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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 591

RIN 3206-AJ40 and 3206-AJ41

Cost-of-Living Allowances (Nonforeign Areas); Methodology Changes

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is making wide-ranging changes in the methodology used to determine nonforeign area cost-of-living allowances (COLAs). OPM is implementing these changes pursuant to the settlement of litigation regarding the COLA program. These regulations also incorporate the changes OPM implemented in interim rules published last year. In addition, the regulations include other changes that improve their clarity and ease of use but do not change their meaning.

EFFECTIVE DATE: June 3, 2002.

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SUPPLEMENTARY INFORMATION: Section 5941 of title 5, United States Code, authorizes the payment of cost-of-living allowances (COLAs) to employees of the Federal Government stationed in certain nonforeign areas outside the contiguous 48 States whose rates of basic pay are fixed by statute. Executive Order 10000, as amended, delegates to the Office of Personnel Management (OPM) the authority to administer nonforeign area COLAs and prescribes certain operational features of the program. The Government pays nonforeign area COLAs to General Schedule, U.S. Postal Service, and certain other Federal employees in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands (CNMI), Puerto Rico, and the U.S. Virgin Islands.

OPM published proposed regulations in the November 9, 2001, **Federal Register** (at 66 FR 56741) that would modify significantly the current COLA methodology consistent with the agreement made by the parties in the settlement of *Caraballo, et al. v. United States*, No. 1997-0027 (D.V.I), August 17, 2000. In the same issue of the **Federal Register**, OPM published an interim rule (66 FR 56751) to implement recent amendments to Executive Order 10000 regarding the COLA program. Both the proposed regulations

published on November 9, 2001, and these final regulations incorporate the changes required by the amendments to Executive Order 10000. Therefore, this final rule makes that interim rule final. OPM received no comments on the interim rule and six written comments in response to the proposed regulations. We discuss the comments we received below.

This final rule also incorporates part of an interim rule published on December 11, 2001 (66 FR 63909), which added administrative appeals judges paid under 5 U.S.C. 5372b to the list of pay plans covered under these regulations. This change is incorporated at 5 CFR 591.204(a)(8).

In addition, this rule corrects an error we discovered in the proposed rule. In § 591.215(b) of the proposed rule, we stated that OPM would average the price indexes for each of the three survey areas in the Washington, DC area. That is incorrect. OPM does not compute price indexes for the DC area because the DC area is the base or reference area and the price indexes are 100. Instead of averaging price indexes, OPM averages prices, and we have corrected that regulation, which is now codified at § 591.216(a).

Finally, these regulations incorporate several changes that improve their clarity and ease of use but do not change their meaning. The following table shows the sections where OPM made a change and the nature of the change:

Section	Nature of change
§ 591.210(b)(1)	Added clarifying language.
§ 591.211(b) and (c)	Added and revised language for clarity.
§ 591.212(c)	Revised language for clarity.
§ 591.215, 216, and 217	1. Moved what was § 591.215(b) to § 591.216, made a correction, and added and revised language for clarity. 2. Redesignated § 591.215(c) as (b) and revised language for clarity. 3. Moved what was § 591.217 to § 591.215 (c) and added and revised language for clarity. 4. Redesignated what was § 591.216 as § 591.217.
§ 591.221	Added and revised language for clarity.
§ 591.222(a)	Added clarifying language.
§ 591.228(c)	Added clarifying language.
§ 591.232	Added clarifying language.
§§ 591.235 and 236	Added clarifying language in section headings.
§ 591.237(a)	Added and revised language for clarity.

Discussion of Comments

An office within one agency suggested that OPM address commissary and exchange privileges for civilian employees in nonforeign areas. The

agency noted that OPM's regulations currently state that eligibility for commissary and exchange privileges "is determined by the appropriate military

department," but that the proposed regulations did not address the issue.

OPM believes it is no longer appropriate to reference commissary and exchange shopping privileges in the

regulations. Last year, the President amended Executive Order 10000 to remove the requirement that OPM take into consideration commissary and exchange shopping privileges in setting the COLA rates. Therefore, commissary and exchange shopping privileges and COLA rates are no longer related. Since OPM has no jurisdiction over access to commissaries and exchanges, employees should contact their employing agency, which can contact the appropriate military department if necessary.

A commenter from Alaska was concerned that OPM might not take into consideration seasonal temperature variations in computing home energy requirements and requested that OPM not use average temperatures reported at the Anchorage International Airport as the sole method for determining utility cost for Anchorage. As described in the supplementary information accompanying the proposed rule, OPM will use a utility function model to compute the energy usage of a standard home and the relative cost of maintaining an ambient temperature in that home in the COLA areas relative to the Washington, DC, area. OPM will publish details about how it computes energy requirements for a particular area in the survey results for the area. At present, OPM anticipates using hourly or daily average temperatures as reported by the National Weather Service for the area. OPM believes these temperatures are representative for the area. OPM does not believe it would be practical to use an approach that required average annual temperature readings for several locations within a COLA area.

The same commenter noted the cost of long distance travel from Alaska to areas in the continental United States and that, in many cases, driving is not a feasible alternative to flying. The commenter requested that OPM consider time, distance, and excessive travel expenses in setting COLA rates. The new COLA methodology will take travel expenses into account in two ways. First, as in the past, OPM will compare the cost of air travel from the various COLA areas to common destinations in the continental U.S. with the cost of air travel from the DC area to those same destinations. In previous surveys, OPM has found such travel to be relatively more expensive from the COLA areas than from the Washington, DC, area. Second, as provided in § 591.227, OPM will add to the overall price index for the COLA area an adjustment factor that reflects differences in need, access to and availability of goods and services, and quality of life in the COLA area relative

to the DC area. This adjustment factor is designed to address such considerations as the difficulty of traveling long distances by road in Alaska.

The same commenter and three other commenters noted that COLA area employees do not receive locality pay under the Federal Employees Pay Comparability Act of 1990 (FEPCA). The commenters noted that as locality payments have increased, the relative difference between Federal pay in the COLA areas and in the Washington, DC, area has decreased even though COLA rates have remained the same or increased. The commenters also noted that locality pay is included in base pay for retirement purposes, while COLAs are not included. One of these commenters noted that locality payments are subject to Federal income taxes, while COLAs are not, and the commenter said it might be appropriate to tax COLAs if they were included in retirement calculations. Another commenter also noted that because COLAs are not considered taxable income, they are not used in the computation of Social Security benefits. Two of the commenters said that not considering COLAs in retirement calculations creates a disincentive to retire in a COLA area. All of the commenters believe OPM should investigate and address these issues.

