

**§ 3185.10 What does this part do?**

This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the Institute of Museum and Library Services (IMLS) policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for IMLS to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" (3 CFR 1986 Comp., p. 189), Executive Order 12689, "Debarment and Suspension" (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Pub. L. 103-355, 108 Stat. 3327).

**§ 3185.20 Does this part apply to me?**

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through I of 2 CFR part 180 (see table at 2 CFR 180.100(b)) apply to you if you are a—

(a) Participant or principal in a "covered transaction" (see Subpart B of 2 CFR part 180 and the definition of "nonprocurement transaction" at 2 CFR 180.970.

(b) Respondent in an IMLS suspension or debarment action.

(c) IMLS debarment or suspension official;

(d) IMLS grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

**§ 3185.30 What policies and procedures must I follow?**

The IMLS policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in Subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (i.e., 2 CFR 180.220) as supplemented by section 220 in this part (i.e., § 3185.220). For any section of OMB guidance in Subparts A through I of 2 CFR 180 that has no corresponding section in this part, IMLS policies and procedures are those in the OMB guidance.

**Subpart A—General****§ 3185.137 Who in the IMLS may grant an exception to let an excluded person participate in a covered transaction?**

The IMLS Director has the authority to grant an exception to let an excluded person participate in a covered

transaction, as provided in the OMB guidance at 2 CFR 180.135.

**Subpart B—Covered Transactions****§ 3185.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?**

Although the OMB guidance at 2 CFR 180.220(c) allows a Federal agency to do so (also see optional lower-tier coverage in the figure in the Appendix to 2 CFR part 180), IMLS does not extend coverage of nonprocurement suspension and debarment requirements beyond first-tier procurement contracts under a covered nonprocurement transaction.

**Subpart C—Responsibilities of Participants Regarding Transactions****§ 3185.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?**

You as a participant must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with Subpart C of the OMB guidance in 2 CFR part 180, as supplemented by this subpart.

**Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions****§ 3185.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?**

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, as supplemented by Subpart C of this part, and requires the participant to include a similar term or condition in lower-tier covered transactions.

**Subpart E—I—[Reserved]****Title 45 Public Welfare****Chapter XI—National Foundation for the Arts and the Humanities****PART 1185—[REMOVED]**

■ 2. Under authority Sec. 2455, Public Law 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235) part 1185 is removed.

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**OFFICE OF PERSONNEL MANAGEMENT****5 CFR Part 351**

RIN 3206-AL64

**Competitive Area**

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

**ACTION:** Final rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing final regulations that provide agencies with the option of establishing a reduction in force (RIF) competitive area that only includes pay band positions. An agency has this option when a RIF competitive area otherwise includes pay band positions and other positions that are not covered by one or more pay bands.

**DATES:** *Effective Date:* These regulations are effective August 11, 2008.

**FOR FURTHER INFORMATION CONTACT:** Thomas A. Glennon by telephone on 202-606-0960, by Fax on 202-606-2329, by TDD on 202-418-3134, or by e-mail at [employ@opm.gov](mailto:employ@opm.gov).

**SUPPLEMENTARY INFORMATION:** On April 15, 2008, OPM published proposed reduction in force (RIF) regulations in the *Federal Register* at 73 FR 20180. Interested parties could submit comments to OPM on the regulations through May 15, 2008. OPM received timely comments from three agencies, two unions, and two individuals on these proposed regulations. We considered all of the timely comments in publishing this final regulation. Below is a discussion of the specific comments.

**Discussion of Comments**

All three agencies concurred with the option of establishing a separate competitive area for pay band positions. One agency supported our proposed regulation without any additional comments or suggestions.

Two agencies concurred, but had additional comments. One agency suggested that OPM further revise the RIF regulations to allow agencies the additional option of establishing separate competitive areas for individual pay band systems when a competitive area includes more than one pay band system. OPM did not adopt this suggestion. Because all pay band systems have common characteristics flowing from the consolidation of former graded positions into broad pay bands, we see no need to further allow agencies the additional option of establishing separate competitive areas for individual pay

bands when these individual pay bands would otherwise be included in the same competitive area.

