

provisions or to prohibit agencies from implementing a regulatory revision affecting nonbargaining unit positions.

### G. Public Notice

Many individual commenters asked that we ensure proper dissemination of National Performance Review initiatives to all levels of the work force to allow greater input and commentary. Some commenters suggested that OPM's 60-day comment period on the initial proposal appeared to be designed to restrict the number of comments and commenters.

OPM's 60-day comment period is the standard open period for receiving comments on proposed regulatory changes. As is our usual practice required by law, OPM distributed the time-in-grade proposal to agencies with instructions for public posting. OPM also made the proposal available through its primary electronic bulletin board, Mainstreet, at 202-606-4800. OPM issued a press release on the proposal, and it was widely reported in the press. We are taking the same steps with this notice. Furthermore, the recommendations of the NPR and the National Partnership Council were widely reported in the press and in newsletters that reach employees.

**Authority:** 5 U.S.C. secs. 552, 3301, 3302; E.O. 10577, 3 CFR, 1954-1958 Comp., page 218, unless otherwise noted.

Secs. 300.101 through 300.104 also issued under 5 U.S.C. secs. 7201, 7204, 7701; E.O. 11478, 3 CFR, 1966-1970 Comp., page 803.

Secs. 300.401 through 300.408 also issued under 5 U.S.C. secs. 1302(c), 2301, and 2302.

Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5).

Office of Personnel Management.

**James B. King,**

Director.

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## 5 CFR Part 551

RIN 3206-AA40

### Pay Administration Under the Fair Labor Standards Act

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is publishing a proposed rule to amend regulations on the Fair Labor Standards Act (FLSA or the "Act"). This rule supersedes instructions contained in Federal Personnel Manual Letter 551-9, *Civil Service Commission System for Administering the Fair Labor Standards*

*Act (FLSA) Compliance and Complaint System* (March 30, 1976), provisionally retained through December 31, 1994; and provides for OPM compliance authority regarding FLSA matters.

**DATES:** Comments must be received on or before February 9, 1995.

**ADDRESSES:** Written comments may be sent to Bruce Oland, Chief, Program Development Division, Office of Agency Compliance and Evaluation, Room 7661, U.S. Office of Personnel Management, 1900 E Street NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Jeffery Miller, (202) 606-2530.

**SUPPLEMENTARY INFORMATION:** In 1974, Congress amended the FLSA to authorize the former Civil Service Commission (CSC) to administer the Act for Federal employees. OPM has since taken over this responsibility and issued substantive regulations at part 551 of title 5, Code of Federal Regulations, prescribing the criteria and conditions for administration of the Act. These regulations have, from time to time, been supplemented by issuances under the Federal Personnel Manual System (FPM). FPM Letter 551-9 describes the complaint and compliance system for FLSA complaints. One of the key features of this system is that OPM served as an adjudicator of individual (and group) FLSA complaints. This role remained essentially unchanged until 1990.

On March 30, 1990, a Federal court in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990), ruled that the rights of certain employees to seek review of FLSA complaints were limited by the *Civil Service Reform Act of 1978* (CSRA). In this regard, the court determined that employees covered by negotiated grievance procedures (NGP's) established under Section 7121 of title 5, United States Code, could not seek judicial review of matters under the Act and that their only forum in which to seek relief is through the NGP up to and including the arbitration process. A subsequent decision by the Federal Circuit in *Muniz v. U.S.*, 972 F.2d 1304 (Fed. Cir. 1992), expanded on *Carter* by holding that its principles also applied to former employees of agencies (including retirees) and employees promoted out of bargaining unit positions.

On October 1, 1990, the Supreme Court denied certiorari of the Federal Circuit's en banc decision in *Carter*. As a result, OPM informed agencies by memorandum dated November 29, 1990, that, in view of *Carter*, OPM would no longer adjudicate complaints

from employees covered by NGP's when those NGP's did not exclude grievances over FLSA matters, but would continue to accept complaints from other employees.

On April 23, 1992, the General Accounting Office (GAO), in *Cecil E. Riggs, et al.*, B-222926.3, announced that, in view of *Carter* and other judicial decisions, it too would no longer accept complaints from employees covered by NGP's. The GAO subsequently amended (57 FR 31272, July 14, 1992) its regulations at 4 CFR parts 22 and 30 to reflect this policy change. The GAO noted that it would continue to accept claims from Federal employees not subject to an NGP.

