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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 550, 551, 575, 581, and 870

RIN 3206–AG47

Pay Administration; Premium Pay

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations on availability pay, a new form of premium pay that applies to criminal investigators who are required to work, or be available to work, substantial amounts of unscheduled overtime duty based on the needs of the employing agency. Availability pay is fixed at 25 percent of basic pay (including locality pay).

DATES: *Effective Date:* The regulations are effective October 30, 1994.

Applicability Dates: The regulations apply on the first day of the first pay period beginning on or after October 30, 1994.

Comments Date: Comments must be received on or before February 21, 1995.

ADDRESSES: Comments may be sent or delivered to Donald J. Winstead, Acting Assistant Director for Compensation Policy, Office of Personnel Management, room 6H31, 1900 E Street NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: D. Bryce Baker, (202) 606–1413.

SUPPLEMENTARY INFORMATION: Section 633 of the Treasury, Postal Service and General Government Appropriations Act for fiscal year 1995 (Public Law 103–329, September 30, 1994) amended title 5, United States Code, to provide for a new form of premium pay called "availability pay" for criminal investigators. The availability pay provision takes effect on the first day of the first pay period beginning on or after October 30, 1994, except that implementation may be delayed until September 1995 for certain criminal investigators employed by Inspectors General. Criminal investigators receiving availability pay are exempt from the minimum wage and overtime pay provisions of the Fair Labor Standards Act and may not receive administratively uncontrollable overtime (AUO) pay.

AUO Pay and Availability Pay

Availability pay replaces AUO pay for covered criminal investigators. Some of the major differences between AUO pay and availability pay are as follows:

- The use of AUO pay is discretionary on the part of the employing agency. In contrast, availability pay is a guaranteed employee entitlement that the employing agency must provide, if the required conditions are met.
- The level of AUO pay may vary from 10 to 25 percent of basic pay, depending on the average number of AUO hours worked per week. Availability pay is fixed at 25 percent of basic pay.
- AUO pay is calculated based upon the number of hours actually worked. Availability pay also takes into account certain hours when a criminal investigator is determined by the employing agency to be available to work.
- While both AUO pay and availability pay are the sole compensation for irregular and occasional overtime work (i.e., overtime hours not scheduled in advance of an employee's administrative workweek), availability pay is also the sole compensation for any overtime work hours that are the first 2 hours of overtime work on any day containing part of the employee's basic 40-hour workweek (regardless of how those hours are scheduled).
- AUO pay is not basic pay for severance pay purposes, while availability pay is basic pay for severance pay purposes.

Coverage

Eligibility for availability pay is limited to criminal investigators. The regulations make clear that the only General Schedule (GS) employees who qualify as criminal investigators for the purpose of availability pay are those properly classified in the GS–1811 (Criminal Investigating) and GS–1812 (Game Law Enforcement) series under OPM standards. The GS–1812 series applies to criminal investigators with specialized duties and skill requirements associated with game law enforcement. Congress indicated its intent that availability pay be limited to these two classification series of employees in the conference report on the bill that was enacted as Public Law 103–329. (See House Congressional Record, September 20, 1994, page H9268.)

Availability pay applies only to those GS–1811 and GS–1812 criminal investigators who meet the definition of "law enforcement officer" in 5 U.S.C. 5541(3), which generally requires that the employee be covered under the early retirement provisions for law enforcement officers. However, an investigator may also meet that definition if he or she holds a supervisory or administrative position that has been officially approved as a "secondary position" under the regulations governing the law enforcement officer retirement provisions.

Members of the Senior Executive Service (SES) (including the Federal Bureau of Investigations and Drug Enforcement Administration SES) are not eligible to receive availability pay. Availability pay is one type of premium pay among many that are addressed in subchapter V of title 5, United States Code. No premium pay under subchapter V is applicable to SES members, since they are excluded from the definition of "employee" in 5 U.S.C. 5541(2). The term "criminal investigator" in the availability pay provision is linked to the definition of "law enforcement officer" in 5 U.S.C. 5541(3), which in turn is linked to the definition of "employee" in 5 U.S.C. 5541(2). In interpreting a term within the context of the premium pay subchapter, all of the conditions of these definitions must be met.

Availability Hours

In determining whether a criminal investigator qualifies for availability pay, the employing agency must determine whether the investigator is expected to work, or be available to work, an annual average of 2 hours of

unscheduled duty per regular work day. Available-to-work hours are those hours during which the employing agency determines the investigator is generally and reasonably accessible to perform unscheduled duty based on the needs of the agency. Generally, the agency will place the investigator in availability status, meaning that it directs the investigator to be available during designated periods to meet agency needs. Availability hours on a regular workday are included in the computation of the annual average, regardless of whether an investigator actually works during those hours. However, availability hours on a nonregular workday are used in computing the annual average only if the investigator is actually required to work during those hours. (See 5 U.S.C. 5545a(d)(3) and 5 CFR 550.183(c).)

Although availability hours during which no work is performed may be used to justify entitlement to availability pay, it was the intent of Congress that the existence of this availability condition should not be interpreted by criminal investigators as license to reduce their actual work hours. (See Senate Committee on Appropriations Report 103–286, June 16, 1994, page 100.) This suggests that agencies should ensure that all investigators receiving availability pay are performing significant amounts of actual unscheduled overtime work, as opposed to being merely available to perform such work.