The other agency suggested that OPM include criteria for the agency to consider when deciding whether to define separate competitive areas under § 351.402(e) for pay band and for non-pay band positions. The agency also suggested that OPM provide criteria on what types of documentation are appropriate under § 351.403(a)(2)(ii) to supplement an employee's official position description for purposes of establishing one or more pay band competitive levels. OPM did not adopt either suggestion. Because each agency-specific RIF situation is unique, OPM believes that the agency conducting the RIF has the best information to make RIF-related decisions, including the definition of what is an appropriate competitive area or competitive areas for its competing employees, and what documentation is appropriate to supplement the position descriptions of employees in pay band positions. Section 351.204 provides that each agency covered by 5 CFR part 351 is responsible for all decisions when following and applying the RIF regulations if the agency determines that a RIF is necessary.

This agency also suggested that OPM revise the retention regulations to state that an agency retains the right to potentially redefine one or more competitive areas if the agency finds it necessary to conduct a subsequent RIF. OPM did not adopt this suggestion. Present § 351.201(c) provides that the agency's RIF decisions must be uniform and consistent with 5 CFR part 351 in any one RIF (i.e., the agency may potentially make different decisions applying the 5 CFR part 351 regulations to a subsequent RIF).

Finally, this agency suggested that OPM include definitions of "competitive area" and "competitive level" in section 351.203 ("Definitions"). OPM did not adopt this suggestion. Section 351.402 specifically covers RIF competitive areas while section 351.403 specifically covers RIF competitive levels.

Regarding the two union comments, both unions commented that the proposed regulations would allow agencies to improperly target certain employees for RIF, while unfairly restricting the placement opportunities of these employees. OPM does not agree with this assertion. Agencies must apply the same level of objectivity and administrative probity in using these provisions as they do in making any personnel-related decision. An employee who believes that a

competitive area is unlawfully constituted may, as applicable, contest the agency's action. Further, the RIF competitive area is only one of many factors that impact an employee's placement opportunities. Factors such as an individual's veterans' preference status, tenure (e.g., permanent v. temporary), performance appraisal (e.g., Exceptional v. Fully Successful), and years of service all play a part in an employee's final outcome in a RIF scenario.

One union, in objecting to the proposed regulation, commented that potential separate competitive areas in a pay band environment reduces the relative weight of seniority in RIF competition, which the union suggests is a hallmark of the RIF system. OPM disagrees. The proposed RIF regulation continues to assign the same relative weight to each of the four retention factors mandated in 5 U.S.C. 3502(a)(1)–(4): (1) Tenure (i.e., type of appointment), (2) veterans' preference, (3) total creditable civilian and uniformed service, and (4) additional retention service credit for performance. We note that although the RIF regulation, and the determining factors, have been modified through the years, the one true constant of the RIF system since 1876 has been protection based on an individual's veterans' preference status, not necessarily the retention of senior employees.

This union also commented that our proposal to allow separate RIF competitive areas for pay band environments was based on an assumption that a unified competitive area might create difficulty for the agency facing a RIF. The union suggested that changes to governmentwide rules should be based on facts, not guesses. To clarify, from our review of demonstration projects we know that certain inconsistencies exist between pay band positions and positions covered by the General Schedule (GS) or Federal Wage System (FWS). For example, pay band positions are subject to different rules than other positions covered by traditional pay systems (i.e., GS and FWS positions): (1) Each pay band covers a wide salary range that encompass multiple GS or FWS grades, (2) pay band positions are generally covered by generic position descriptions while GS and FWS positions have specific position descriptions keyed in part to the classification of each position, and (3) pay band positions are generally more closely linked to performance incentives than GS and FWS positions. What we do not know is the size or scope of any one RIF an agency may be facing. RIFs

involving large numbers of pay band and non-pay band positions will be more disruptive than those with few mixed-positions. This is why we stated in the supplementary information of the proposed regulation published on April 15, 2008, at page 73 FR 20180, that significant inconsistencies "may" result when a RIF competitive area includes pay band positions and positions covered by the General Schedule (GS) or Federal Wage System (FWS). The new § 351.402(e) is an agency option, not a requirement, to permit agencies to assess their situation and determine how best to apply the RIF regulations to suit their needs. On May 21, 2008, at 73 FR 29387, OPM published a final regulation covering how an agency may conduct a RIF in a competitive area that includes pay band and other positions not covered by a pay band system if the agency chooses that option.

Of the two individuals who commented, one individual suggested that OPM include a definition of "pay band" for purposes of the 5 CFR part 351 regulations. OPM did not adopt this suggestion. Each pay band system includes a specific definition of pay band applicable to that pay band system.