With judicial and GAO decisions placing most FLSA-covered employees under the exclusive jurisdiction of the NGP for the purpose of FLSA complaints, OPM has reviewed its FLSA compliance program to determine whether the program could be changed in a manner that would facilitate efficient governmentwide administration of the Act. Specifically, OPM believes that FLSA complaint adjudication at the agency level, now provided to most FLSA-covered employees under the above decisions, can and should be extended to all employees. In this event, OPM would no longer adjudicate FLSA complaints. In the case of bargaining unit employees, the procedure would be the NGP (unless FLSA complaints are excluded), with the possibility of invoking binding arbitration. All other employees would seek redress through and agency-based review or grievance system. Such employees also would have access to GAO and the courts if they are not satisfied with the agency decision, thus providing them with a third-party review opportunity. OPM believes this change, as well as other provisions of this proposed subpart, will make administration of the Act more efficient and consistent. The subpart more clearly defines the various FLSA complaint resolution forums and explains which employees have access to which forum at a particular time; i.e. negotiated grievance procedures, or other agency-based review or grievance systems, the GAO, and the judiciary.

OPM also believes that the complaints adjudication process is likely to work better if the parties to the dispute are better aware of their respective responsibilities. Therefore, the proposed rule contains sections discussing the responsibilities of both the employee and the agency. Another section describes the responsibilities of OPM. In this regard, while OPM proposes to discontinue accepting complaints, OPM

also proposes to provide guidance and information to agencies and employees on request. OPM would provide legal interpretations on technical FLSA issues (binding on decision-makers in relevant causes) and also would provide general technical assistance (non-binding). OPM's regional offices would be available to provide general assistance but not legal interpretations.

The authority of GAO to settle claims against the United States is contained in 31 U.S.C. 3702 (b)(1) which provides that a claim filed with the Office must be received within 6 years after the date the claim accrues "except \* \* \* as provided by \* \* \* another law." In a decision rendered on May 23, 1994 (Joseph M. Ford, B-250051), GAO announced that the 2-year statute of limitations (3 years for willful violations) as provided in the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a), would apply to all FLSA claims with GAO that have not been settled prior to that date and all claims filed with GAO after that date. Section 640 of Public Law 103-329, signed September 30, 1994, provides for a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) for claims filed before June 30, 1994. Under this provision, claims filed on or after June 30, 1994, are subject to a 2-year statute of limitations, based on the May 23 Comptroller General decision. The 2-year statute of limitations would now apply to employees covered by NGP's when those NGP's do not exclude grievances over FLSA matters; and to employees not covered by an NGP whose pay claims are reviewable under other agency-based review or grievance systems. The GAO decision would not apply to claims that arise solely out of the title 5 overtime provisions; that is, the 6-year limitation period still applies to title 5 claims.

The proposed rule provides for agency maintenance of records of compliance adjudication and would require agencies to forward to OPM copies of final administrative decisions on FLSA adjudication activities. OPM would utilize this information to help ensure that the requirements of the Act are being met by agencies and employees and to help evaluate how well the adjudication system is working.

The proposed rule explains that complaints covered by OPM regulations do not include matters pertaining to equal pay under 29 U.S.C. 206(d). Equal pay matters are resolved by procedures established by the Equal Employment Opportunity Commission.

### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it applies only to Federal employees.

### List of Subjects in 5 CFR Part 551

Government employees, Wages.

Office of Personnel Management.

**James B. King,**

*Director.*

Accordingly, OPM is proposing to amend part 551 as follows:

1. The title and authority citation for part 551 is revised to read as follows:

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

**Authority:** 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); Sec. 210 of the *Federal Employees Pay Comparability Act of 1990*, Pub. L. 101-509, 104 Stat. 1460.

2. Subpart F is added to read as follows:

#### Subpart F—Complaints and Compliance

- 551.601 Purpose.
- 551.602 Administrative complaint forums.
- 551.603 Time limits.
- 551.604 Employee responsibilities.
- 551.605 Agency responsibilities.
- 551.606 OPM responsibilities.
- 551.607 Judicial review.
- 551.608 OPM addresses.

#### Subpart F—Complaints and Compliance

##### § 551.601 Purpose.

This subpart constitutes OPM's complaint and compliance program for the resolution of matters arising under the Act. This subpart, established under OPM's authority to administer the Act as noted in § 551.101, sets forth administrative complaint systems available to Federal employees. The subpart also describes OPM's role in assisting agencies to comply with the Act.