Regular Workday

The regular workdays used as the denominator in the annual average computation are defined in the regulations as days in the investigator's basic workweek during which the investigator works at least 4 hours, excluding overtime hours, approved training hours, hours engaged in travel under official travel orders, approved leave hours, and excused absence hours. (Travel hours are limited to hours during which the investigator is traveling under official travel orders so as to make clear that local area "travel" that is part of an investigator's normal duties should not be excluded as work hours in determining regular work days. An investigator is "traveling under official orders" only for out-of-area travel and then only for that period of time during which he or she is actually engaged in traveling. Once an investigator reaches the out-of-area destination, any local travel in that area must be treated the same as local travel in the area where the investigator is permanently stationed.)

The exclusion of training, travel, approved leave, and excused absence hours reflects, in part, an interpretation of the of the term "works" as used in the statutory definition of "regular work day" (5 U.S.C. 5545a(a)(4)). At the same time, the exclusion gives effect to another statutory provision requiring that an investigator "be considered to be available when the investigator cannot reasonably and generally be accessible" due to certain assignments or circumstances controlled by the agency (5 U.S.C. 5545a(d)(4)).

Excluding hours in training, travel, approved leave, and excused absence in determining whether a day qualifies as a regular workday ensures that the time spent in such situations does not adversely affect an investigator's annual average hours computation. In effect, the same annual average of unscheduled duty hours computed for regular workdays is presumed to apply to other days in the basic workweek (such as leave days). Thus, consistent with the law, the investigator essentially is treated as if he or she were available on such days. While training and travel hours are not used in determining regular workdays, unscheduled duty hours involving training or travel that are otherwise qualifying would be included as hours of unscheduled duty (numerator) in the annual average computation.

When Availability Pay Must Be Paid

The purpose of the availability pay provision is to ensure the availability of criminal investigators for unscheduled duty based on the needs of the employing agency (See 5 U.S.C. 5545a (b) and (c).) The law provides that availability pay "shall be paid" to ensure this availability, subject to the conditions of the law. One condition is that availability pay can be paid only if the annual average hours requirement is and will be met, as certified by the investigator.

To ensure the availability of criminal investigators as intended by the law, agencies generally must ensure that each criminal investigator's hours of unscheduled duty are sufficient to enable the investigator to meet the average hours requirement and make the necessary certification. However, the regulations provide for the possibility of not providing availability pay to otherwise qualified criminal investigators under several narrow exceptions. (See 5 CFR 550.182 (d) through (f), 550.184(d), and 550.185 (c) and (d).)

The regulations provide that an employing agency may, at its discretion, approve a criminal investigator's voluntary request that he or she generally not be assigned any overtime hours (including unscheduled duty) for a designated period based on a personal or family hardship situation (e.g., the investigator needs to assist in caring for a chronically ill family member). The investigator would be required to sign a written statement documenting this request and his or her understanding that availability pay will be suspended. This voluntary opt-out provision is intended to apply to situations where the expected duration of the designated period is long enough that the investigator would likely be unable to satisfy the annual average hours requirement. Agencies are expected to monitor closely the use of this authority to ensure that investigators are not allowed to opt out of availability pay for long periods of time, only to opt back in at the end of a career as a way of inappropriately inflating the average salary used in the retirement annuity computation. OPM invites comments on this voluntary opt-out provision and will consider refinements of the criteria for opting out when final regulations are issued.

The regulations also provide that an agency may suspend payment of availability pay when the agency determines that an investigator has not been performing the required amount of unscheduled duty as assigned or reported. This reflects the intent of Congress that agencies would have the prerogative to remove availability pay if an investigator avoids work or availability. (See Senate Committee on Appropriations Report 103–286, June 16, 1994, page 100.) In addition, the regulations provide that availability pay may be suspended if an investigator is in a duty status but unable to perform unscheduled duty for an extended period due to physical or health limitations.

As required by the law, an involuntary suspension of availability pay as a result of a denial or cancellation of an availability pay certification is an adverse action under 5 U.S.C. 7512(4) and 5 CFR part 752. This means that availability pay is considered to be "pay" under 5 CFR 752.402(f). Also, a voluntary request that availability pay be suspended under the voluntary opt-out provision does not trigger adverse action rights.

A criminal investigator who is not receiving availability pay would be entitled to compensation for any overtime work under other provisions of law, as applicable. However, given the nature of the exceptions described above, it is not expected that any such investigator would receive AUO pay

Criminal Investigators in Inspector General Offices

The law provides for a delayed effective date for criminal investigators employed in offices of Inspectors General who are not receiving 25-percent AUO pay. These regulations clarify that the employing Inspector General (IG) office, not the criminal investigators themselves, shall be responsible for determining the delayed effective date for such criminal investigators, subject to the limits in the law. (For clarification of congressional intent in this regard, see Senate Congressional Record, September 28, 1994, page S13551.)

These regulations also clarify that criminal investigators in IG offices are subject to the same rules, requirements and conditions that apply to all other criminal investigators under the availability pay provision. Thus, for example, the required initial and annual certifications (related to the annual average hours requirement) must be made.

Waiver of Notice of Proposed Rule Making and Delay in Effective Date

Pursuant to 5 U.S.C. 553(b)(3)(B) and 5 U.S.C. 553(d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and making this rule effective retroactively. Section 633 of Public Law 103–329, which authorizes availability pay, was enacted on September 30, 1994. The availability pay authority is effective on October 30, 1994 and applies on the first day of the first applicable pay period beginning on or after October 30, 1994. These regulations are being made effective retroactively to the effective date of the law to ensure that the availability pay provision is uniformly implemented.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

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

List of Subjects

5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

5 CFR Part 551

Government employees, Wages.