OPM is aware that employees in the COLA areas do not receive locality payments under FEPCA. Sections 5304(c)(4)(B) and 5304(f)(1)(A) of title 5, United States Code, limit locality payments to Federal employees stationed in the continental United States. OPM also is aware that COLAs are not included in Federal retirement calculations. Under 5 U.S.C. 8331(3) and 8401(4), allowances are excluded from base pay for Federal retirement purposes. Furthermore, OPM is aware that because COLAs are excluded from income under 26 U.S.C. 912(2), COLAs are not subject to Federal income or Social Security taxes and, therefore, are not used in the computation of Social Security benefits. It would take changes in the law to extend locality payments to Federal employees in the COLA areas, to include COLAs in base pay for Federal retirement purposes, or to make COLAs subject to Federal income or Social Security taxes. Therefore, these issues are outside the scope of these regulations.

Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed this rule in accordance with Executive Order 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 affect only Federal agencies and employees.

List of Subjects in 5 CFR Part 591

Government employees, Travel and transportation expenses, Wages.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, the Office of Personnel Management revises subpart B of 5 CFR part 591 to read as follows:

PART 591—ALLOWANCES AND DIFFERENTIALS

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

Sec.

591.201 Definitions.

Cost-of-Living Allowances and Post Differentials

- 591.202 Why does the Government pay COLAs?
 591.203 Why does the Government pay post differentials?
 591.204 Who can receive COLAs and post differentials?
 591.205 Which areas are nonforeign areas?

Cost-of-Living Allowances

- 591.206 How does OPM establish COLA areas?
 591.207 Which areas are COLA areas?
 591.208 How does OPM establish COLA rates?
 591.209 What is a price index?
 591.210 What are weights?
 591.211 What are the categories of consumer expenditures?
 591.212 How does OPM select survey items?
 591.213 What prices does OPM collect?
 591.214 How does OPM collect prices?
 591.215 Where does OPM collect prices in the COLA and DC areas?
 591.216 How does OPM combine survey data for the DC area and for COLA areas with multiple survey areas?
 591.217 In which outlets does OPM collect prices?
 591.218 How does OPM compute price indexes?
 591.219 How does OPM compute shelter price indexes?
 591.220 How does OPM calculate energy utility cost indexes?
 591.221 How does OPM compute the consumer expenditure weights it uses to combine price indexes?
 591.222 How does OPM use the expenditure weights to combine price indexes?
 591.223 When does OPM conduct COLA surveys?
 591.224 How does OPM adjust price indexes between surveys?
 591.225 Which CPIs does OPM use?

- 591.226 How does OPM apply the CPIs?
 591.227 What adjustment factors does OPM add to the price indexes?
 591.228 How does OPM convert the price index plus adjustment factor to a COLA rate?
 591.229 How does OPM inform agencies and employees of COLA rate changes?

Post Differentials

- 591.230 When does OPM establish post differential areas?
 591.231 Which areas are post differential areas?
 591.232 How does OPM establish and review post differentials?
 591.233 Who can receive a post differential?
 591.234 Under what circumstances may people recruited locally receive a post differential?

Program Administration

- 591.235 When do COLA and post differential payments begin?
 591.236 When do COLA and post differential payments end?
 591.237 Under what circumstances may employees on leave or travel receive a COLA and/or post differential?
 591.238 How do agencies pay COLAs and post differentials?
 591.239 How do agencies treat COLAs and post differentials for the purpose of overtime pay and other entitlements?
 591.240 How are agency and employee representatives involved in the administration of the COLA and post differential programs?
 591.241 What are the key activities of the COLA Advisory Committees?
 591.242 What is the tenure of a COLA Advisory Committee?
 591.243 How many members are on each COLA Advisory Committee?
 591.244 How does OPM select COLA Advisory Committee members?
 Appendix A of Subpart B—Places and Rates at Which Allowances Are Paid
 Appendix B of Subpart B—Places and Rates at Which Differentials Are Paid

Authority: 5 U.S.C. 5941; E.O. 10000, 3 CFR, 1943–1948 Comp., p. 792; and E.O. 12510, 3 CFR, 1985 Comp., p. 338.

Subpart B—Cost-of-Living Allowance and Post Differential—Nonforeign Areas

§ 591.201 Definitions.

In this subpart—

Agency means an Executive agency as defined in section 105 of title 5, United States Code, but does not include Government-controlled corporations.

Bureau of Labor Statistics (BLS) means the Bureau of Labor Statistics of the Department of Labor.

Commonwealth of the Northern Mariana Islands (CNMI) means the Commonwealth of the Northern Mariana Islands, which is part of the Guam/CNMI COLA area.

Consumer Expenditure Survey (CES) means the BLS survey of consumers and their expenditures.

Consumer Price Index (CPI) means the BLS survey of the change of consumer prices over time.

Cost-of-living allowance (COLA) means an allowance that the Office of Personnel Management (OPM) establishes under 5 U.S.C. 5941 at a location in a nonforeign area where living costs are substantially higher than in the Washington, DC, area.

Cost-of-living allowance area means a geographic area for which OPM has authorized a COLA. COLA areas are listed in § 591.207.

Detailed Expenditure Category (DEC) means the lowest level of expenditure shown in tabulated nationwide CES data.

Major Expenditure Group (MEG) means one of the nine major groups into which OPM categorizes expenditures. These categories are food, shelter and utilities, clothing, transportation, household furnishings and supplies, medical, education and communication, recreation, and miscellaneous.

Nonforeign area means one of the areas listed in § 591.205.

Office of Personnel Management (OPM) means the Office of Personnel Management.

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action. For an employee who is authorized to receive relocation allowances under 5 U.S.C. 5737 in connection with an extended assignment, the temporary duty station associated with that assignment is the employee's official duty station. *Exception:* A new duty station assignment that is followed within 3 working days by a reduction in force that results in the employee's separation before the employee is required to report for duty at the new location is not an official duty station.

