

(b) * * * Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS, and provided that the area is not abandoned.

22. A new § 12.34 is added to read as follows:

§ 12.34 Paperwork Reduction Act assigned number.

The information collection requirements contained in this regulation (7 CFR part 12) have been approved by the Office of Management and Budget under provisions of 44 U.S.C. chapter 35 and have been assigned OMB Number 0560-0004.

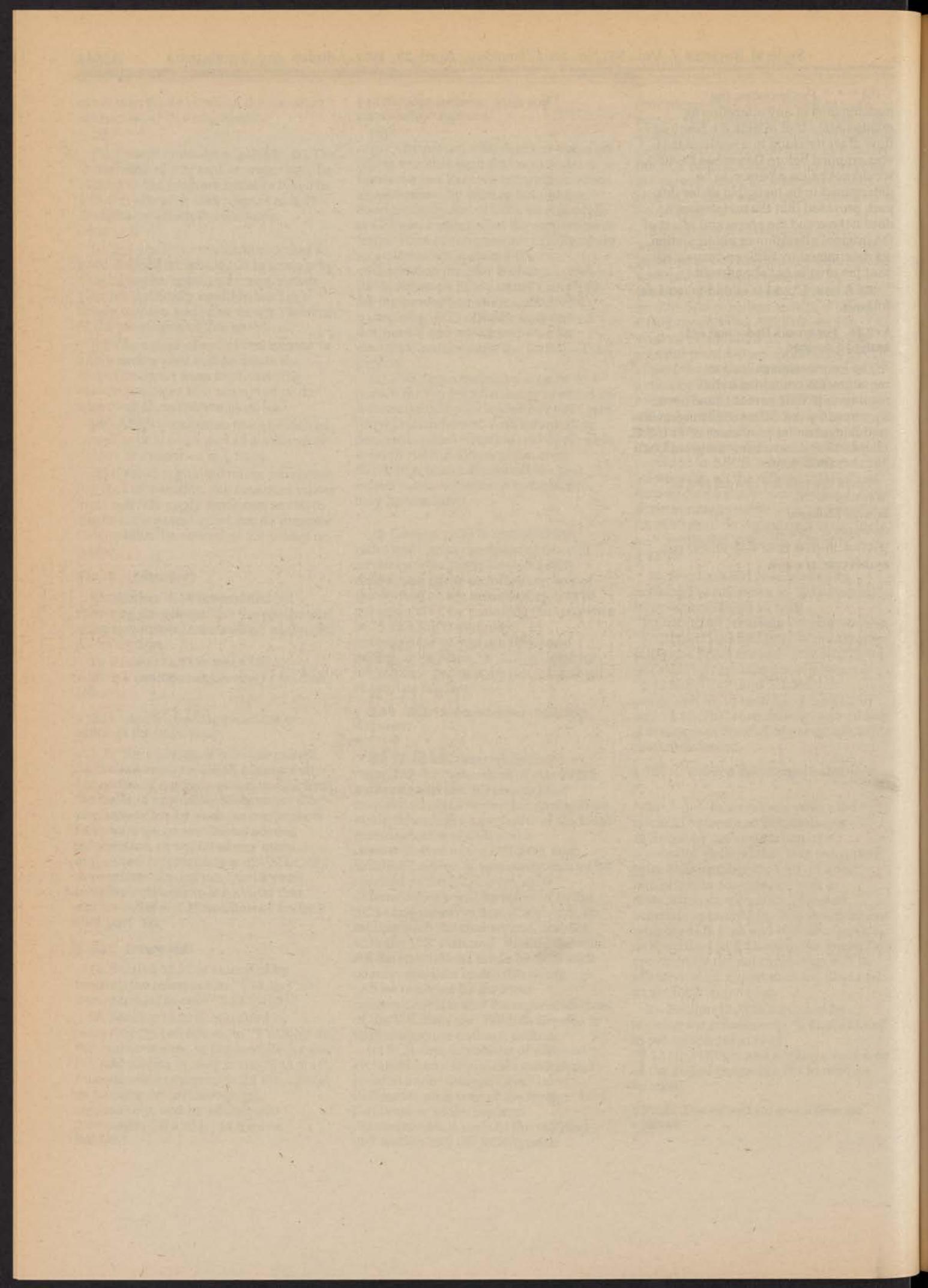
Signed this 15th day of April 1991 in Washington, DC.