5 CFR Part 575

Government employees, Wages.

5 CFR Part 581

Alimony, Child support, Government employees, Wages.

5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending parts 550, 551, 575, 581, and 870 of title 5 of the Code of Federal Regulations as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

1. The authority citation for part 550, subpart A, is revised to read as follows:

Authority: Subpart A issued under 5 U.S.C. 5304 note, 5305 note, 5541(2)(iv), 5548, and 6101(c); E.O. 12748, February 1, 1991, 3 CFR 1992 Comp., p. 316.

2. In § 550.103, paragraphs (i) and (p) are revised, and paragraph (u) is added to read as follows:

§ 550.103 Definitions.

* * * * *

(i) *Premium pay* means additional pay authorized by subchapter V of chapter 55 of title 5, United States Code, and this subpart for overtime, night, holiday, or Sunday work, and for standby duty, administratively uncontrollable overtime work, or availability duty

* * * * *

(p) *Regularly scheduled work* means work that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with § 610.111, excluding any such work to which availability pay under § 550.181 applies.

* * * * *

(u) *Criminal investigator* means a law enforcement officer as defined in paragraph (t) of this section (other than a special agent in the Diplomatic Security Service) who, based on OPM standards, is properly classified under the GS–1811 or GS–1812 series in the General Schedule classification system, or who would be so classified if covered under that system.

3. In § 550.111, paragraph (a) is revised and paragraph (f) is added to read as follows:

§ 550.111 Authorization of overtime pay.

(a) Except as provided in paragraphs (d) and (f) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

* * * * *

(f)(1) For any criminal investigator receiving availability pay under § 550.181, overtime work means work that is scheduled in advance of the administrative workweek—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40-hour workweek, or

(ii) On a day not containing hours that are part of such investigator's basic 40-hour workweek.

(2) Any work that would be overtime work under this section but for paragraph (f)(1) of this section shall be compensated by availability pay under § 550.181.

4. In § 550.163, paragraph (e) is added to read as follows:

§ 550.163 Relationship to other payments.

(e) Premium pay on an annual basis under § 550.141 or § 550.151 may not be paid to a criminal investigator receiving availability pay under § 550.181.

5. Sections 550.181 through 550.187 are added to read as follows:

Law Enforcement Availability Pay

§ 550.181 Coverage.

Each criminal investigator meeting the definition in § 550.103(u), and the conditions and requirements of 5 U.S.C. 5545a and the regulations in §§ 550.181 through 550.187, shall receive availability pay to ensure the availability of criminal investigators for unscheduled duty in excess of the 40-hour workweek based on the needs of the employing agency.

§ 550.182 Unscheduled duty.

(a) *Unscheduled duty hours.* For the purpose of availability pay, unscheduled duty hours are those hours during which a criminal investigator performs work, or is determined by the employing agency to be available for work, that are not—

(1) Part of the 40-hour basic workweek of the investigator; or

(2) Overtime hours compensated under 5 U.S.C. 5542 and § 550.111 (which are those overtime hours

scheduled in advance of the investigator's administrative workweek, excluding any such hours that are the first 2 hours of overtime work on any day containing a part of the investigator's basic 40-hour workweek, as required by § 550.111(f)).

(b) *Actual work hours.* To be considered to be performing work under paragraph (a) of this section, a criminal investigator must be performing work as officially ordered or approved, including work performed without specific supervisory preapproval, if circumstances require the criminal investigator to perform the duty to meet the needs of the employing agency, subject to agency policies and procedures (including any requirements for after-the-fact validation or approval).

(c) *Availability hours.* To be considered available for work under paragraph (a) of this section, a criminal investigator must be determined by the employing agency to be generally and reasonably accessible to perform unscheduled duty based on the needs of the agency. Generally, the agency will place the investigator in availability status by directing the investigator to be available during designated periods to meet agency needs, as provided by agency policies and procedures. Placing the investigator in availability status shall not be considered scheduling the investigator for overtime hours compensated under 5 U.S.C. 5542 and 5 CFR 550.111. Availability hours may include hours during which an investigator places himself or herself in availability status to meet the needs of the agency, subject to agency policies and procedures (including any requirements for after-the-fact validation or approval).

(d) *Ensuring availability.* Except as provided in paragraphs (e) and (f) of this section, an employing agency shall ensure that each criminal investigator's hours of unscheduled duty are sufficient to enable the investigator to meet the substantial hours requirement in § 550.183 and make the certification required under § 550.184.

(e) *Voluntary opt-out.* Notwithstanding paragraph (d) of this section, an employing agency may, at its discretion, approve a criminal investigator's voluntary request that the investigator generally be assigned no overtime work (including unscheduled duty) for a designated period of time because of a personal or family hardship situation. The investigator must sign a written statement documenting this request and his or her understanding that availability pay will not be payable during the designated period.

(f) *When availability pay is suspended.* The employing agency is not subject to the requirement of paragraph (d) of this section in the case of a criminal investigator for whom availability pay is suspended in accordance with § 550.184(d) due to denial or cancellation of the required certification based on—

(1) Failure to perform unscheduled duty as assigned or reported; or

(2) Inability to perform unscheduled duty for an extended period because of a physical or health condition.