Post differential means an allowance OPM establishes under 5 U.S.C. 5941 at a location in a nonforeign area where conditions of environment differ substantially from conditions of environment in the contiguous United States and warrant its payment as a recruitment incentive.

Post differential area means a geographic area for which OPM authorizes a post differential. Post differential areas are listed in § 591.231.

Primary Expenditure Group (PEG) means one of approximately 40 expenditure groups into which OPM categorizes expenditures. A PEG is the first level of categorization under the MEG.

Rate of basic pay means the rate of pay fixed by statute for the position held by an individual before any deductions and exclusive of additional pay of any kind, such as overtime pay, night differential, extra pay for work on holidays, or other allowances and differentials. For firefighters covered by 5 U.S.C. 5545b (as provided in § 550.1305(b) of this chapter), straight-time pay for regular overtime hours is basic pay.

Washington, DC, area or DC area means the District of Columbia; Montgomery County, MD; Prince Georges County, MD; Arlington County, VA; Fairfax County, VA; Prince William County, VA; and the independent cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park, Virginia.

Cost-of-Living Allowances and Post Differentials

§ 591.202 Why does the Government pay COLAs?

The Government pays COLAs as additional compensation to certain civilian Federal employees in specified nonforeign areas in consideration of higher living costs in the local area compared with living costs in the Washington, DC, area.

§ 591.203 Why does the Government pay post differentials?

The Government pays post differentials to certain civilian Federal employees in specified nonforeign areas as a recruitment incentive based on conditions of environment in the local area compared with conditions in the continental United States. Post differentials are designed to attract persons from outside the area to work for the Federal Government in the post differential area.

§ 591.204 Who can receive COLAs and post differentials?

(a) Agencies pay COLAs and post differentials authorized under this subpart to civilian Federal employees whose rates of basic pay are fixed by statute. The following pay plans are covered by this subpart:

- (1) General Schedule,
- (2) Veterans Health Administration (Department of Veterans Affairs),
- (3) Foreign Service (including the Senior Foreign Service),
- (4) Postal Service (where applicable under title 39, United States Code),
- (5) Administrative law judges paid under 5 U.S.C. 5372,
- (6) Senior Executive Service (including the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service),

(7) Senior-level and scientific or professional positions paid under 5 U.S.C. 5376, and

(8) Administrative appeals judges paid under 5 U.S.C. 5372b.

(b) At its sole discretion and consistent with the intent of 5 U.S.C. 5941, an agency may apply this subpart to other positions authorized by specific law.

(c) Agencies pay COLAs to employees covered by paragraphs (a) or (b) of this section and whose official duty station is in a COLA area as defined in § 591.207.

(d) Agencies pay post differentials to employees covered by paragraphs (a) or (b) of this section whose official duty station or detail to temporary duty is in a post differential area as defined in § 591.231 and who are eligible to receive a post differential under § 591.233.

§ 591.205 Which areas are nonforeign areas?

(a) The nonforeign areas are States, commonwealths, territories, and possessions of the United States outside the 48 contiguous United States and any additional areas the Secretary of State designates as being within the scope of Part II of Executive Order 10000, as amended.

(b) The following areas are nonforeign areas:

- (1) State of Alaska;
- (2) State of Hawaii;
- (3) American Samoa (including the island of Tutuila, the Manua Islands, and all other islands of the Samoa group east of longitude 171 degrees west of Greenwich, together with Swains Island);
- (4) Commonwealth of Puerto Rico;
- (5) Commonwealth of the Northern Mariana Islands;
- (6) Howland, Baker, and Jarvis Islands;
- (7) Johnston Atoll;
- (8) Kingman Reef;
- (9) Midway Atoll;
- (10) Navassaa Island;
- (11) Palmyra Atoll;
- (12) Territory of Guam;
- (13) United States Virgin Islands;
- (14) Wake Atoll;
- (15) Any small guano islands, rocks, or keys that, in pursuance of action taken under the Act of Congress, August 18, 1856, are considered as pertaining to the United States; and
- (16) Any other islands outside of the contiguous 48 states to which the U.S. Government reserves claim.

Cost-of-Living Allowances

§ 591.206 How does OPM establish COLA areas?

(a) OPM designates, within nonforeign areas, areas where agencies

pay employees a COLA by virtue of living costs that are substantially higher than those in the Washington, DC, area. In establishing the boundaries of COLA areas, OPM considers—

- (1) The existence of a well-defined economic community,
- (2) The availability of consumer goods and services,
- (3) The concentration of Federal employees covered by this subpart, and
- (4) Unique circumstances related to a specific location.

(b) If a department or agency wants OPM to consider establishing or revising the definition of a COLA area, the head of the department or agency or his or her designee must submit a request in writing to OPM.

§ 591.207 Which areas are COLA areas?

OPM has established the following COLA areas:

- (a) City of Anchorage, AK, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;
- (b) City of Fairbanks, AK, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;
- (c) City of Juneau, AK, and 80-kilometer (50-mile) radius by road, as measured from the Federal courthouse;
- (d) Rest of the State of Alaska;
- (e) City and County of Honolulu, HI;
- (f) County of Hawaii, HI;
- (g) County of Kauai, HI;
- (h) County of Maui (including Kalawao County), HI;
- (i) Commonwealth of Puerto Rico;
- (j) Territory of Guam and Commonwealth of the Northern Mariana Islands; and
- (k) U.S. Virgin Islands.

§ 591.208 How does OPM establish COLA rates?

OPM establishes COLA rates based on price differences between the COLA area and the Washington, DC, area, plus an adjustment factor. OPM expresses price differences as indexes.

(a) OPM computes price indexes for various categories of consumer expenditures.

(b) OPM combines the price indexes using Consumer expenditure weights to produce an overall price index for the COLA area.

(c) To combine overall price indexes for COLA areas with multiple survey areas, OPM uses employment weights to combine overall price indexes by survey area for COLA areas. The COLA areas that have multiple survey areas are listed in § 591.215(b).

(d) OPM adds an adjustment factor to the overall price index for the COLA area.

§ 591.209 What is a price index?

(a) The price index is the COLA area price divided by the DC area price and multiplied by 100.