##### § 551.602 Administrative complaint forums.

(a) *Negotiated grievance procedures.* An individual covered by a negotiated grievance procedure (NGP) established under section 7121 of title 5, United States Code must utilize that procedure to seek review of FLSA complaints provided the NGP does not exclude such matters.

(b) *Agency-based review or grievance systems.* An individual not covered by an NGP described in paragraph (a) of this section may file a request for review of an agency's FLSA determination under an agency-based review or

grievance system. Decisions under such agency-based systems must be in accordance with the Act and the conditions and criteria prescribed by this part for administration of the Act as well as any legal interpretations issued under § 551.606. These procedures do not cover matters concerning "equal pay" under section 206(d) of title 29, United States Code (which are subject to consideration by the Equal Employment Opportunity Commission under its regulations at part 1620 of title 29, Code of Federal Regulations).

(c) *General Accounting Office.* An individual not covered by an NGP described in paragraph (a) of this section may file a claim concerning a dispute under the Act with the GAO under procedures described by GAO at part 30 of title 4, Code of Federal Regulations. Such a complaint may be filed after receiving an agency decision under paragraph (b) of this section or in lieu of requesting a review under paragraph (b).

##### § 551.603 Time limits.

(a) *Administrative review.* Complaints involving pay claims under the Act and filed under §§ 551.602 (a) and (b) of this subpart must meet the time limits and procedural requirements of the complaint system used.

(b) *Statute of limitations.* Notwithstanding any time limitations contained in the system being used, pay claims under the Act are subject to the 2-year statute of limitations provided in section 255(a) of title 29, United States Code for claims filed on or after June 30, 1994. This statutory limit is satisfied (or tolled) when:

- (1) A claim is received by the agency out of whose activities the claim arose within 2 years from the date the claim or any portion of the claim accrued; or
- (2) A claim is filed directly with GAO within 2 years from the date the claim or any portion of the claim accrued.

##### § 551.604 Employee responsibilities.

(a) *Filing of claims.* The employee has the burden of proving compliance with § 551.603(b) by providing documentation showing the date when the agency received his or her claim. Absent such documentation, any back payments on the claim can be made only to cover a period up to 2 years prior to the date of actual payment.

(b) *Hours-of-work complaints.* The employee has the burden to provide evidence from which a reasonable inference can be drawn that he or she was improperly compensated for a certain amount and extent of work performed. A reasonable inference may

be rebutted by the agency as described in § 551.605(b).

(c) *Waiver of rights.* An employee who will accept payment in connection with an administrative decision on a claim must first agree in binding written form that, by accepting the award, the employee waives the right to pursue the matter in the courts or in any administrative forum. This requirement does not apply to payments made in connection with administrative adjudication of claims under § 551.602(a).

(d) *Reprisal.* An employee alleging reprisal for filing a complaint or causing one to be filed may file a request for review of the allegation under the procedures described in §§ 551.602 (a) or (b) whichever applies to the employee.

**§ 551.605 Agency responsibilities.**

(a) *Processing complaints.* Each agency, after providing the complainant written acknowledgement of receipt of the complaint, must process complaints under the Act that are filed under the procedures described in §§ 551.602 (a) and (b). Complaint decisions must apply the requirements of the Act and part 551 and adhere to any relevant legal interpretations issued under § 551.606(a).

(b) *Hours-of-work complaints.* When an employee has established under § 551.604(b) that he or she has been improperly compensated, the agency has the burden to provide evidence of either the precise amount of work performed or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence.

(c) *Records.* Each agency must maintain the following records:

(1) *Hours of work.* Complete and accurate records of all hours worked by an agency's employees are required by section 11(c) of the Act and § 551.402.

The agency must keep such records for a minimum period of 6 years or after GAO audit, whichever is sooner.

(2) *Administrative complaint processes.* Records of these processes include, at a minimum, any decisions issued under § 551.602. These records are maintained within an agency's established system of records.

(d) *Legal basis for pay.* An agency cannot voluntarily apply the pay provisions of the Act to an employee not covered by it, or to an employee that has been determined to be exempt from the Act. In such circumstances, no legal basis exists for making payment under the Act.