§ 550.183 Substantial hours requirement.

(a) A criminal investigator shall be eligible for availability pay only if the annual average number of hours of unscheduled duty per regular workday is 2 hours or more, as certified in accordance with § 550.184. This average is computed by dividing the total unscheduled duty hours for the annual period (numerator) by the number of regular workdays (denominator).

(b) For the purpose of this section, *regular workday* means each day in the criminal investigator's basic workweek during which the investigator works at least 4 hours, excluding—

(1) Overtime hours compensated under 5 U.S.C. 5542 and § 550.111;

(2) Unscheduled duty hours compensated by availability pay under 5 U.S.C. 5545a and this subpart; and

(3) Hours during which an investigator is engaged in agency-approved training, is traveling under official travel orders, is on approved leave, or is on excused absence with pay (including paid holidays).

(c) In computing average hours under paragraph (a) of this section, the total unscheduled duty hours in the numerator shall include—

(1) Any unscheduled duty hours on a regular workday; and

(2) Any unscheduled duty hours actually worked by an investigator on days that are not regular workdays.

§ 550.184 Annual certification.

(a) Each newly hired criminal investigator who will receive availability pay and the appropriate supervisory officer (as designated by the head of the agency or authorized designee) shall make an initial certification to the head of the agency attesting that the investigator is expected to meet the substantial hours requirement in § 550.183 during the upcoming 1-year period. A similar certification shall be made for a criminal investigator who will begin receiving availability pay after a period of nonreceipt (e.g., a designated voluntary opt-out period under § 550.182(e)).

(b) Each criminal investigator who is receiving availability pay and the appropriate supervisory officer (as designated by the head of the agency or authorized designee) shall make an annual certification to the head of the agency attesting that the investigator currently meets, and is expected to continue to meet during the upcoming 1-year period, the substantial hours requirement in § 550.183.

(c) A certification shall no longer apply when the employee separates from Federal service, is employed by another agency, moves to a position that does not qualify as a criminal investigator position, or begins a voluntary opt-out period under § 550.182(e).

(d) The employing agency shall ensure that criminal investigators receiving availability pay comply with the substantial hours requirement in § 550.183, as certified in accordance with this section. The employing agency may deny or cancel a certification based on a finding that an investigator has failed to perform unscheduled duty (availability or work) as assigned or reported, or is unable to perform unscheduled duty for an extended period due to physical or health reasons. If a certification is denied or canceled, the investigator's entitlement to availability pay shall be suspended for an appropriate period, consistent with agency policies. If the investigator's certification was valid when made, the suspension of availability pay shall be effected prospectively.

(e) An involuntary suspension of availability pay resulting from a denial or cancellation of certification under paragraph (d) of this section shall be a reduction in pay for the purpose of applying the adverse action provisions of 5 U.S.C. 7512 and 5 CFR part 752.

(f) The head of an agency (or authorized designee) may prescribe any additional regulations necessary to administer the certification requirement, including procedures for retroactive correction in cases in which a certification is issued belatedly or lapses due to administrative error.

§ 550.185 Payment of availability pay.

(a) Availability pay shall be an amount equal to 25 percent of the criminal investigator's rate of basic pay (as defined in § 550.103(j)). However, availability pay shall be paid only for periods of time during which the investigator receives basic pay.

(b) Except as provided in paragraph (c) of this section, a criminal investigator who is eligible for availability pay shall continue to receive

such pay during any period such investigator is attending agency-sanctioned training, on agency-ordered travel status, on agency-approved leave with pay, or on excused absence with pay for relocation purposes.

(c) Agencies may, at their discretion, provide availability pay to criminal investigators during training that is considered initial, basic training usually provided in the first year of service.

(d) Agencies may, at their discretion, provide for the continuation of availability pay when a criminal investigator is on excused absence with pay, except where payment is mandatory under paragraph (b) of this section.

(e) The amount of availability pay payable to a criminal investigator for a pay period is not affected by the occurrence of a paid holiday during that period.

§ 550.186 Relationship to other payments.

(a) Standby duty pay under § 550.141 and administratively uncontrollable overtime pay under § 550.151 may not be paid to a criminal investigator receiving availability pay. Receipt of availability pay does not affect an investigator's entitlement to other types of premium pay (including overtime pay under § 550.111) based on hours other than unscheduled duty hours. However, a criminal investigator receiving availability pay may not be paid any other premium pay based on unscheduled duty hours.

(b) Availability pay shall be treated as part of basic pay only for the following purposes:

(1) 5 U.S.C. 5524a, pertaining to advances in pay;

(2) 5 U.S.C. 5595(c), pertaining to severance pay;

(3) 5 U.S.C. 8114(e), pertaining to workers' compensation;

(4) 5 U.S.C. 8331(3) and 5 U.S.C. 8401(4), pertaining to retirement benefits;

(5) 5 U.S.C. 8431, pertaining to the Thrift Savings Plan; and

(6) 5 U.S.C. 8704(c), pertaining to life insurance.

(c) Availability pay shall be used in computing a lump-sum payment for accumulated annual leave under 5 U.S.C. 5551 and 5552.

(d) The minimum wage and the hours of work and overtime pay provisions of the Fair Labor Standards Act do not apply to criminal investigators receiving availability pay.

§ 550.187 Transitional provisions.

