

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 530, 531, and 536

RIN 3206-AM43

#### Pay in Nonforeign Areas

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) proposes to revise certain pay administration rules dealing with employees in nonforeign areas outside the 48 contiguous States. The proposed regulations would allow consideration of locality pay and nonforeign area cost-of-living allowances (COLAs) in evaluating the need for special rates, special rate supplements to be computed using an alternate method in nonforeign areas, locality rates to be considered basic pay for the purpose of computing nonforeign area COLAs and post differentials, a retained rate established based on a special rate payable in a nonforeign area that is in excess of the applicable limitation on special rates on January 1, 2012, to exceed the rate payable for level IV of the Executive Schedule, and temporary and term employees in nonforeign areas to be eligible for a retained rate in certain circumstances.

**DATES:** Comments must be received on or before September 15, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number “3206–,” using either of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* Jerome D. Mikowicz, Deputy Associate Director, Pay and Leave, Employee Services, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200.

**FOR FURTHER INFORMATION CONTACT:** Carey Jones by telephone at (202) 606-

2858; by fax at (202) 606-0824; or by e-mail at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing proposed regulations to revise certain pay administration rules for employees in “nonforeign areas,” which include Alaska, Hawaii, Guam, Puerto Rico, the Virgin Islands, and certain other areas listed in 5 CFR 591.205. Some of the proposed revisions are necessary to address the effects of implementing the Non-Foreign Area Retirement Equity Assurance Act of 2009 (NAREAA), as contained in subtitle B of title XIX of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84, October 28, 2009).

#### NAREAA Provisions Affecting Locality Rates, Special Rates, and Retained Rates

NAREAA provided for entitlement to locality pay in the nonforeign areas while phasing out nonforeign area cost-of-living allowances (COLAs) authorized under 5 U.S.C. 5941(a)(1). Under section 1914 of Public Law 111-84, locality pay is phased in during a transition period beginning on the first day of the first pay period in January 2010 and ending on the first day of the first pay period in January 2012, hereafter referred to as the “transition period.” As locality pay increases, payable COLA rates must be reduced as specified in section 1912(b) of NAREAA. (See also 5 U.S.C. 5941(c), as amended by section 1912(b).) NAREAA also amended 5 U.S.C. 5941 to provide that a nonforeign area COLA must be paid as a percentage of basic pay, including any applicable locality-based comparability payment. (See 5 U.S.C. 5941(c)(4), as amended by NAREAA.)

Under section 1915(b)(1) of NAREAA, when locality pay for a nonforeign area is increased during the transition period, the increase in the minimum rate (step 1) of any grade of a special rate schedule under 5 U.S.C. 5305 must be increased by no less than the dollar increase in the locality payment for a non-special rate employee at the same grade and step and in the same location. Corresponding increases must be provided for all special rates at higher steps in the pay range for the given grade.

OPM determined a methodology for increasing special rates for General

Schedule (GS) employees in nonforeign areas in conjunction with locality pay increases during the transition period that complies with the minimum requirements in section 1915(b)(1). OPM explained this methodology in a memorandum (CPM 2009-27) issued on December 30, 2009. (See <http://www.opm.gov/oca/compmemo/INDEX.asp>.) OPM calculates the dollar value of any locality pay increase for a non-special rate employee at each step rate and adds that dollar amount—referred to as an “additional adjustment”—to the corresponding special rate that would apply but for this additional adjustment. This additional adjustment is equal to a constant percentage of the employee’s GS base rate based on the applicable locality payment. For example, in 2010, when locality pay in all the nonforeign areas was set at 4.72 percent (one-third of the full 2010 “Rest of U.S.” locality rate of 14.16 percent), the special rate “additional adjustment” in all nonforeign areas equaled 4.72 percent of the applicable GS base rate.