(b) Example:

COLA Area Average Price for Item A = \$1.233

DC Area Average Price for Item A = \$1.164

Computation:

$\$1.233/\$1.164 = 1.0592783$

$1.0592783 \times 100 = 105.92783$.

(c) In the case of the final index, OPM rounds the index to two decimal places.

§ 591.210 What are weights?

(a) A weight is the relative importance or share of a subpart of a group compared with the total for the group. A weight is frequently expressed as a percentage. For example, in a pie chart, each wedge has a percentage that represents its relative importance or the size of the wedge compared with the whole pie.

(b) OPM uses two kinds of weights: Consumer expenditure weights and employment weights.

(1) *Consumer expenditure weights.* The consumer expenditure weight for a category of expenditures (e.g., Food) is the relative importance or share (often expressed as a percentage) of that category in terms of total consumer expenditures. OPM derives consumer expenditure weights from the tabulated results of the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (CES).

(2) *Employment weights.* The employment weight is the relative employment population of the survey area compared with the employment population of the COLA area as a whole. OPM uses the number of General Schedule employees in the survey area to compute employment weights. OPM uses these employment weights as described in § 591.216(b).

§ 591.211 What are the categories of consumer expenditures?

OPM uses three different types of categories: Major expenditure groups, primary expenditure groups, and detailed expenditure categories.

(a) *Major expenditure groups.* OPM groups expenditures into nine major expenditure groups (MEGs). These categories are food, shelter and utilities, clothing, transportation, household furnishings and supplies, medical, education and communication, recreation, and miscellaneous.

(b) *Primary expenditure groups.* OPM subdivides each MEG into primary expenditure groups (PEGs). There are approximately 40 PEGs.

(c) *Detailed expenditure categories.* OPM further subdivides each PEG into

other categories down to the detailed expenditure categories (DECs), which are generally equivalent to the most detailed level of tabulated CES categories. OPM classifies each DEC into one of the PEGs to aggregate DEC with similar demand and cost characteristics into PEGs. Alternatively, OPM may remove the DEC entirely from the list of expenditures. Therefore, the classification of the DECs into PEGs and sub-PEGs does not necessarily follow that used in published CES tables.

§ 591.212 How does OPM select survey items?

(a) OPM selects a sufficient number of items to represent PEGs and reduce overall price index variability. In selecting these items, OPM applies the following guidelines. The item should be—

- (1) Relatively important (i.e., represent a DEC with a relatively large weight) within the PEG;
- (2) Relatively easy to find in both COLA and DC areas;
- (3) Relatively common, i.e., what people typically buy;
- (4) Relatively stable over time, e.g., not a fad item; and
- (5) Subject to similar supply and demand functions.

(b) To the extent practical, the items OPM surveys in the COLA area must be identical to the items that OPM surveys in the DC area or be of closely similar quality and quantity, with quantity adjustments as necessary. An example of a quantity adjustment is converting prices for 10 and 12 oz. packages to a price per pound.

(c) Within any DEC, OPM may specify items that differ in quality and quantity from other items specified for the same DEC. However, when OPM compares prices for such items between the COLA area and the DC area, OPM compares prices of like products.

§ 591.213 What prices does OPM collect?

(a) OPM surveys the price charged to the consumer at the time of the survey. The price includes any sales, excise, or general business tax passed on to the consumer at the time of sale and any discounts, mark-downs, or “sales” in progress at the time the price was collected.

(b) Exceptions:

- (1) OPM does not collect coupon prices, going-out-of-business prices, or area-wide distress sale prices.
- (2) OPM prices automobiles at dealers and obtains the sticker (i.e. non-negotiated) price for the model and specified options. The prices are the manufacturer’s suggested retail price (including options), destination charges, additional shipping charges, appropriate dealer-added items or options, dealer mark-up, and taxes.

(3) OPM estimates prices for selected items, such as health insurance and K–12 education, based on employee usage of the item. For example, OPM estimates health insurance prices based on the employee’s share of the premium costs and weights reflecting Federal enrollment, as reported in OPM’s Central Personnel Data File, in the various plans available to Federal employees in each area.

§ 591.214 How does OPM collect prices?

(a) OPM collects most prices by visiting or calling retail outlets in each survey area and observing or verbally obtaining the item prices.

(b) OPM prices some items by catalog, Internet, or a similar source. Other items, not normally sold within an area, may be priced in a different area. In either case, the price of such items includes any applicable taxes, shipping, and handling charges. When an item is normally sold within an area but is not available at the time of survey, OPM may, on a case-by-case basis, use the price of the item in a neighboring survey or COLA area.

§ 591.215 Where does OPM collect prices in the COLA and DC areas?

(a) *Survey areas.* Each COLA area has one survey area, except Hawaii County, HI, and the U.S. Virgin Islands COLA areas. Hawaii County has two survey areas: the City of Hilo and the Kailua-Kona area. The U.S. Virgin Islands also has two survey areas: the Island of St. Croix and the Islands of St. Thomas and St. John. The Washington, DC, area has three survey areas: the District of Columbia, the Maryland suburbs of the District of Columbia, and the Virginia suburbs of the District of Columbia. OPM collects non-housing data throughout the survey area. OPM may collect housing data throughout the survey area or in specific housing data collection areas. The following table shows the survey areas:

SURVEY AND DATA COLLECTION AREAS

COLA areas & reference areas	Survey area
Anchorage	City of Anchorage.
Fairbanks	City of Fairbanks.
Juneau	Juneau, Mendenhall.
Rest of Alaska	See paragraph (c) of this section.
Honolulu	City and County of Honolulu.
Hawaii County	City of Hilo, Kailua-Kona area.
Kauai	Kauai Island.
Maui	Maui Island.
Guam & CNMI	Guam.
Puerto Rico	San Juan area.
U.S. Virgin Islands	St. Croix, St. Thomas, St. John (housing data only).
Washington, DC-DC	District of Columbia.
Washington, DC-MD	Montgomery County and Prince Georges County.
Washington, DC-VA	Arlington County, Fairfax County, Prince William County, City of Alexandria, City of Fairfax, City of Falls Church, City of Manassas, and City of Manassas Park.