(a) Except as provided in paragraph (b) of this section, not later than the first day of the first pay period beginning on or after October 30, 1994, each criminal investigator qualified to receive availability pay and the appropriate supervisory officer (as designated by the agency head or authorized designee) shall make an initial certification to the head of the agency that the investigator is expected to meet the substantial hours requirement in § 550.183. The head of an agency may prescribe procedures necessary to administer this paragraph.

(b)(1) In the case of criminal investigators who are employed in offices of Inspectors General and who, immediately prior to September 30, 1994, were not receiving administratively uncontrollable overtime pay, or were receiving such pay at a rate of less than 25 percent, the employing office may delay implementation of availability pay; however, availability pay shall be implemented (in accordance with §§ 550.181 through 550.186) no later than—

(i) September 30, 1995, for investigators who are not receiving administratively uncontrollable overtime pay; or

(ii) The first day of the last pay period ending on or before September 30, 1995, for investigators who were receiving administratively uncontrollable overtime pay at a rate of less than 25 percent immediately prior to September 30, 1994.

(2) A criminal investigator who is employed in an Inspector General office and was receiving administratively uncontrollable overtime pay at a rate of less than 25 percent immediately prior to September 30, 1994, shall continue to receive at least that rate or a higher rate, if increased by the employing agency, until the availability pay provision is implemented for the position (no later than as provided in paragraph (b)(1)(ii) of this section).

(3) Implementation of availability pay for criminal investigators under paragraph (b)(1) of this section shall be in accordance with the requirements and conditions set forth in §§ 550.181 through 550.186. For qualified investigators, an initial certification shall be made, consistent with paragraph (a) of this section.

Subpart B—Advances in Pay

6. The authority citation for part 550, subpart B, is revised to read as follows:

Authority: 5 U.S.C. 5524a, 5545a(h)(2)(B); sections 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509), 104 stat. 1462 and 1466, respectively; E.O. 12748, February 1, 1991, 3 CFR 1992 Comp., p. 316.

7. In § 550.202, the definition of *rate of basic pay* is revised to read as follows:

§ 550.202 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including, as applicable, annual premium pay under 5 U.S.C. 5545(c), availability pay under 5 U.S.C. 5545a, night differential for prevailing rate employees under 5 U.S.C. 5343(f), and any interim geographic adjustment or special pay adjustment for law enforcement officers under section 302 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively, or locality-based comparability payment under 5 U.S.C. 5304, but not including additional pay of any kind.

Subpart G—Severance Pay

8. The authority citation for part 550, subpart G, is revised to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, November 13, 1965, 3 CFR 1954–1965 Comp., p. 357

9. In § 550.703, the definition of *rate of basic pay* is revised to read as follows:

§ 550.703 Definitions.

* * * * *

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including, as applicable, annual premium pay for standby duty under 5 U.S.C. 5545(c)(1), availability pay under 5 U.S.C. 5545a, night differential for prevailing rate employees under 5 U.S.C. 5343(f), and any interim geographic adjustment or special pay adjustment for law enforcement officers under section 302 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), respectively, or locality-based comparability payment under 5 U.S.C. 5304, but not including additional pay of any kind.

* * * * *

PART 551—PAY ADMINISTRATION UNDER THE FLSA

10. The authority citation for part 551 is revised to read as follows:

Authority: 5 U.S.C. 5542c; sec. 4(f) of the Fair Labor Standards Act for 1938, as amended by Public Law 93–259, 88 Stat. 55 (29 U.S.C. 204f).

Subpart B—Exemptions

11. Section 551.209 is added to read as follows:

§ 551.209 Exemption of criminal investigators receiving availability pay.

A criminal investigator receiving availability pay under § 550.181 is exempt from the hours of work and overtime pay provisions of the Act.

Subpart C—Minimum Wage Provisions

12. In § 551.301, paragraph (a) is revised to read as follows:

§ 551.301 Minimum wage.

(a)(1) Except as provided in paragraph (a)(2) of this section and § 551.311, an agency shall pay each of its employees wages at rates not less than the minimum wage specified in section 6(a)(1) of the Act for all hours of work as defined in subpart D of this part.

(2) The minimum wage provisions of the Act do not apply to a criminal investigator receiving availability pay under § 550.181.

* * * * *

PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS

13. The authority citation for part 575 is revised to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 5753, 5754, and 5755; sec. 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101–509), 104 Stat. 1462 and 1466, respectively; E.O. 12748, February 1, 1991, 3 CFR 1992 Comp., p. 316.

Subpart D—Supervisory Differentials

14. In § 575.405, paragraphs (c)(5) and (c)(6) are revised and paragraph (c)(7) is added to read as follows:

§ 575.405 Calculation and payment of supervisory differential.

* * * * *

(c) * * *

(5) Any other continuing payment, except night, Sunday, or holiday premium pay or a hazardous duty differential under chapter 55 of title 5, United States Code;

(6) Premium pay paid on an annual basis under 5 U.S.C. 5545(c); and

(7) Availability pay under 5 U.S.C. 5545a.

* * * * *

PART 581—PROCESSING GARNISHMENT ORDERS FOR CHILD SUPPORT AND/OR ALIMONY

15. The authority citation for part 581 continues to read as follows:

Authority: 42 U.S.C. 659, 661–662; 15 U.S.C. 1673; E.O. 12105 (43 FR 59465 and 3 CFR 262) (1979).

Subpart A—Purpose and Definitions

16. In § 581.103, paragraph (a)(6) is revised to read as follows:

§ 581.103 Moneys which are subject to garnishment.