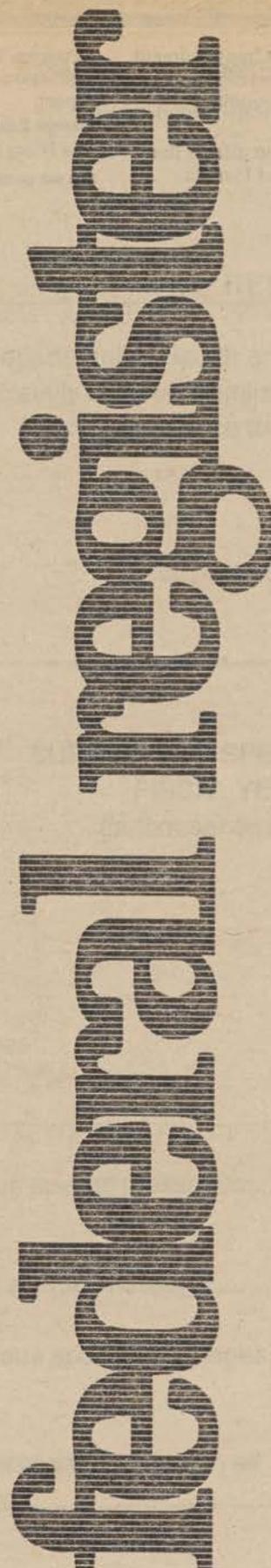
Edward Madigan,

Secretary of Agriculture.

[FR Doc. 91-9146 Filed 4-17-91; 4:47 pm]

BILLING CODE 3410-05-M.





Tuesday
April 23, 1991

Part IV

**Office of
Management and
Budget**

Budget Rescissions and Deferrals; Notice

OFFICE OF MANAGEMENT AND BUDGET**Budget Rescissions and Deferrals**

To the Congress of the United States:

In accordance with the Impoundment Control Act of 1974, I herewith report one proposed rescission, totaling \$2,400,000.

The proposed rescission affects the Department of Health and Human

Services. The details of the proposed rescission are contained in the attached report.

George Bush,

The White House, April 16, 1991.

BILLING CODE 3110-01-M

CONTENTS OF SPECIAL MESSAGE
 (in thousands of dollars)

<u>RESCISSION NO.</u>	<u>ITEM</u>	<u>BUDGET AUTHORITY</u>
	Department of Health and Human Services:	
	Family Support Administration:	
R91-27	Interim assistance to States for legalization.....	2,400
	Total rescissions.....	2,400

SUMMARY OF SPECIAL MESSAGES
FISCAL YEAR 1991
 (in thousands of dollars)

	<u>RESCSSIONS</u>	<u>DEFERRALS</u>
Fourth special message:		
New items.....	2,400	—
Revisions to previous special messages.....	—	—
Effects of the fourth special message.....	2,400	—
Amounts from previous special messages....	4,309,851	9,342,646
TOTAL amount proposed to date in all special messages.....	4,312,251	9,342,646

Department of Health and Human Services
Family Support Administration
Interim assistance to States for legalization

The first paragraph under this heading in Public Law 101-517 is amended by deleting "\$566,854,000" and inserting in its place "\$569,254,000."