(b) *Rest of the State of Alaska COLA area.* OPM may collect survey data onsite, use alternative indicators of relative living costs (e.g., price and cost information published by the University of Alaska), or both. If the use of

alternative indicators would result in a COLA rate reduction, OPM will conduct onsite surveys in one or more locations in the Rest of the State of Alaska COLA area, before making a reduction, to ensure that the reduction is warranted.

(c) *Determining Survey Coverage.* To aid OPM in determining survey coverage, OPM may from time to time conduct surveys of Federal employees in the COLA areas and/or the Washington, DC, area to determine

where employees shop and what they spend on certain goods or services and to collect other information related to the price surveys and the calculation of price indexes.

§ 591.216 How does OPM combine survey data for the DC area and for COLA areas with multiple survey areas?

(a) *Washington, DC, area.* For each survey item except shelter, OPM averages separately the prices collected in each of the DC survey areas identified in § 591.215(a) and then averages these average prices together using equal weights to compute an overall average by item for the DC area.

(b) *COLA areas with multiple survey areas.* OPM computes weighted average indexes at the PEG, MEG, and overall level by using the corresponding indexes and Federal employment weights from each survey area within the COLA area.

§ 591.217 In which outlets does OPM collect prices?

OPM collects prices in popular outlets in each survey area. OPM selects these outlets based on their proximity to the housing data collection areas, accessibility by road, physical size, advertising, and other characteristics that reflect sales volume. To the extent practical, OPM prices like items in the same types of outlets in the COLA areas and the Washington, DC, area. As warranted, OPM also may conduct point-of-purchase surveys and select outlets based on the results of those surveys.

§ 591.218 How does OPM compute price indexes?

Except for shelter and energy utilities, OPM averages by item the prices collected in each survey area. For the Washington, DC, area, OPM computes a simple average for each item based on the average prices from each DC survey area. On an item-by-item basis, OPM divides the COLA survey area average price by the DC average price and produces a price index.

§ 591.219 How does OPM compute shelter price indexes?

(a) In addition to rental and rental equivalence prices and/or estimates, OPM obtains for each unit surveyed information about the important characteristics of the unit, such as size, number of bathrooms, and other amenities that reflect the quality of the unit.

(b) OPM then uses these characteristics and rental prices and/or estimates in hedonic regressions (a type of multiple regression) to compute for each COLA area the price index for

rental and/or rental equivalent units of comparable quality and size between the COLA survey area and the Washington, DC, area.

§ 591.220 How does OPM calculate energy utility cost indexes?

(a) OPM calculates energy utility cost indexes based on the relative cost of maintaining a standard size dwelling in each area at a given ambient temperature and the cost of other energy uses. Although the dwelling size may vary from one COLA survey area to another, OPM compares the utility cost for the same size dwelling in the COLA survey area and the Washington, DC, area.

(b) OPM applies the following six-step process to compute a cost index(es) for heating and cooling a standard home to a given ambient temperature and to combine the cost index(es) by energy type (e.g., electricity and natural gas) with cost indexes for other energy uses.

(1) *Step 1.* OPM obtains technical information about the requirements by major energy type for heating and cooling a standard size dwelling, built according to current local building practices and codes in each area, given local climatic conditions (e.g., seasonal temperature and humidity). OPM also obtains similar information for use of energy types in other household operations (e.g., hot water, cooking, cleaning, recreation).

(2) *Step 2.* OPM obtains from the shelter survey, a survey of Federal employees, or other appropriate sources, information on dwelling size and the types and prevalence of heating and cooling equipment and energy types (e.g., electricity, gas, and oil) in each area.

(3) *Step 3.* OPM computes estimates of total home energy requirements by energy type attributable to heating and cooling plus all other household energy uses for the COLA survey area and the Washington, DC, area.

(4) *Step 4.* OPM surveys utility prices for each major energy type appropriate to the area.

(5) *Step 5.* OPM combines the above data to produce for each COLA survey area the cost of maintaining the standard size dwelling at a given ambient temperature and the cost of other household energy uses.

(6) *Step 6.* OPM compares the COLA survey area cost with the DC area cost to produce a price index.

§ 591.221 How does OPM compute the consumer expenditure weights it uses to combine price indexes?

OPM uses the following ten-step process to compute consumer expenditure weights:

(a) *Step 1.* OPM obtains the latest BLS tabulated CES data nationwide and for the Washington, DC, area.

(b) *Step 2.* In both the nationwide and DC area tabulated data, OPM replaces the homeowners' expenditures for shelter with estimated rental values of owned homes that are available elsewhere in tabulated CES data. Note: These replacements are consistent with the rental equivalence approach described in § 591.219.

(c) *Step 3.* OPM selects the central income groups in the nationwide CES tabulation.

(d) *Step 4.* OPM calculates the expenditure shares (i.e., percentages) for each central income group by dividing each of its DEC expenditures by total expenditures for the income group. OPM also calculates expenditure shares for total nationwide expenditures by dividing each nationwide DEC expenditure by total nationwide expenditures.

(e) *Step 5.* OPM computes a democratic distribution of expenditure shares by averaging the central income groups' shares at each DEC and higher level of aggregation.

(f) *Step 6.* OPM computes a set of ratios by dividing each expenditure share of the nationwide democratic distribution by the corresponding expenditure share of the total national distribution.

(g) *Step 7.* OPM computes estimated expenditures for Washington DC for each DC DEC and higher level of aggregation that BLS reported by multiplying the reported expenditure by the corresponding ratio derived in Step 6.

(h) *Step 8.* For each DC DEC and higher level of aggregation that BLS did not report, OPM computes expenditures for DC by distributing the DC expenditure calculated in step 7 using the distribution of expenditure shares derived in step 5.

(i) *Step 9.* As described in § 591.211(c), OPM classifies each DEC and aggregate into PEGs.

(j) *Step 10.* OPM computes expenditure weights by dividing each DEC or aggregate by the total expenditure derived from the DC expenditure computed in step 8. Therefore, the sum of the MEGs, PEGs, and DEC's, will separately total 100, i.e., so that all consumer expenditures in the original tabulation are accounted for.

§ 591.222 How does OPM use the expenditure weights to combine price indexes?

OPM uses a three-step process to combine price indexes.