(a) * * *

(6) Standby duty pay, administratively uncontrollable overtime pay, and availability pay;

* * * * *

PART 870—BASIC LIFE INSURANCE

17. The authority citation for part 870 continues to read as follows:

Authority: 5 U.S.C. 8716; § 870.202(c) also issued under 5 U.S.C. 7701(b)(2); subpart J is also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended.

Subpart C—Amount of Insurance

18. In § 870.302, paragraph (a) is revised to read as follows:

§ 870.302 Annual rates of pay.

(a) An insured employee's annual pay is his/her annual rate of basic pay as fixed by law or regulation, except that annual pay for this purpose shall include—

(1) Standby duty premium pay under 5 U.S.C. 5545(c)(1);

(2) For a law enforcement officer as defined in §§ 831.902 or 842.802, administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2); and

(3) Availability pay under 5 U.S.C. 5545a.

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[FR Doc. 94–31650 Filed 12–22–94; 8:45 am]
BILLING CODE 6325–01–M

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 966

[Docket No. FV94–966–1FIR]

Tomatoes Grown in Florida; Amendment of Rules and Regulations

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule which clarified registered handler application and approval procedures and the Florida Tomato Committee's (committee) authority to cancel a handler's certificate of registration for good cause. That rule also clarified that only registered handlers of Florida tomatoes may ship such tomatoes in interstate commerce. The interim final rule also added special purpose shipment outlets, redefined one of those outlets, and brought the order's special purpose shipment provisions into conformity with each other. Finally, that rule provided that handlers must report packout information on a daily basis to the committee or an authorized agent of the committee. Continuation of these changes is expected to enhance compliance with the order.

EFFECTIVE DATE: January 23, 1995.

FOR FURTHER INFORMATION CONTACT: Aleck Jonas, Marketing Specialist, Southeast Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, P.O. Box 2276, Winter Haven, Florida 33883–2276; (813) 299–4770 or FAX (813) 299–5169, or Shoshana Avrishon, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2523–S., P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–3610, or FAX (202) 720–5698.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 966 [7 CFR part 966], both as amended, regulating the handling of tomatoes grown in Florida. The order is authorized by the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

The Department is issuing this rule in accordance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform and is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After a hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or

has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of entry of the ruling.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 50 handlers of Florida tomatoes subject to regulation under the marketing order and approximately 250 producers in the production area. Small agricultural service firms, including tomato handlers, are defined by the Small Business Administration [13 CFR 121.601] as those whose annual receipts are less than $5,000,000, and small agricultural producers have been defined as those having annual receipts of less than $500,000. The majority of the tomato handlers and producers may be classified as small entities.

This rule finalizes an interim final rule that added a daily packout report and special purpose shipment outlets, redefined one of those outlets, and brought the order's special purpose shipment provisions into conformity with each other. That rule clarified registered handler application and approval procedures and the Florida Tomato Committee's (committee) authority to cancel a handler's certificate of registration for good cause. That rule also clarified that only registered handlers of Florida tomatoes may ship such tomatoes in interstate commerce. These changes were unanimously recommended by the committee. In addition, the Department made conforming changes.

The interim final rule was published in the **Federal Register** [59 FR 51087, October 7, 1994], with an effective date of October 7, 1994. The rule amended §§ 966.113, 966.120, and 966.323. Interested persons were invited to submit written comments until November 7, 1994. Three comments were received in support of the changes.

On May 31, 1994, the committee met to discuss the difficulty it had experienced in collecting assessments from a few handlers and in receiving complete, up-to-date packout information from some handlers. The committee recommended several modifications to the order's existing rules and regulations to improve these situations.

Handler Certification

Pursuant to § 966.323 Handling regulation, fresh market shipments of tomatoes by handlers to points outside the regulated area must meet grade, size, inspection, and container requirements. Fresh market shipments within the regulated area are not subject to such requirements. Fresh market shipments within and outside the regulated area are subject to assessments. The regulated area is defined as the portion of the State of Florida which is bounded by the Suwannee River, the Georgia Border, the Atlantic Ocean, and the Gulf of Mexico. Basically, it is the entire State of Florida, except the Panhandle. The production area is part of the regulated area.

Under § 966.113 Registered handler, and for the purpose of this order, registered handlers are persons who have adequate facilities for grading tomatoes for market and who assume initial responsibility for compliance with inspection, assessment, reporting, and other regulatory requirements concerning tomatoes grown in the production area. Any person who wishes to become a registered handler is required to make an application for registration with the committee on forms prescribed by, and available at the principle office of, the committee. If the applicant has facilities which are determined by the committee as adequate for grading tomatoes, the applicant may be approved as a registered handler. "Adequate facilities" had been defined as those being in a permanent location with nonportable equipment for the proper grading, sizing and packing of tomatoes. The committee recommended two minor additions to the definition: (1) The term "washing" was added to the definition, as that activity is an integral part of the handling process; and (2) the phrase "grown in the production area" was added at the end of the definition to further identify the tomatoes being handled. These changes were implemented by the interim final rule.

Most tomatoes produced in Florida are shipped fresh to markets outside the regulated area. The committee's goal is to avoid marketing problems associated with poor quality tomato shipments. The industry has spent substantial sums of money to promote Florida tomatoes to the trade and consumers. Such expenditures are predicated on the shipment by handlers of good quality tomatoes, which buyers have come to expect from Florida.

