claimant or the claimant's representative requests additional time and OPM grants a longer period of time in which to provide the requested information. OPM may, at its discretion,

reconsider a cancelled claim on a showing that circumstances beyond the claimant's control prevented pursuit of the claim.

#### § 551.708 Finality and effect of OPM FLSA claim decision.

(a) OPM will send an FLSA claim decision to the claimant or the claimant's representative and the agency. An FLSA claim decision made by OPM is final. There is no further right of administrative appeal. However, at its discretion, OPM may reconsider its FLSA claim decision when material information was not considered or there was a material error of law, regulation, or fact in the original decision. The request must be submitted in writing and received by OPM within 45 calendar days after the date of the decision. At its unreviewable discretion, OPM may waive the time limit.

(b) A decision by OPM under the Act is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which OPM administers the Act.

(c)(1) Upon receipt of a decision, the agency employing the claimant during the claim period must take all necessary steps to comply with the decision, including adherence to compliance instructions provided with the decision. All compliance actions must be completed within the time specified in the decision, unless an extension of time is requested by the agency and granted by OPM.

(2) The agency should identify all similarly situated current and former employees to ensure that they are treated in a manner consistent with the decision on FLSA coverage, informing them in writing of their right to file an FLSA claim with the agency or OPM.

#### § 551.709 Availability of information.

(a) Except when the claimant has requested confidentiality, the agency and the claimant must provide to each other a copy of all information submitted with respect to the claim.

(b) When a claimant has not requested confidentiality, OPM will disclose to the parties concerned the information contained in an FLSA claim file. When a claimant has requested confidentiality, OPM will delete any information identifying the claimant before disclosing the information in an FLSA claim file to the parties concerned. For the purposes of this subpart, "the parties concerned" means the claimant, any representative designated in writing, and any representative of the agency or OPM involved in the proceeding.

(c) Except when the claimant has requested confidentiality or the disclosure would constitute a clearly unwarranted invasion of personal privacy, OPM, upon a request which identifies the individual from whose file the information is sought, will disclose the following information from a claim file to a member of the public:

- (1) Confirmation of the name of the individual from whose file the information is sought and the names of the other parties concerned;
- (2) The remedy sought;
- (3) The status of the claim;
- (4) The decision on the claim; and
- (5) With the consent of the parties concerned, other reasonably identified information from the file.

**§ 551.710 Where to file an FLSA claim with OPM.**

An FLSA claim must be filed with the OPM Classification Appeals and FLSA Program, 1900 E Street, NW., Washington, DC 20415-0001.

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**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**7 CFR Part 305**

[Docket No. APHIS-2007-0061]

RIN 0579-AC40

**Importation of Blueberries From South Africa, Uruguay, and Argentina With Cold Treatment**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** We are allowing the importation into the continental United States of fresh blueberries from South Africa and Uruguay under certain conditions. As a condition of entry, the blueberries will have to undergo cold treatment and will have to be accompanied by a phytosanitary certificate issued by the national plant protection organization of the exporting country. This action will allow for the importation of blueberries from South Africa and Uruguay into the continental United States while continuing to provide protection against the introduction of quarantine pests. In addition, we are allowing the use of cold treatment for blueberries imported into the United States from Argentina. This action provides an alternative to the methyl bromide treatment that is

currently required for blueberries imported from Argentina.

**EFFECTIVE DATE:** September 17, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mr. Tony Román, Import Specialist, Commodity Import Analysis and Operation Staff, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737-1231; (301) 734-8758.

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations in “Subpart—Fruits and Vegetables” (7 CFR 319.56 through 319.56-47, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

On June 5, 2007, we published in the **Federal Register** (72 FR 30979-30984, Docket No. APHIS 2007-0061) a proposal<sup>1</sup> to amend the regulations to allow the importation into the continental United States of fresh blueberries from South Africa and Uruguay under certain conditions. As a condition of entry, we proposed that the blueberries would have to undergo cold treatment and would have to be accompanied by a phytosanitary certificate issued by the national plant protection organization (NPPO) of the exporting country. In addition, we proposed to allow the use of cold treatment for blueberries imported into the United States from Argentina.

We solicited comments concerning our proposal for 45 days ending July 20, 2007. We received six comments by that date. They were from blueberry distributors, a commercial fumigation company, and a blueberry industry group. Four of the commenters supported the proposed rule. One commenter did not address the proposed rule.

One commenter objected to the proposed rule. The commenter expressed concern that we did not consult with domestic blueberry producers prior to issuing the proposal and that the studies conducted in support of the rule were conducted hastily. Because the proposed rule and its supporting risk analysis were focused on identifying and managing the risks associated with importing blueberries from Uruguay and South Africa, we did not find it necessary to consult with the domestic blueberry

industry during the preparation of those documents. The risk assessment and risk management documents were drafted using the same approach and in the same timeframe as the other risk analyses the Animal and Plant Health Inspection Service (APHIS) prepares or reviews. In addition, we offered the public, including domestic blueberry producers, the opportunity to comment on the proposed rule following its publication in the **Federal Register**.

The commenter further stated that information in the proposed rule regarding domestic production is out of date and incorrect, and suggested that we refer to information released by the North American Blueberry Council (NABC). The data we used in the proposed rule’s economic analysis was taken from the National Agricultural Statistics Service (NASS) and the Economic Research Service (ERS), with the ERS report cited being the most current data available (May 2007). The data we received incorporates information from a variety of sources, including the NABC.

Finally, the commenter expressed concern regarding the lack of market access for U.S.-grown blueberries into Uruguay and South Korea. This is not germane to the proposal.

**Note:** In a final rule published in the **Federal Register** on July 18, 2007 (72 FR 39482-39528, Docket No. APHIS-2005-0106), we revised the fruits and vegetables regulations to establish a performance-based process for approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in § 319.56-4(b) of the regulations. Under those revised regulations, commodities that are authorized for importation subject only to one or more designated measures will be listed in the fruits and vegetables manual<sup>2</sup> rather than being listed in the regulations. The requirements that will apply to the importation of blueberries from Uruguay and South Africa—i.e., that they be cold treated for specific pests, accompanied by a phytosanitary certificate, and imported in commercial consignments only—are all designated phytosanitary measures listed in § 319.56-4(b). Therefore, we are not adding the provisions regarding the entry of blueberries from Uruguay and South Africa to the fruits and vegetables regulations in part 319 in this final rule; rather, those conditions will be listed in the fruits and vegetables manual. For those same reasons, the provisions regarding the importation of blueberries from Argentina were removed from the regulations in the July 2007 final

<sup>1</sup>To view the proposed rule and the comments we received, go to <http://www.regulations.gov/jdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0061>.

<sup>2</sup>The fruits and vegetables manual is available on the Internet at [http://www.aphis.usda.gov/import\\_export/plants/manuals/ports/downloads/fv.pdf](http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/fv.pdf).