(a) *Step 1.* For each DEC represented by one or more items for which OPM

could make valid price comparisons (e.g., OPM was able to collect representative prices in both the COLA and DC areas), OPM computes the unweighted geometric average (the *n*th root of the product of *n* numbers) of the price index(es) of all item(s) representing the DEC.

(b) *Step 2.* OPM multiplies the price index for each DEC by its expenditure weight, sums the cross products, and divides by the sum of the weights used in the calculation. This produces a price index for the level of aggregation (e.g., PEG or sub-PEG) in which the DEC is categorized.

(c) *Step 3.* OPM repeats the process described in step 2 at each level of aggregation within the PEG to produce a price index for the PEG, at the PEG level to produce an index for the MEG, and at the MEG level to produce the overall price index for the survey area.

§ 591.223 When does OPM conduct COLA surveys?

(a) OPM conducts a survey in each COLA area once every 3 years on a rotational basis and surveys the Washington, DC, area concurrently with each COLA area survey. The order of the COLA area surveys is as follows:

(1) *Year 1.* All COLA areas in the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

(2) *Year 2.* All COLA areas in the State of Alaska, except as provided in paragraph (b)(2) of this section.

(3) *Year 3.* All COLA areas in the State of Hawaii and the Territory of Guam and CNMI.

(b) *Exceptions:*

(1) Nothing in this subpart precludes OPM from conducting interim surveys or implementing some other change in response to conditions caused by a natural disaster or similar emergency, provided OPM publishes a notice or rule in the **Federal Register** explaining the change and the reason(s) for it.

(2) As provided in § 591.215(c), OPM does not conduct surveys in the Rest of the State of Alaska COLA area unless COLA rate reductions appear warranted.

§ 591.224 How does OPM adjust price indexes between surveys?

(a) OPM adjusts price indexes between the triennial surveys in each COLA area that is not surveyed in that year. To do this, OPM uses the annual or biennial change in the Consumer Price Index (CPI) for the COLA area relative to the annual or biennial change in the CPI for the Washington, DC, area. OPM uses the annual change for those areas surveyed the preceding year. OPM uses the biennial change for those areas surveyed 2 years before.

(b) This section applies beginning with the effective date of the results of the second survey conducted in Puerto Rico and the U.S. Virgin Islands under these regulations.

§ 591.225 Which CPIs does OPM use?

OPM uses the following CPIs:

(a) For the Washington, DC, area—the BLS Consumer Price Index, All Urban Consumers (CPI-U);

(b) For all COLA areas in the State of Alaska—the BLS CPI-U for Anchorage, AK;

(c) For all COLA areas in the State of Hawaii and for Guam and the CNMI—the BLS CPI-U for Honolulu, HI; and

(d) For Puerto Rico and the U.S. Virgin Islands—the Puerto Rico CPI as produced by the Puerto Rico Department of Work and Human Resources.

§ 591.226 How does OPM apply the CPIs?

(a) OPM uses a three-step process to adjust price indexes by relative annual or biennial changes in the CPIs. For steps 1 and 2, OPM computes the annual change by dividing the CPI from 1 year after the survey by the CPI from the time of the survey. OPM computes the biennial change by dividing the CPI from 2 years after the survey by the CPI from the time of the survey.

(1) *Step 1.* OPM computes the annual or biennial CPI change for the COLA area.

(2) *Step 2.* OPM computes the annual or biennial CPI change for the DC area.

(3) *Step 3.* OPM multiplies the COLA area price index from the last survey by

the COLA area CPI change computed in step 1 divided by the DC area CPI change computed in step 2. The adjusted price index is rounded to the second decimal place.

(b) *Example:*

	2008	2009
COLA Area CPI	172.2	174.7
DC Area CPI	159.7	161.9
COLA Area Survey Index	117.33	(1)
COLA Area CPI Adjusted Index	(2)	117.42

¹ No survey.

² N/A

Computation:

$$117.33 \times (174.7/172.2)/(161.9/159.7) = 117.4159, \text{ which would round to } 117.42.$$

§ 591.227 What adjustment factors does OPM add to the price indexes?

OPM adds to the price index an adjustment factor that reflects differences in need, access to and availability of goods and services, and quality of life in the COLA area relative to the DC area. The following table shows the adjustment factor for each area:

COLA area	Amount
Anchorage, AK	7.0
Fairbanks, AK	9.0
Juneau, AK	9.0
Rest of the State of Alaska	9.0
City and County of Honolulu, HI ...	5.0
Hawaii County, HI	7.0
Kauai County, HI	7.0
Maui County, HI	7.0
Guam and CNMI	9.0
Commonwealth of Puerto Rico	7.0
U.S. Virgin Islands	9.0

¹ Amount added to the price index.

§ 591.228 How does OPM convert the price index plus adjustment factor to a COLA rate?

(a) OPM converts the price index plus the adjustment factor to a COLA rate as shown in the following table:

Price index plus adjustment factor	COLA rate subject to paragraph (b) of this section
Equal to or greater than 124.50	25 percent.
Equal to or greater than 102.00 but less than 124.50	Price index plus the adjustment factor, minus 100, expressed to the nearest whole percent.
Less than 102.00	0 percent.

(b) This section is applicable on an area-by-area basis beginning with the effective date of the results of the first survey conducted in each area.

(c) OPM may reduce the COLA rate in any area by no more than 1 percentage

point in any 12-month period. Any reduction in the COLA rate for any COLA area cannot be effective until the effective date of the first survey conducted in Hawaii and Guam and CNMI under these regulations.

§ 591.229 How does OPM inform agencies and employees of COLA rate changes?

OPM publishes COLA area survey summary reports, MEG and PEG indexes, and COLA rates in the **Federal Register**. OPM makes survey data and

other information available to the public to the extent authorized by the Freedom of Information Act and the Privacy Act.

Post Differentials

§ 591.230 When does OPM establish post differential areas?

(a) OPM establishes post differential areas in response to agency requests when—

(1) Conditions of environment within the post differential area differ substantially from conditions of environment in the continental United States, and

(2) The major Federal employers within the area believe payment of a post differential is warranted as a recruitment incentive to attract candidates from outside the post differential area to work for the Government in the post differential area.