As provided in section 1913(c) of NAREAA, OPM has temporarily raised the limitations on the amount of special rates to a higher level during the transition period ending on the first day of the first pay period beginning on or after January 1, 2012. In other words, during the transition period, an additional adjustment made under section 1915(b) would not be limited by the normally applicable Executive Schedule level IV (EX-IV) cap on special rates (\$155,500 in 2011), as established under 5 U.S.C. 5305(a)(1). However, NAREAA section 1913(c) required that any special rate in excess of the EX-IV cap at the end of the transition period must be converted to a retained rate under 5 U.S.C. 5363. Such a converted retained rate would be in excess of the current EX-IV cap on retained rates found in 5 CFR 536.304(b)(3) and 536.306(a).

Some employees in nonforeign areas were entitled to retained rates during the transition period for reasons unrelated to NAREAA. On December 27, 2010, OPM issued a memorandum (CPM 2010-23) that provided special rules for adjusting retained rates under 5 U.S.C. 5363 for employees in nonforeign areas receiving COLAs during the transition period. These special rules were

authorized by NAREAA section 1918(a)(2).

### Proposed Changes in Special Rate and Locality Rate Regulations

Normally, OPM computes a special rate supplement by adding a fixed-dollar amount or fixed percentage of the applicable GS base rate to all GS base rates within a rate range for a category of employees. However, adding an additional adjustment in nonforeign areas (as a result of NAREAA section 1915(b)(1)) provides a third way to compute special rate supplements by allowing a combination of a fixed-dollar supplement and a percentage-based additional adjustment. OPM proposes revising 5 CFR 530.304(c) to recognize the possibility of an alternate method for computing special rate supplements in nonforeign areas for special rate schedules established before January 1, 2012.

The regulations in 5 CFR 530.304(b) provide the circumstances OPM considers in evaluating the need for special rates. OPM proposes adding locality pay for the area involved and a nonforeign area COLA for the area involved as other circumstances for OPM to consider. OPM currently has the ability to consider “any other circumstances OPM considers appropriate” under 5 CFR 530.304(b)(4). However, specifically listing locality pay and nonforeign area COLA will make it explicit that these additional circumstances are appropriate for OPM to consider in evaluating the need for special rates. For similar reasons, we are proposing to amend 5 CFR 530.306(a) to add locality pay and COLA as factors that may be considered in evaluating a special rate proposal and in determining the level of special rates, as provided under 5 CFR 530.306(b)(1).

The regulations in 5 CFR 530.304 govern the establishment of a special rate schedule covering a category of employees in one or more areas or locations, grades or levels, occupational groups, series, classes, or subdivisions thereof. Certain provisions in NAREAA required increases in special rate schedules to levels beyond what may be justified to prevent significant recruitment or retention difficulties. Accordingly, OPM may consider reducing special rate schedules in nonforeign areas. Under these circumstances, and in light of the special regulatory authority provided in NAREAA section 1918(a)(1), we are proposing to add a new paragraph (e) in § 530.304, which would authorize OPM to establish a separate special rate schedule that temporarily maintains the higher special rates for current

employees in a covered category—i.e., those covered by the given special rate schedule before the effective date of the schedule reduction. Employees in that same category who become employed in a nonforeign area after the effective date would be covered by the reduced special rate schedule. In other words, future hires would be covered by a lower special rate schedule established consistent with labor market conditions and other provisions of 5 U.S.C. 5305, while current employees would have “grandfather” coverage under a higher special rate schedule that would provide pay protection, but would be phased out over time.

The regulations in 5 CFR 530.308 list the purposes for which a special rate is considered a rate of basic pay. Section 530.308 specifically states that special rates are considered basic pay for the purpose of computing nonforeign area COLAs and post differentials. Section 530.308 also states that special rates are considered basic pay for the same purposes that locality pay is considered basic pay, as provided in 5 CFR 531.610. Currently, § 531.610 is silent regarding the treatment of locality pay as part of basic pay in computing nonforeign area COLAs, since, at the time the regulation was issued, locality pay was not payable in nonforeign areas or to any employee receiving a COLA. Section 531.610(g) does provide that a locality rate is considered a rate of basic pay for computing nonforeign area post differentials, but mentions only the scenario in which an employee is temporarily working in a nonforeign area when the employee’s official worksite is located in a locality pay area because, at the time the regulation was issued, this was the only scenario in which locality pay was payable to an employee receiving a nonforeign area post differential. However, locality pay now applies to employees whose official worksites are located in a nonforeign area, and NAREAA specifically provided that nonforeign area COLA must be paid as a percentage of basic pay, including any applicable locality-based comparability payment. (See 5 U.S.C. 5941(c)(4) as amended by NAREAA.) Based on that law change, OPM is proposing to revise § 531.610 to reflect the fact that a locality rate must be used in computing nonforeign area COLAs. In addition, based on the original intent of the § 531.610(g) regulation and in light of the change in law to provide locality pay in nonforeign areas, OPM is proposing to revise § 531.610 to clarify that a locality rate is considered a rate of basic pay for the purpose of computing nonforeign