(e) *Service of administrative adjudication decisions.* Agencies are required to send one copy of each final agency administrative decision issued under §§ 551.602 (a) or (b) to the following address: United States Office of Personnel Management, Office of Agency Compliance and Evaluation, 1900 E Street NW., Washington, DC 20415.

(f) *Prohibition against reprisal.* Section 15(a)(3) of the Act prohibits discharge of an employee, or discrimination against an employee, in reprisal for filing a complaint under the Act or causing one to be filed.

**§ 551.606 OPM responsibilities.**

(a) *Legal interpretations.* OPM may issue legal interpretations on FLSA matters on its own initiative or at the request of others, including agency officials, individuals, representatives of individuals (or groups), and arbitrators. Legal interpretations are meant to convey official interpretations of the Act and this part and do not constitute findings of fact for individual (or group) complaints. They are, however, binding with respect to policy issues arising in the context of FLSA complaints adjudicated within an agency. Legal

interpretations may be requested by writing to the address designated in § 551.608.

(b) *Technical assistance.* OPM provides technical assistance regarding employee or agency obligations under the Act in response to requests from all sources. Such assistance does not have the force and effect of official legal interpretations issued under paragraph (a) of this section.

(c) *Corrective action.* OPM will require agency action to correct violations of the Act except when the same issues affecting the same employees are under consideration in an agency complaint forum that can also lead to corrective action. Corrective actions may include designation of FLSA exemption status, orders to compute back pay, assurance from the agency of future compliance, or other appropriate action.

**§ 551.607 Judicial review.**

An employee may seek judicial review of a complaint in a manner prescribed by law.

**§ 551.608 OPM addresses.**

Requests for legal interpretations and technical assistance under § 551.606 (a) or (b) involving an FLSA matter in the Washington, DC Metropolitan Area or anywhere outside the 50 States, Puerto Rico, the Virgin Islands, and the Pacific Ocean area must be sent to: United States Office of Personnel Management, Office of Agency Compliance and Evaluation, 1900 E Street NW., Washington, DC 20415. Requests for legal interpretations involving matters in other geographical areas also must be sent to the above address while requests for technical assistance must be sent to the appropriate OPM regional office as follows:

OPM Regional Office	Areas covered
Atlanta Region, OPM, Richard B. Russell Fed. Building, 75 Spring Street SW., Atlanta, GA 30303, Telephone: (404) 331-3451.	Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.
Chicago Region, OPM, John C. Kluczynski Fed. Building, 230 South Dearborn Street, Chicago, IL 60604, Telephone: (312) 353-0387.	Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, West Virginia, and Wisconsin.
Dallas Region, OPM, 1100 Commerce Street, Dallas, TX 75242, Telephone: (214) 767-0561.	Arkansas, Arizona, Colorado, Louisiana, Montana, New Mexico, Oklahoma, Texas, Utah, and Wyoming.
Philadelphia Region, OPM, Wm. J. Green, Jr., Fed. Bldg., 600 Arch Street, Philadelphia, PA 19106, Telephone: (215) 597-9797.	Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, and Virgin Islands.
San Francisco Region, OPM, 120 Howard Street, 7th Floor, San Francisco, CA 94105, Telephone: (415) 281-7050.	Alaska, California, Hawaii, Idaho, Nevada, Oregon, Pacific Ocean Area, and Washington.

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## FARM CREDIT ADMINISTRATION

### 12 CFR Parts 614, 615, and 618

RIN 3052-AB53

#### Loan Policies and Operations; Funding and Fiscal Affairs, Loan Policies and Operations, and Funding Operations; General Provisions

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

**SUMMARY:** The Farm Credit Administration (FCA), by order of the FCA Board (Board), proposes to repeal several regulations as part of an ongoing effort to reduce unnecessary regulatory burden on Farm Credit System (FCS or System) institutions. Comments that the FCA solicited through a notice of intent regarding regulatory burden identified most of the regulations that the FCA now proposes to delete. The FCA concurs with the commenters that these particular regulations should be repealed because they are outdated or impose a burden that is greater than the benefit derived.

**DATES:** Written comments must be received on or before February 9, 1995.

**ADDRESSES:** Comments may be mailed or delivered (in triplicate) to Patricia W. DiMuzio, Associate Director, Regulation Development, Office of Examination, 1501 Farm Credit Drive, McLean, VA 22102-5090. Copies of all communications received will be available for examination by interested parties in the Office of Examination, Farm Credit Administration.