The committee reported that it had been difficult to collect assessments from some handlers in the past. One handler indicated no intention of paying assessments this year. Because of these compliance difficulties, and to foster shipments of good quality tomatoes, the committee recommended changes in the rules and regulations to strengthen the registered handler procedures, clarify handler responsibilities under the order and enhance the committee's compliance capabilities.

The committee recommended amending § 966.113 and adopting new provisions which: (1) Established that registered handlers must be certified by the committee; (2) provided the committee with the authority, criteria, and procedures for approving registered handler certifications and for cancelling such certifications for failure to pay assessments or provide reports to the committee; and (3) allowed only registered handlers to lawfully ship tomatoes outside of the regulated area. After considering the committee's recommendations, the Department determined that the changes were necessary to effectuate the declared policy of the Act.

New § 966.113 contained an introductory statement explaining the criteria that a handler must meet to be registered under the order. These provisions include having adequate facilities and being certified by the committee as a registered handler, handling tomatoes in compliance with order requirements, obtaining inspection, submitting required reports, and paying applicable assessments. Four of these provisions were specified in § 966.113. The provisions for certification as a registered handler and submission of reports were added to § 966.113 to help the committee with its compliance responsibilities and improve marketing assistance provided to handlers under the order.

New paragraph (a) established qualifications for registered handler certification. The committee or its duly authorized agent inspects handling facilities to determine if those facilities meet the requirements for certification. The facilities must be located in the regulated area and be permanent, nonportable buildings. The equipment in the facilities must also be nonportable and capable of properly washing, grading, sizing, and packing tomatoes grown in the production area. These requirements were the same as

those in the former definition for *Adequate facilities* in paragraph (e) of § 966.323, with the addition of washing as an activity and the reference to where the tomatoes are produced. The definition was removed from paragraph (e) of § 966.323 and, as modified, added to new paragraph (a) of § 966.113 to define, in the appropriate place in the rules and regulations, the kind of facilities and equipment needed for certification as a registered handler.

New paragraph (b) of § 966.113 specified the information requested by the committee in the application for registered handler certification. The information requested is common business identification information.

New paragraph (c) of § 966.113 provided that the committee or an agent of the committee make the determination that an applicant's facilities meet requirements. Such certification is made in writing by the committee. Denial of certification, and the basis thereof, is also made in writing to the applicant by the committee.

New paragraph (d) of § 966.113 established criteria for cancellation of a registered handler's certification, with the approval of the Secretary, based on failure to pay assessments on a timely basis and failure to provide required reports. A registered handler's certification is also subject to cancellation, with the approval of the Secretary, if the handler no longer has adequate facilities, as that term is defined in § 966.113(a). A cancelled certification is reinstated once a handler demonstrates compliance with assessment, reporting and facility requirements. New paragraph (d) also included the exemption, currently in § 966.113, concerning persons who make deliveries of ungraded tomatoes to handling facilities.

New paragraph (e) of § 966.113 provided that any inspection certificate of tomatoes offered for inspection by a non-registered handler contains a statement to that effect. The inspection certificate for all such tomato lots reads "Fails to meet the requirements of Marketing Order No. 966 because the handler is not a registered handler." Such failing certificate is issued, regardless of the grade, size, or containerization of the tomatoes inspected. The committee keeps the Federal State Inspection Service (inspection service) abreast of all handlers' status. Any handler who is denied a registered handler certificate or who has a registered handler certificate cancelled, may appeal to the committee for reconsideration. Such appeal must be made in writing.

The Florida Road Guard Bureau of the Florida Department of Agriculture and Consumer Services releases tomato shipments for interstate commerce only if the inspection certificates indicate that such shipments meet marketing order requirements. Thus, persons or handlers not certified as a registered handler by the committee will not be able to ship tomatoes outside the regulated area.

The committee recommended that this provision be included under a separate title and paragraph. Because inspection certification is dependent on handler certification, the Department included this recommendation as part of the new provision on certified registered handlers in § 966.113. For emphasis and to provide consistency in regulations, the Department also added this requirement to paragraph (a)(4) *Inspection.* in § 966.323.

Section 966.113 provides that handlers must pay assessments on a timely basis to maintain their registered handler certification. For emphasis and to provide consistency in regulations, the Department also added this requirement as new paragraph (e) *Assessments.* under § 966.323.

Certificates of Privilege

The committee recommended changing an incorrect citation in the first sentence of § 966.120 Application for Certificate of Privilege which incorrectly referred to § 966.53 of the order. The committee stated that the intent of the section is to require Certificates of Privilege for special purpose shipments authorized in § 966.54 Shipments for special purposes. Thus, § 966.54 was referenced in the first sentence of § 966.120. This adjustment did not change former practices as the committee's use of Certificates of Privilege is consistent with § 966.54 of the order.

The interim final rule also changed § 966.120 to be consistent with the outlets specified in § 966.323 Handling regulations. One outlet currently specified in § 966.120 was changed and three new outlets were added. The term "processing" replaced the term "canning" to make the regulations consistent with current industry practice. Pickling, experimental purposes and export, which were specified in § 966.323(b), are added to § 966.120. The committee also proposed that it have the authority, with the Secretary's approval, to add other outlets to meet changing food technologies and services which could benefit from receiving tomatoes shipped under Certificate of Privilege. This authority was added to § 966.120.

The Department made conforming changes to paragraph (b) of § 966.323 to make that paragraph consistent with the changes to § 966.120. The term "canning" was changed to "processing" and committee authority to add special purpose outlets, with the Secretary's approval, was added.