area post differentials without any qualification. OPM is also proposing to make conforming changes in § 530.308. Using locality rates to compute nonforeign area post differentials is consistent with using locality rates to compute nonforeign area COLAs, which is required by law. It is also consistent with use of special rates in computing nonforeign area post differentials, and consistency in treatment of locality rates and special rates is a key objective underlying a number of OPM pay administration regulations.

### Proposed Changes in Pay Retention Regulations

Under current pay retention regulations—specifically, 5 CFR 536.304(b)(3) and 536.306(a)—a retained rate is capped at EX-IV. However, as explained above, NAREAA allows for a special rate above EX-IV to be converted to an equal retained rate at the end of the transition period. Also, under NAREAA section 1918(a)(3), the Director of OPM is authorized to prescribe rules governing the establishment and adjustment of retained rates for any employee whose rate of pay exceeds applicable pay limitations beginning on the first day of the first pay period in January 2012. Accordingly, OPM is proposing to revise its pay retention regulations to allow a retained rate established based on a special rate payable in a nonforeign area that was in excess of the applicable limitation on special rates on January 1, 2012, to exceed the EX-IV limitation until the retained rate becomes equal to or falls below the EX-IV limitation.

Under current pay retention law and regulations, an employee is not eligible for pay retention if he or she was employed on a temporary or term basis immediately before the action causing a reduction in pay. (See 5 U.S.C. 5361(1) and 5 CFR 536.102(b)(2).) OPM is proposing to revise its pay retention regulations to allow an exception to this bar on eligibility in the case of a temporary or term employee in a nonforeign area who is receiving a special rate in excess of EX-IV at the end of the transition period. This proposal is consistent with NAREAA section 1913(c), which requires that “any special rate” in excess of the applicable pay limitation be converted to a retained rate. Furthermore, NAREAA section 1918(a)(3) allows OPM to prescribe rules governing the establishment of retained rates for “any employee” whose rate of pay exceeds applicable pay limitations at the end of the transition period. In addition, OPM is authorized to extend pay retention

provisions to individuals not otherwise eligible under 5 U.S.C. 5365(b)(2).

OPM is also proposing to revise its pay retention regulations to include an additional exception allowing pay retention for a temporary or term employee who is receiving a special rate incorporating an "additional adjustment" under NAREAA section 1915(b)(1) in the event the employee's special rate schedule is reduced or terminated in the future. NAREAA section 1918(a)(1) authorizes OPM to prescribe rules for special rate employees described in NAREAA section 1913. Also, as already noted above, OPM is authorized to extend pay retention provisions to individuals not otherwise eligible under 5 U.S.C. 5365(b)(2).

The above-described changes in the pay retention regulations will be made in a proposed new § 536.310. That section will be removed once all affected employees have a retained rate at or below EX-IV or have lost entitlement to pay retention under 5 CFR 536.308.

OPM is not proposing to continue special retained rate adjustment rules described in CPM 2010-23 after the transition period. Those special adjustment rules were needed while locality pay was being increased by significant amounts (1/3rd phase-in in January 2010, 2/3rd phase-in in January 2011, and full phase-in in January 2012), resulting in corresponding large reductions in COLA payments. OPM believes a continuing exception to the statutory retained rate adjustment rule would not be appropriate. The NAREAA section 1918(a)(2) authority under which OPM established the special retained rate adjustment rules applies only during the transition period. After the transition period, agencies must use the retained rate adjustment rules in 5 U.S.C. 5363(b)(2)(B) and 5 CFR 536.305 to adjust an employee's retained rate, including a retained rate that is above EX-IV, when a pay schedule is adjusted.