Rescission Proposal No. R91-27

PROPOSED RESCISSION OF BUDGET AUTHORITY
Report Pursuant to Section 1012 of P.L. 93-344

AGENCY: Department of Health and Human Services	New budget authority..... \$ <u>273,146,000</u> (P.L. 99-603, 101-517)
BUREAU: Family Support Administration	Other budgetary resources...
Appropriation title and symbol: Interim assistance to States for legalization 7511508	Total budgetary resources... <u>273,146,000</u>
OMB identification code: 75-1508-0-1-506	Amount proposed for rescission.....\$ <u>2,400,000</u>
Grant program: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Legal authority (in addition to sec. 1012): <input type="checkbox"/> Antideficiency Act <input type="checkbox"/> Other
Type of account or fund: <input checked="" type="checkbox"/> Annual <input type="checkbox"/> Multi-year _____ <input type="checkbox"/> No-Year _____ (expiration date)	Type of budget authority: <input checked="" type="checkbox"/> Appropriation <input type="checkbox"/> Contract authority <input type="checkbox"/> Other

JUSTIFICATION: Transitional grants are provided to States to assist in providing financial, medical, and educational assistance to newly legalized aliens. Federal administrative expenses are included in this appropriation. States have large balances they can draw down in lieu of new budget authority. Section 204(a) (1)(C) of the Immigration Reform and Control Act of 1986 will automatically increase advance appropriations for FY 1992 by an amount equal to the rescission. As a result, States will receive the funds before using all their balances.

Enactment of this rescission would eliminate the need for a sequester of approximately .0013 percent of all sequesterable domestic discretionary resources in FY 1991. A sequester action is potentially necessary due to the fact that H.R. 1281, the "Dire Emergency Supplemental Appropriations Act, 1991," exceeds the statutory domestic discretionary cap by \$2.4 million.

ESTIMATED PROGRAM EFFECT: None.

OUTLAY EFFECT: (in thousands of dollars):

1991 Outlay Estimate		Outlay Changes					
Without Rescission	With Rescission	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996
545,765	545,765	---	---	---	---	---	---



Tuesday
April 23, 1991

Part V

Office of Personnel Management

**5 CFR Parts 731, 732, 736, and 754
Suitability, Personnel Security and
Related Programs, Investigations, and
Suitability Disqualification Actions; Interim
Rule**

OFFICE OF PERSONNEL MANAGEMENT**5 CFR Parts 731, 732, 736, and 754**

RIN 3206-AC19, 3206-AC21, 3206-AB92

Suitability, Personnel Security and Related Programs, Investigations, and Suitability Disqualification Actions**AGENCY:** Office of Personnel Management.**ACTION:** Interim regulations with request for comments.

SUMMARY: The Office of Personnel Management has revised regulations on making personnel suitability investigations and designating risk levels for public trust positions, separating national security positions, procedures, and guidelines, and readjusted some personnel investigations guidelines. These changes reflect a reassessment of existing authorities that was made in response to recent concerns about these program areas as expressed on the SF 86, Questionnaire for Sensitive Positions, and SF 85, Questionnaire for Non-Sensitive Positions, and are intended to make clearer the distinctions between the requirements for suitability and those for national security. These changes support the new SF 85P, Questionnaire for Public Trust Positions, and the revised SF 85 and SF 86, which were recently approved.

DATES: Effective date: May 23, 1991. Comments must be received on or before June 24, 1991.

ADDRESSES: Send written comments to Frances A. Sclafani, Associate Director for Investigations, Office of Personnel Management, Post Office Box 886, Washington, DC, 20044, or deliver to OPM, room 5478, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Peter Garcia, Assistant Director, Office of Federal Investigations, (202) 376-3800.

SUPPLEMENTARY INFORMATION: Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, the Director finds that good cause exists for waiving the general notice of proposed rulemaking. The notice is being waived because of the heightened concerns about Government suitability and security programs and related investigative requirements and procedures. The urgency of the need to address the concerns expressed in the courts, the Congress, and by various public and private individuals and organizations, which has contributed to an intensive reassessment of OPM policies and procedures, now prompts OPM to

expedite issuing these regulations to provide the foundation for program and guidance changes that respond to the concerns and implement the results of the OPM reassessment. OPM will consider comments received in response to this notice and make whatever adjustments are indicated based on a review of the comments received.