#### FOR FURTHER INFORMATION CONTACT:

W. Eric Howard, Policy Analyst, Regulation Development, Office of Examination, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4498, TDD (703) 883-4444,

or

Richard A. Katz, Senior Attorney, Regulatory Operations Division, Office of General Counsel, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4020, TDD (703) 883-4444.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On June 10, 1993, the FCA Board approved a Statement on Regulatory Burden seeking public comment on the appropriateness of requirements the FCA regulations impose on the FCS.

More specifically, the FCA asked the public to identify regulations that either duplicate other governmental requirements, are not effective, or impose a burden that is greater than the benefit derived. The notice of intent was published in the **Federal Register** (58 FR 34003) on June 23, 1993. Although the 90-day comment period expired on September 21, 1993, the FCA considered comments that were received subsequent to that date.

The FCA received a total of 28 responses. The FCA received nine comment letters from individual Farm Credit associations and three letters from groups of associations in particular Farm Credit districts. Seven Farm Credit banks sent 12 comment letters to the FCA. The Farm Credit Council (FCC) sent a comment letter on behalf of its membership. Additionally, three separate work groups of the Farm Credit System Presidents Planning Committee each sent the FCA a position paper containing recommendations to relieve regulatory burdens pertaining to capital, eligibility, and financially related services.

Many of the comments involve regulatory projects that the FCA Board previously identified in the Unified Agenda of Federal Regulations published in the **Federal Register** on October 25, 1993 (58 FR 57276). The FCA work groups organized to develop revised regulations on these issues will consider the comments as they evaluate various policy options during the course of their regulatory projects. The analysis and appropriate response to comments regarding topics under review by these existing work groups will be included as part of any regulatory action published in the **Federal Register**.

The remaining comments contained a number of recommendations for eliminating or modifying specific regulations that are perceived as imposing unnecessary regulatory burdens on the FCS. The FCA's review and analysis of these comments was guided, in part, by the FCA Board's Policy Statement on Regulatory Philosophy (Policy Statement).<sup>1</sup>

The Policy Statement conveys that "[t]he FCA will work to eliminate outdated regulations and ensure that its regulations implement the purposes of the law without unnecessary burden or cost." According to the Policy Statement, the FCA shall only adopt regulations that: (1) Implement or interpret the law; or (2) are necessary to promote the safe and sound operations of System institutions. The Policy Statement also commits the FCA to

replacing outmoded regulations with new regulations that implement the purposes of the law without imposing unnecessary costs or burdens on FCS institutions. Another provision in the Policy Statement declares that the FCA will strive to ensure that each regulation has a well-defined objective addressing specific problems or risks. In this context, the FCA will seek to establish a regulatory environment that grants FCS institutions the business flexibility to offer a full range of high-quality, low-cost credit services to borrowers. The Policy Statement also states that the FCA, to the extent feasible, will seek to eliminate regulations that prescribe specific operational or managerial practices to System institutions. If appropriate, the FCA will consider the regulatory approaches of other Federal financial institution regulators. Finally, another provision in the Policy Statement pledges that when the need arises, the FCA will draft new regulations so that they are clear, easy to understand, and designed to minimize the potential for ambiguity, uncertainty, and resultant litigation.

The FCA analyzed the commenters' recommendations, and determined that many of the suggestions warranted the immediate repeal of certain FCA regulations. Other suggestions will require additional research and analysis before the FCA determines whether, and to what extent, changes in the existing regulations should be proposed. Once a determination is made, the public will be notified of the FCA Board's decisions regarding the remaining issues in an appropriate manner.

The FCA is proposing to repeal the following regulatory provisions: §§ 615.5104; 615.5105(c); 615.5170(b) through (e); 615.5190; 615.5498; 615.5500; 615.5520; 615.5530; and 618.8220. In addition, the FCA is proposing to repeal the FCA prior approval requirements in §§ 614.4470(b)(1) and (b)(3). An explanation of the FCA's reasons for proposing the repeal of these regulations follows. The FCA invites public comment on all aspects of the proposed rule.

## II. Analysis of Changes and Comments by Section

### A. Loans Subject to Bank Approval

A Farm Credit Bank (FCB) and a bank for cooperatives (BC) suggested that the FCA eliminate all agency prior approvals of FCS institution policies, procedures, and transactions that are not required by the Act. The commenters stated that these prior approval requirements are inconsistent

<sup>1</sup> 59 FR 32189, June 22, 1994.