**Waiver of 60-Day Comment Period for Proposed Rulemaking**

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists to waive the 60-day comment period for general notice of proposed rulemaking. Limiting the comment period for the proposed regulations to 45 days will enable OPM to issue final regulations by the time the transition period under NAREAA ends, which will ensure appropriate treatment of nonforeign area employees following the transition period and avoid administrative difficulties. Because of the reduced period for public comment, OPM will ensure that agency human

resources officials, management groups, employee organizations representing Federal workers in the nonforeign areas, and congressional offices, are notified promptly once these regulations are published for public comment.

Issuance of final regulations before the end of the NAREAA transition period is necessary to ensure that certain employees will not experience reductions in pay when the transition period ends on January 1, 2012. For example, employees in nonforeign areas who are receiving special rates above level IV of the Executive Schedule (EX-IV) prior to January 1, 2012, must be converted to a retained rate under 5 U.S.C. 5363 on January 1, 2012, under NAREAA section 1913(c). Under current regulations implementing section 5363, retained rates are capped at EX-IV. However, NAREAA section 1918(a)(3) allows OPM to issue regulations under which normal retained rate limitations could be exceeded, and that is what these proposed regulations would do—thus, preventing a possible loss in pay. Similarly, regulation changes are necessary to allow certain temporary or time-limited appointees in nonforeign areas to receive a retained rate and avoid a reduction in pay.

**Executive Order 13563 and Executive Order 12866**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 12866.

**Regulatory Flexibility Act**

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

**List of Subjects in 5 CFR Parts 530, 531 and 536**

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

U.S. Office of Personnel Management.

**John Berry,**  
*Director.*

Accordingly, OPM is proposing to amend 5 CFR parts 530, 531, and 536 as follows:

**PART 530—PAY RATES AND SYSTEMS (GENERAL)**

1. Revise the authority citation for part 530 to read as follows:

**Authority:** 5 U.S.C. 5305 and 5307; subpart C also issued under 5 U.S.C. 5338, sec. 4 of the Performance Management and Recognition System Termination Act of 1993

(Pub. L. 103-89), 107 Stat. 981, and sec. 1918 of Public Law 111-84, 123 Stat. 2619.

**Subpart C—Special Rate Schedules for Recruitment and Retention**

- 2. In § 530.304—
  - a. Remove "or" at the end of paragraph (b)(3);
  - b. Redesignate paragraph (b)(4) as (b)(6);
  - c. Add new paragraphs (b)(4) and (b)(5);
  - d. Revise paragraph (c); and
  - e. Add a new paragraph (e).
 The revisions and additions read as follows:

**§ 530.304 Establishing or increasing special rates.**

- \* \* \* \* \*
- (b) \* \* \*
- (4) Locality pay authorized under 5 U.S.C. 5304 for the area involved;
- (5) A nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved; or
- \* \* \* \* \*

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used—

(1) For grades GS-1 and GS-2, where within-grade increases vary throughout the range; and

(2) In the nonforeign areas listed in 5 CFR 591.205 for special rate schedules established before January 1, 2012.

\* \* \* \* \*

(e) Using its authority in section 1918(a)(1) of the Non-Foreign Area Retirement Equity Assurance Act of 2009 in combination with its authority under 5 U.S.C. 5305, OPM may establish a separate special rate schedule for a category of employees who are in GS positions covered by a nonforeign area special rate schedule in effect on January 1, 2012, and who are employed in a nonforeign area before an OPM-specified effective date. Such a separate schedule may be established if the existing special rate schedule is being reduced. An employee's coverage under the separate special rate schedule is contingent on the employee being continuously employed in a covered GS position in the nonforeign area after the OPM-specified effective date. Such a separate special rate schedule must be designed to provide temporary pay protection and be phased out over time until all affected employees are covered under the pay schedule that would otherwise apply to the category of employees in question.

