

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 532

RIN 3206-A113

### Prevailing Rate Systems; Redefinition of the Orlando, FL, Appropriated Fund Wage Area

**AGENCY:** Office of Personnel Management.

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

**SUMMARY:** The Office of Personnel Management (OPM) is issuing an interim rule to redefine Orange, Osceola, Seminole, and Volusia Counties, FL, from the Orlando, FL, Federal Wage System (FWS) appropriated fund wage area to the Jacksonville, FL, FWS wage area. March 11, 1998.

**DATES:** This interim rule is effective March 11, 1998. Employees in the Orlando wage area will be transferred to the Jacksonville wage schedule on the first day of the first applicable pay period beginning on or after March 11, 1998. Comments must be received on or before March 11, 1998.

**ADDRESSES:** Send or deliver comments to Donald J. Winstead, Assistant Director for Compensation Administration, Workforce Compensation and Performance Service, Office of Personnel Management, Room 7H31, 1900 E Street NW., Washington, DC 20415, or FAX: (202) 606-0824.

**FOR FURTHER INFORMATION CONTACT:** Mark A. Allen at (202) 606-2848, or send an email message to maallen@opm.gov.

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management is issuing the second of two interim rules to abolish and redefine the Orlando, FL, appropriated fund wage area. The Orlando wage area is currently

composed of Orange, Osceola, Seminole, and Volusia Counties in Florida. Because of the pending closure of the Orlando Naval Training Station, the Department of Defense (DOD), the lead agency for the Orlando wage area, was unable to conduct the wage survey that was scheduled to begin in the Orlando wage area in September 1997. An earlier interim rule removed the requirement that local wage surveys be conducted in the Orlando wage area (62 FR 51759). This interim rule redefines the four counties of the Orlando wage area to the Jacksonville, FL, wage area's area of application.

Section 532.211 of title 5, Code of Federal Regulations, lists the following criteria for consideration when OPM defines FWS wage area boundaries:

- (i) Distance, transportation facilities, and geographic features;
- (ii) Commuting patterns; and
- (iii) Similarities in overall population, employment, and the kinds and sizes of private industrial establishments.

An examination of the above criteria found that the distance criterion favored defining Orange, Osceola, Seminole, and Volusia Counties to the Cocoa Beach-Melbourne, FL, wage area. However, the similarities in overall population and employment criteria favored defining the four counties to the Jacksonville wage area more than to the Cocoa Beach-Melbourne wage area. The other regulatory criteria were indeterminate. An additional factor taken into consideration in the review of Orange, Osceola, Seminole, and Volusia Counties was the fact that wage schedules for FWS employees who are stationed in the Cocoa Beach-Melbourne wage area are constructed predominantly from wage data obtained from private industrial establishments working on Federal contracts for the National Aeronautics and Space Administration that have little similarity to the private industrial establishments found in the Orlando wage area. Wage schedules for FWS employees who are stationed in the Jacksonville wage area are constructed from wage data obtained from a broader range of private industrial establishments that appear to be more similar to the private industrial establishments generally found in the Orlando wage area. On balance, the regulatory criteria for defining FWS wage areas show that the four counties

of the Orlando wage area are a better fit with the Jacksonville wage area than with the Cocoa Beach-Melbourne wage area. For this reason, OPM is moving Orange, Osceola, Seminole, and Volusia Counties to the Jacksonville wage area.

The Federal Prevailing Rate Advisory Committee reviewed this recommendation and by consensus recommended approval.

### Waiver of Notice of Proposed Rulemaking and Delayed Effective date

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. The notice is being waived because FWS employees who are stationed in the Orlando wage area would have received wage adjustments in November 1997 had DOD been able to continue conducting local wage surveys in the Orlando wage area. This interim rule will allow those employees to receive wage adjustments as soon as is practicable with an appropriate period of time for agencies to implement the change.

### Regulatory Flexibility Act

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

### List of Subjects in 5 CFR Part 532

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

Office of Personnel Management.

**Janice R. Lachance,**

*Director.*

Accordingly, OPM is amending 5 CFR part 532 as follows:

### PART 532—PREVAILING RATE SYSTEMS

1. The authority citation for Part 532 continues to read as follows:

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

### Appendix C to Subpart B of Part 532 [Amended]

2. Appendix C to subpart B is amended under the State of Florida by removing the wage area listing for the Orlando wage area and by revising the Jacksonville wage area listing to read as follows:

**Appendix C to Subpart B of part 532—  
Appropriated Fund Wage and Survey  
Areas**

\* \* \* \* \*

Florida

\* \* \* \* \*

Jacksonville

*Survey Area*

Florida:

Alachua  
Baker  
Clay  
Duval  
Nassau  
St. Johns

*Area of Application. Survey Area Plus*

Florida:

Bradford  
Citrus  
Columbia  
Dixie  
Flagler  
Gilchrist  
Hamilton  
Lafayette  
Lake  
Levy  
Madison  
Marion  
Orange  
Osceola  
Putnam  
Seminole  
Sumter  
Suwanee  
Taylor  
Union  
Volusia  
Georgia:  
Brantley  
Camden  
Charlton  
Glynn  
Pierce

\* \* \* \* \*

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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the  
Currency**

**12 CFR Part 9**

[Docket No. 98-02]

RIN 1557-AB63

**Fiduciary Activities of National Banks**

**AGENCY:** Office of the Comptroller of the  
Currency, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller  
of the Currency (OCC) is amending its

rules governing national banks' fiduciary activities by issuing an interpretive ruling to clarify the types of investment advisory activities that come within the scope of these rules. This action will assist banks in determining the extent to which their investment advisory activities are subject to the OCC's fiduciary rules.

**EFFECTIVE DATE:** March 11, 1998.

**FOR FURTHER INFORMATION CONTACT:**

Andrew Gutierrez, Senior Attorney, Legislative and Regulatory Activities Division, (202) 874-5090; Lisa Lintecum, Director, Asset Management, (202) 874-5419; Dean Miller, Special Advisor, Fiduciary Activities, (202) 874-4852; Laurie Edlund, National Bank Examiner, Fiduciary Activities, (202) 874-3828; Donald Lamson, Assistant Director, Securities and Corporate Practices Division, (202) 874-5210, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:**

**Background**

*1996 Revision of 12 CFR Part 9*

On December 30, 1996, the OCC issued a final rule revising 12 CFR part 9, effective January 29, 1997 (61 FR 68543). Among other changes, the final rule revised the terms that specify the types of activities governed by part 9. In particular, the final rule replaced the former regulation's terms "fiduciary" and "managing agent" with the term "fiduciary capacity," found at § 9.2(e). Under the revised part 9, if a national bank acts in a fiduciary capacity while engaging in an activity, then part 9 governs that activity.

One of the fiduciary capacities set forth in § 9.2(e) is "investment adviser, if the bank receives a fee for its investment advice." The concept of investment adviser for a fee is new to part 9, and the OCC's addition of this term to the list of fiduciary capacities raised questions from the banking industry about what activities entail providing investment advice for a fee.

*Interpretive Letter #769*

In response to these inquiries, the OCC issued Interpretive Letter #769 (January 28, 1997). In that interpretive letter, the OCC clarified that "investment adviser" generally means a national bank that is providing advice or recommendations concerning the purchase or sale of specific securities, such as a national bank engaged in portfolio advisory and management activities (including acting as investment adviser to a mutual fund). Moreover, the OCC explained that the

qualifying phrase "if the bank receives a fee for its investment advice" excludes from part 9's coverage those activities in which investment advice is merely incidental to other services. Generally, if a national bank receives a fee for providing services, and a significant portion of that fee is attributable to the provision of investment advice (*i.e.*, advice or recommendations concerning the purchase or sale of specific securities), then part 9 governs that activity. In effect, the OCC explained, the new term "fiduciary capacity" generally includes those activities that the former regulation covered and does not capture additional lines of business.

In the interpretive letter, the OCC indicated that it generally will consider full-service brokerage services to involve investment advice for a fee only if a non-bank broker engaged in that activity is considered an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) (15 U.S.C. 80b-1 *et seq.*).<sup>1</sup> The Advisers Act, at section 202(a)(11)(C) (15 U.S.C. 80b-2(a)(11)(C)), excludes from its definition of investment adviser any broker or dealer whose performance of investment advisory services is solely incidental to the conduct of its business as a broker or dealer and who receives no special compensation for providing investment advice.

The OCC also addressed in the interpretive letter whether certain other activities came within the scope of part 9.

*Proposed Rule*

On July 9, 1997, the OCC proposed to add a new interpretation to part 9, at § 9.101, codifying the clarification contained in Interpretive Letter #769 (62 FR 36746). The OCC invited comments on any aspect of that proposal, including suggestions on whether any specific activities should be added to or removed from the list of activities that do not generally entail providing investment advice for a fee, found at proposed § 9.101(b)(2) (the "list of excluded activities").

**Summary of Comments and Final Rule**

The OCC received seven comment letters in response to the July 9, 1997, proposal. Six of the seven commenters explicitly supported the proposal, and no commenter opposed it. Several of the commenters suggested minor modifications to the list of excluded activities.

<sup>1</sup> Banks are excluded from the Advisers Act's definition of investment adviser. 15 U.S.C. 80b-2(a)(11)(A).