(b) If a department or agency wants OPM to consider establishing or revising the definition of a post differential area, the head of the department or agency or his or her designee must submit a request in writing to OPM.

§ 591.231 Which areas are post differential areas?

OPM has established the following post differential areas:

- (a) American Samoa as defined in § 591.205,
- (b) Territory of Guam,
- (c) Commonwealth of the Northern Mariana Islands,
- (d) Johnston Atoll (including Sand Island),
- (e) Midway Atoll, and
- (f) Wake Atoll.

§ 591.232 How does OPM establish and review post differentials?

(a) OPM establishes a post differential by rulemaking if Government agencies require it for recruitment purposes and if one or more of the following conditions exist:

- (1) Extraordinarily difficult living conditions,
- (2) Excessive physical hardship, and/or
- (3) Notably unhealthful conditions.

(b) OPM periodically reviews with Federal agencies whether conditions of environment have changed in the post differential areas and whether payment of the post differential continues to be warranted as a recruitment incentive.

§ 591.233 Who can receive a post differential?

An employee must meet all of the following conditions to be eligible to receive a post differential:

(a) The employee must be a citizen or national of the United States,

(b) The employee's official duty station or detail to temporary duty must be in the post differential area, and

(c) Immediately prior to being assigned to duty in the post differential area, the employee must have maintained his or her actual place(s) of residence outside the post differential area for an appropriate period of time (generally at least 1 year or more), except as provided in § 591.234.

§ 591.234 Under what circumstances may people recruited locally receive a post differential?

(a) Current residents of the area qualify for a post differential if they were originally recruited from outside the differential area and have been in substantially continuous employment by the United States or by U.S. firms, interests, or organizations.

(b) Examples of persons recruited locally but eligible to receive a post differential include, but are not limited to—

(1) Those who were originally recruited from outside the area and have been in substantially continuous employment by other Federal agencies, contractors of Federal agencies, or international organizations in which the U.S. Government participates and whose conditions of employment provide for their return transportation to places outside the post differential area,

(2) Those who are temporarily present in the post differential area for travel or formal study at the time they are hired and have maintained actual places of residence outside the area for an appropriate period of time, and

(3) Those who are discharged from U.S. military service in the differential area to accept employment with a Federal agency and have maintained actual places of residence outside the differential area for an appropriate period of time.

Program Administration

§ 591.235 When do COLA and post differential payments begin?

(a) Agencies begin paying an employee a COLA or post differential on the effective date of the change in the employee's official duty station to a duty station within the COLA or post differential area or, in the case of local recruitment, on the effective date of the appointment.

(b) For an employee detailed to temporary duty in a post differential area and who is otherwise eligible for a post differential, agencies must begin paying a post differential after 42 consecutive calendar days of temporary duty in the post differential area.

§ 591.236 When do COLA and post differential payments end?

Subject to § 591.237(a), agencies stop paying an employee a COLA or post differential on—

- (a) Separation,
- (b) The effective date of assignment or transfer to a new official duty station outside the COLA or post differential area, or
- (c) In the case of an employee on detail to temporary duty in a post differential area, the ending date of the detail.

§ 591.237 Under what circumstances may employees on leave or travel receive a COLA and/or post differential?

(a) An employee on leave or travel may receive a COLA or post differential only if the agency anticipates that the employee will return to duty in the area.

Exceptions: If the employee does not return to duty in the area, the agency may still pay a COLA and/or a post differential for the period of leave or travel, subject to paragraph (b) of this section, if the agency determines that—

(1) It is in the public interest not to return the employee to the duty station, or

(2) The employee will not return because of compelling personal reasons or circumstances over which the employee has no control.

(b) *Post differentials.* Agencies may pay a post differential to an employee only during the employee's first 42 consecutive calendar days of absence from the post differential area.

§ 591.238 How do agencies pay COLAs and post differentials?

(a) Agencies pay COLAs and post differentials as a percentage of an employee's hourly rate of basic pay, including a retained rate of pay under 5 U.S.C. 3594(c) or 5363, for those hours during which the employee receives basic pay. This includes all periods of paid leave, detail, or travel status outside the COLA or post differential area.

(b) Agencies pay employees eligible for both a COLA and a post differential the full amount of the COLA, plus so much of the post differential as will not cause the combined total of the COLA and post differential to exceed 25 percent of the hourly rate of basic pay.

§ 591.239 How do agencies treat COLAs and post differentials for the purpose of overtime pay and other entitlements?

(a) Agencies include COLAs in the employee's straight time rate of pay and include COLAs and post differentials in an employee's regular rate of pay for computing overtime pay entitlements for nonexempt employees under the

Fair Labor Standards Act of 1938, as amended.

(b) Agencies may not include a COLA or post differential as part of an employee's rate of basic pay for the purpose of computing entitlements to overtime pay, retirement, life insurance, or any other additional pay, COLA, or post differential under title 5, United States Code.

(c) Payment of a COLA or post differential is not an equivalent increase in pay within the meaning of 5 U.S.C. 5335.

§ 591.240 How are agency and employee representatives involved in the administration of the COLA and post differential programs?

(a) OPM may establish a COLA Advisory Committee in each COLA survey area. The committees are composed of agency and employee representatives from the COLA survey area and one or more representatives from OPM.

(b) To the extent practical, the COLA Advisory Committees coordinate and work with the Survey Implementation Committee established pursuant to *Caraballo, et al. v. United States*, No. 1997-0027 (D.V.I).

§ 591.241 What are the key activities of the COLA Advisory Committees?

(a) The COLA Advisory Committees may—

- (1) Advise and assist OPM in planning living-cost surveys;
- (2) Provide or arrange for observers for data collection during living-cost surveys;
- (3) Advise and assist OPM in the review of survey data;
- (4) Advise OPM on its administration of the COLA program, including survey methodology; and

(5) Assist OPM in disseminating information to affected employees about the living-cost surveys and the COLA program.

(b) The committees also may advise OPM on special situations or conditions, such as hurricanes and earthquakes, as they relate to OPM's authority under § 591.223(b) to conduct interim surveys or implement some other change in response to conditions caused by a natural disaster or similar emergency.

§ 591.242 What is the tenure of a COLA Advisory Committee?