The Department also added a definition for "processing" to paragraph (e) § 966.323 Definitions. "Processing" was defined as the manufacture of any tomato product which has been converted into juice, or preserved by any commercial process, including canning, dehydrating, drying, and the addition of chemical substances. Also, paragraph (e) of § 966.323 was redesignated as paragraph (g).

Packout Reports

The committee also recommended that all handlers be required to present daily packout reports to the inspection service. The inspection service collects these reports from most handlers for inspection billing purposes and sends a daily packout report to the committee.

All handlers maintain records of their daily packout activity based on the grade, size, and containers of tomatoes handled. The inspection service collects this data at the end of each work day for inspection billing purposes. As a service to the committee and tomato handlers, the inspection service compiles this information (received from its various inspectors) and reports it to the committee at the end of the day or the following morning. The committee compiles this data into a daily, industry-wide, packout report. The report is considered an indispensable tool for handlers to assess daily tomato market conditions and is disseminated, upon request, to registered handlers.

However, some handlers had failed to provide their packout data to the inspection service on a timely basis to allow inclusion of the handler's data in each daily, industry-wide report. To be a useful tool, the industry-wide report must be accurate and include, to the extent possible, the total industry packout. Because the report is such a valuable marketing tool for handlers, the committee voted unanimously to propose that each registered handler be required to report the handler's daily packout data to the inspection service in a timely manner.

The packout data that handlers provide to the inspection service, to the committee directly, or to another agent of the committee is data that is routinely compiled by each handler as part of the handler's normal, daily operating records. The reporting deadline of the end of the working day, as designated

by the committee, has not presented an undue burden on handlers because the data requested is routinely recorded by handlers at the end of each working day. Individual handler data collated and disseminated in an industry-wide report has not disclosed confidential information or the business position of individual handlers.

The committee recommended that this change be added to the rules and regulations as a separate, new number, title and paragraph. However, because the new provision established a reporting requirement on handlers, the Department inserted the provision as a separate, new paragraph under § 966.323. Thus, a new paragraph (e) was added to the handling regulation and former paragraph (e) *Definitions.* was redesignated as paragraph (g).

Assessments

Finally, the committee recommended that a clarification be added to the rules and regulations to clearly state that handlers must pay assessments to maintain their certification as registered handlers. Failure of some handlers to pay their assessments places an unfair burden upon those handlers who comply with order requirements. The Department added this clarification to § 966.323 Handling regulation because payment of assessments is a requirement of handlers under the order. A new paragraph *(f) Assessments.* was added to § 966.323. This paragraph stated that failure of a registered handler to pay assessments in a timely manner will result in cancellation of the registered handler's status, thus making that handler ineligible to ship tomatoes outside of the regulated area. Current committee collection procedures are:

(1) Weekly assessment billings during the harvest season;

(2) Payment within 30 days;

(3) Followed by a demand letter specifying the end of a 15-day extended notice period; and

(4) Referral to the Department for legal action. Under this rule, a handler who has not paid assessments after expiration of the extended notice period provided in the demand letter is considered out of compliance and is reported to the inspection service as a non-registered handler.

Based on the above, the Administrator of the AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paper Work Reduction Act of 1980, [44 U.S.C. Chapter 35], the information collection requirements contained in the interim final rule were submitted to the Office of Management and Budget (OMB) for approval and assigned OMB No. 0581–0073. Because handlers complete a form to be certified as a registered handler, no additional OMB approval was needed for such registration. However, that rule provided that each registered handler, at the end of each day in which tomatoes were handled by the registered handler, furnish the committee or it's designated agent an accurate accounting of the number of tomato containers packed that day. This report provides the grade, size, and containers of tomatoes packed by the handler each packing day. Because the information is readily available from each day's packout, the report takes five minutes to complete. The committee needs this information to compile a daily packout report which is used by handlers in their marketing efforts. This provision is consistent with current industry practice. It is estimated that 50 handlers submit daily reports and receive marketing assistance during the marketing period October 10, through June 15 each year. The OMB approved this information collection request on November 18, 1994.

After consideration of all relevant material presented, the information and recommendations submitted by the committee, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** [59 FR 51087, October 7, 1994], will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 966

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For the reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

PART 966—TOMATOES GROWN IN FLORIDA

Accordingly, the interim final amending 7 CFR part 966 which was published at 59 FR 51087 on October 7, 1994, is adopted as a final rule without change.

Dated: December 19, 1994

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division

[FR Doc. 94–31612 Filed 12–22–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Part 984

[Docket No. FV94–984–1FIR]

Walnuts Grown in California; Expenses and Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule that authorized expenses and established an assessment rate that will generate funds to pay those expenses. Authorization of this budget enables the Walnut Marketing Board (Board) to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program are derived from assessments on handlers.

EFFECTIVE DATE: August 1, 1994, through July 31, 1995.

FOR FURTHER INFORMATION CONTACT: Martha Sue Clark, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone 202–720–9918, or Richard P. Van Diest, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, Suite 102B, 2202 Monterey Street, Fresno, CA 93721, telephone 209–487–5901.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 984, both as amended (7 CFR part 984), regulating the handling of walnuts grown in California. The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

The Department of Agriculture is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the provisions of the marketing order now in effect, California walnuts are subject to assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable walnuts handled during the 1994–95 marketing year, which began August 1, 1994, and ends July 31, 1995. This final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for