3. In § 530.306—

a. Remove “and” at the end of paragraph (a)(8);

b. Remove the period at the end of paragraph (a)(9) and add “; or” in its place; and

c. Add a new paragraph (a)(10) to read as follows:

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

(a) \* \* \*

(10) The level of any locality pay authorized under 5 U.S.C. 5304 and any nonforeign area cost-of-living allowance authorized under 5 U.S.C. 5941(a)(1) for the area involved.

\* \* \* \* \*

4. In § 530.308—

a. Revise paragraph (a);

b. Remove paragraph (b); and

c. Redesignate paragraphs (c) and (d) as (b) and (c), respectively.

The revision reads as follows:

**§ 530.308 Treatment of special rate as basic pay.**

\* \* \* \* \*

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

\* \* \* \* \*

**PART 531—PAY UNDER THE GENERAL SCHEDULE**

5. Revise the authority citation for part 531 to read as follows:

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Public Law 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5305, 5333, 5334(a) and (b), and 7701(b)(2); Subpart D also issued under 5 U.S.C. 5335 and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305, and 5941(a); E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682; and E.O. 13106, 63 FR 68151, 3 CFR, 1998 Comp., p. 224.

**Subpart F—Locality-Based Comparability Payment**

6. In § 531.610, revise paragraph (g) to read as follows:

**§ 531.610 Treatment of locality rate as basic pay.**

\* \* \* \* \*

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

\* \* \* \* \*

**PART 536—GRADE AND PAY RETENTION**

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

**Authority:** 5 U.S.C. 5361–5366; sec. 4 of the Performance Management and Recognition System Termination Act of 1993 (Pub. L. 103–89), 107 Stat. 981; § 536.301(b) also issued under 5 U.S.C. 5334(b); § 536.308 also issued under sec. 301(d)(2) of the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411), 118 Stat. 2305; § 536.310 also issued under sections 1913 and 1918 of the Non-Foreign Area Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L. 111–84), 123 Stat. 2619; § 536.405 also issued under 5 U.S.C. 552, Freedom of Information Act, Public Law 92–502.

**Subpart C—Pay Retention**

8. Add a new § 536.310 to read as follows:

**§ 536.310 Exceptions for certain employees in nonforeign areas.**

(a) Notwithstanding §§ 536.304(b)(3) and 536.306(a), an employee may receive a retained rate higher than Executive Schedule level IV if such employee is receiving a special rate in excess of Executive Schedule level IV on January 1, 2012, that is converted to a retained rate, consistent with section 1913 of the Non-Foreign Retirement Equity Assurance Act of 2009 (subtitle B of title XIX of Pub. L. 111–84). This paragraph ceases to apply when the retained rate becomes equal to or falls below Executive Schedule level IV or when the employee ceases to be entitled to pay retention under § 536.308.

(b) Notwithstanding 5 U.S.C. 5361(1) and § 536.102(b)(2), an employee who is employed on a temporary or term basis is not barred from receiving a retained rate if such employee—

(1) Is receiving a special rate above Executive Schedule level IV on January 1, 2012, and is covered by paragraph (a) of this section; or

(2) Is receiving a special rate incorporating an additional adjustment under section 1915(b)(1) of the Non-Foreign Retirement Equity Assurance Act (subtitle B of title XIX of Pub. L. 111–84) at the time the employee’s special rate schedule is reduced or terminated.

[FR Doc. 2011–19361 Filed 7–29–11; 8:45 am]

**BILLING CODE 6325–39–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA–2011–0720; Directorate Identifier 2010–NM–252–AD]

**RIN 2120–AA64**

**Airworthiness Directives; Bombardier Inc. Model DHC–8–400 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

There has been one reported incident where the main landing gear (MLG) failed to extend during testing of the MLG alternate release system. Investigation revealed that the door release lever bushing was worn, causing an increase in the lateral movement of the release cable system. An increase in free-play within the release cable system would cause additional wear to the door release lever bushing and may lead to the turnbuckle fouling against the nacelle frame. The bushing wear at the door release lever and turnbuckle fouling could cause a failure in the alternate release system, preventing the landing gear from extending in the case of a failure of the normal MLG extension/retraction system.

\* \* \* \* \*

The unsafe condition is loss of control during landing. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by September 15, 2011.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, Room W12–40, 1200 New Jersey