OPM may establish a COLA Advisory Committee in each area prior to each living-cost survey conducted in that area. OPM will appoint committee members for 3-year renewable terms. To the extent practical, the committee will continue to exist between surveys, but OPM may periodically review with the committee whether there is a continuing need for the committee.

§ 591.243 How many members are on each COLA Advisory Committee?

A COLA Advisory Committee has up to 12 members composed of OPM representatives and other agency and employee representatives, unless OPM determines that the committee should be larger. In determining the number of committee members, OPM considers the amount of work the committee is likely to be requested to do (based on the size and complexity of the local living-cost survey) and the availability of employee and agency representatives to participate as committee members.

§ 591.244 How does OPM select COLA Advisory Committee members?

(a) In establishing a COLA Advisory Committee, OPM invites local agencies

and employee organizations to nominate committee members. OPM also invites COLA Defense Corporations and the local Federal Executive Board or Federal Executive Association each to nominate committee members. Subject to § 591.243, OPM selects committee members from these nominations in a manner designed to achieve a balanced representation that is reflective of agencies and employee organizations in the area. In consultation with the committee, OPM may select additional nominees to serve as alternates to the primary committee members. OPM designates not more than two OPM representatives to serve on each committee.

(b) Each Executive agency, as defined in 5 U.S.C. 105, must cooperate and release appointed employees for committee proceedings and activities unless the agency can demonstrate that exceptional circumstances directly related to accomplishing the mission of the employee's work unit require his or her presence on the job. Executive agency employees serving as committee members are considered to be on official assignment to an interagency function, rather than on leave, and are eligible to receive reimbursement for authorized travel expenses from their respective agencies.

Appendix A of Subpart B—Places and Rates at Which Allowances Are Paid

This appendix lists the places approved for a cost-of-living allowance and shows the authorized allowance rate for each. The allowance percentage rate shown is paid as a percentage of an employee's rate of basic pay. The rates are subject to change based on the results of future surveys.

Geographic coverage	Allowance rate (percent)
State of Alaska:	
City of Anchorage and 80-kilometer (50-mile) radius by road	25.00
City of Fairbanks and 80-kilometer (50-mile) radius by road	25.00
City of Juneau and 80-kilometer (50-mile) radius by road	25.00
Rest of the State	25.00
State of Hawaii:	
City and County of Honolulu	25.00
County of Hawaii	16.50
County of Kauai	23.25
County of Maui and County of Kalawao	23.75
Territory of Guam and Commonwealth of the Northern Mariana Islands	25.00
Commonwealth of Puerto Rico	11.50
U.S. Virgin Islands	22.50

Appendix B of Subpart B—Places and Rates At Which Differentials Are Paid

This appendix lists the places where a post differential has been approved and shows the differential rate to be paid to eligible employees. The differential percentage rate shown is paid as a percentage of an employee's rate of basic pay.

Geographic coverage	Percentage differential rate
American Samoa (including the island of Tutuila, the Manua Islands, and all other islands of the Samoa group east of longitude 171° west of Greenwich, together with Swains Island)	25.0
Johnston Atoll	25.0
Midway Atoll	25.0
Territory of Guam and Commonwealth of the Northern Mariana Islands	20.0
Wake Atoll	25.0

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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2634

RIN 3209-AA00

Technical Amendments to Qualified Trust Model Certificates Privacy and Paperwork Notices

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; technical amendments.

SUMMARY: The Office of Government Ethics is revising the Privacy Act and Paperwork Reduction Act notices for the model qualified trust certificates of independence and compliance, as codified in an appendix to its executive branchwide financial disclosure regulations, to make a couple minor updating changes.

EFFECTIVE DATE: June 3, 2002.

FOR FURTHER INFORMATION CONTACT: William E. Gressman, Senior Associate General Counsel, Office of Government Ethics; Telephone: 202-208-8000, extension 1110; TDD: 202-208-8025; FAX: 202-208-8037.

SUPPLEMENTARY INFORMATION: In this rulemaking, OGE is making technical Privacy Act and paperwork-related revisions to appendix C of its executive branchwide financial disclosure regulation codified at 5 CFR part 2634. Appendix C sets forth the Privacy Act and Paperwork Reduction Act (public burden) notices for the certificates of independence and compliance (as themselves codified at appendixes A and B to part 2634) for qualified blind and qualified diversified trusts under the Ethics in Government Act of 1978, 5 U.S.C. appendix. First, OGE is adding the words “judge- issued” before the word “subpoena” in the routine use paraphrased in paragraph (3) of the Privacy Act Statement in appendix C order to more accurately reflect case law requirements for any such disclosures. The Office of Government Ethics is also working on a revised notice for its

executive branchwide OGE/GOVT-1 system of records that will include a similar revision. Second, OGE is revising the Public Burden Information and Paperwork Reduction Act Statement in appendix C to indicate the current title of the OGE official to contact for any paperwork comments, the Deputy Director for Administration and Information Management. These changes were included in the recent three-year paperwork renewal OGE received from the Office of Management and Budget for the model certificates and ten other uncodified model trust documents.

Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b) and (d), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking and the opportunity for public comment as to these revisions. The notice and comment are being waived because these technical amendments concern matters of agency organization, practice and procedure. Moreover, it is in the public interest that these updating technical revisions take effect promptly.

Executive Order 12866

In promulgating these technical amendments to appendix C to the branchwide financial disclosure regulations, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These amendments have not been reviewed by the Office of Management and Budget under the Executive order, since they are not deemed “significant” thereunder.

Executive Order 12988

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

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rulemaking will not have a significant economic impact on a substantial number of small entities because it primarily affects high-level Federal executive branch officials who seek OGE approval for the creation of Ethics Act-qualified blind and diversified trusts and their trust fiduciaries.

Paperwork Reduction Act

The certificates of independence and compliance are information collections within the scope of the Paperwork Reduction Act (44 U.S.C. chapter 35). As noted above, the Office of Management and Budget recently granted its paperwork approval for a period of three years for the certificates as codified in appendixes A, B and C to 5 CFR part 2634, with only the latter procedural appendix C being amended in this rulemaking document.

Unfunded Mandates Reform Act

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

Congressional Review Act

The Office of Government Ethics has determined that this amendatory rulemaking is a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and has submitted a report thereon to the United States Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.