This individual also suggested that OPM provide criteria on what types of records may be considered under § 351.403(a)(2)(ii) to supplement an employee's official position description when establishing pay band competitive levels. OPM did not adopt this suggestion. As noted above in response to an agency's similar suggestion, OPM believes that the agency conducting the RIF has the best information to make RIF-related decisions, including what records are appropriate to supplement the position descriptions of employees in pay band positions.

The other individual is concerned about how a separate competitive area could restrict the potential retention rights of employees who are not covered by a pay band system. As noted above, OPM covered its rationale and justification for this option in the "Explanation" material for the proposed regulations published on April 15, 2008, at page 73 FR 20180. One competitive area definition does not necessarily make an individual employee more or less subject to release by RIF than if the agency had retained or implemented a different competitive area definition.

#### Revisions Made by Final Regulations

OPM is adopting the proposed regulations without change. The final regulation makes the following changes to competitive area and competitive level that are summarized below.

Revisions to Competitive Area

New § 351.402(e) provides that when an agency finds that a competitive area defined under § 351.402(b) includes pay band positions and positions not covered by a pay band, at its discretion the agency may define a competitive area otherwise consistent with § 351.402 to include only pay band positions.

Section 351.402(b) is also revised to include a reference to new § 351.402(e).

Revisions to Competitive Level

Section 351.403(a)(2) is renumbered as § 351.403(a)(2)(i) and revised to clarify that, except as provided in new § 351.403(a)(2)(ii) for pay band positions, competitive level determinations are based on each employee's official position of record (including the official position description), not the employee's personal qualifications.

New § 351.403(a)(2)(ii) provides that, to establish a competitive level comprised of pay band positions, an agency may supplement an employee's official position with other applicable records that document the employee's actual duties and responsibilities. Note that § 351.403(a)(2)(ii) also applies to RIF competition in a competitive area that includes pay band and other positions.

Regulatory Flexibility Act

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

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 351

Administrative practice and procedure, Government employees. U.S. Office of Personnel Management. Linda M. Springer, Director.

Accordingly, OPM is amending part 351 of title 5, Code of Federal Regulations, as follows:

PART 351—REDUCTION IN FORCE

1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 1302, 3502, 3503; sec. 351.801 also issued under E.O. 12828, 58 FR 2965.

2. In § 351.402, paragraph (b) is revised, and paragraph (e) is added, to read as follows:

§ 351.402 Competitive area.

\* \* \* \* \*

(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical location and, except as provided in paragraph (e) of this section, it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

\* \* \* \* \*

(e) When an agency finds that a competitive area defined under paragraph (b) of this section includes pay band positions and positions not covered by a pay band, the agency may, at its discretion, define a separate (and additional) competitive area, otherwise consistent with paragraph (b) of this section, to include only pay band positions. The original competitive area would then include only the remaining positions (i.e., those positions not covered by a pay band).

3. In § 351.403, paragraph (a)(2) is revised to read as follows:

§ 351.403 Competitive level.

(a) \* \* \*

(2)(i) Except as provided in paragraph (a)(2)(ii) of this section for pay band positions, competitive level determinations are based on each employee's official position of record (including the official position description), not the employee's personal qualifications.

(ii) To establish a competitive level comprised of pay band positions, an agency may supplement an employee's official position of record with other applicable records that document the employee's actual duties and responsibilities.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 24

[Docket ID OCC-2008-0010]

RIN 1557-AD12

Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments

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

ACTION: Interim final rule with request for comment.

SUMMARY: On July 30, 2008, the President signed into law the Housing and Economic Recovery Act of 2008 (HERA). Section 2503 of the HERA revises the community development investment authority in 12 U.S.C. 24(Eleventh) to permit a national bank to make a broader range of investments designed primarily to promote the public welfare. This interim final rule implements the changes made to section 24(Eleventh) by the HERA.

DATES: Effective Date: This rule is effective on August 11, 2008.

Comment Date: Comments must be received by September 10, 2008.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by e-mail, if possible. Please use the title "Community Development Investments" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—"Regulations.gov": Go to http://www.regulations.gov, under the "More Search Options" tab click next to the "Advanced Docket Search" option where indicated, select "Comptroller of the Currency" from the agency drop-down menu, then click "Submit." In the "Docket ID" column, select "OCC-2008-0010" to submit or view public comments and to view supporting and related materials for this interim final rule. The "How to Use This Site" link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

E-mail: regs.comments@occ.treas.gov.