OPM has changed its regulations on suitability, at 5 CFR part 731, on related ineligibility actions, at 5 CFR part 754 (which are incorporated into revised part 731), and on matters relating to national security positions, at 5 CFR part 732, and on personnel investigations, at 5 CFR part 736. 5 CFR parts 731, 732, and 736 have been adjusted, and a reader of these parts should be aware that in addition to the main changes, words and clauses have been changed where necessary to update, or make consistent, text that was otherwise not changed.

In 5 CFR part 731, subpart A is used to address the scope of this part. It addresses the purpose of this part to reflect a reassessment of suitability program authorities, addresses implementation of regulatory and program changes, and includes delegations to agencies. Subpart B is retitled Suitability Determination to reflect the broader responsibility for suitability in the Government. 5 CFR 731.202, dealing with criteria, is changed in significant parts to focus on job-relatedness of specific factors, and to otherwise narrow the scope of certain of the criteria. Subpart C is revised to address risk designation and investigative requirements and is made the basis for procedures that OPM will implement to address concerns of Congress, Federal employee unions, and others, via a new investigations questionnaire, Questionnaire for Public Trust Positions, SF 85P. Clarifying language has been added in other sections of subpart C. Subpart D incorporates the text of current 5 CFR part 754 amended to insert OPM in place of entities that are otherwise identified. Subpart E establishes an OPM Suitability Review Panel (the Panel) to review suitability determinations made under this part, requirements for operation of the Panel, and the scope of its review. Current subpart D is incorporated into subpart E as § 731.407, Appeal to Merit Systems Protection Board. The current subpart E becomes subpart F, Reemployment Eligibility, and subpart G, Savings Provision, is added to address cases in progress at the time these interim final regulations appear.

In 5 CFR part 732, retitled National Security Positions, subparts A, B, and C

are used to provide a context to the scope of changes in this part and to establish requirements in regulation that are consistent with the recent reassessment of authorities relevant to this part. This includes adding procedures in existence on position sensitivity level designation requirements, related investigative requirements and waivers and exceptions thereto, and periodic reinvestigation requirements.

In 5 CFR part 736, two subparts, A and B, are established, current § 736.102 is incorporated into subpart A substantially unchanged, and each subpart contains adjustments and more economical expression of current content. Subpart A continues to address scope and covers purpose and definitions, provides for notice to investigative sources, and provides requirements on available to the public. Subpart B addresses Investigative Requirements, and speaks specifically to OPM and agency responsibilities. 5 CFR part 754 has been incorporated into revised 5 CFR part 731.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they relate to internal personnel matters within the Federal Government.

List of Subjects in 5 CFR Parts 731, 732, 736, and 754

Administrative practice and procedure, Government employees. U.S. Office of Personnel Management. Constance Berry Newman, Director.

Accordingly, OPM amends 5 CFR parts 731, 732, 736, and 754 as follows:

PART 731—SUITABILITY

1. Part 731 is revised to read as follows:

Subpart A—Scope

Sec.

731.101 Purpose.
731.102 Implementation.
731.103 Delegation to Agencies.

Subpart B—Suitability Determinations

731.201 Standard.
731.202 Criteria.

Subpart C—Suitability Rating Actions

731.301 Jurisdiction.
731.302 Risk designation and investigative requirements.

731.303 Actions by OPM and Other Agencies.

731.304 Debarment.

Subpart D—Suitability Actions

731.401 Scope.

731.402 Notice of proposed action.

731.403 Answer.

731.404 Decision.

Subpart E—Administrative Review and Appeal

731.501 OPM Review Panel.

731.502 Procedures.

731.503 Content of appeal.

731.504 Representation.

731.505 Pay status.

731.506 Decision.

731.507 Scope of review.

731.508 Appeal to the Merit Systems Protection Board.

Subpart F—Reemployment Eligibility

731.601 Reemployment eligibility of certain former Federal employees.

Subpart G—Savings Provision

731.701 Savings provision.

Authority: 5 U.S.C. 1302, 3301, 3302, 7301, 7701; E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218; E.O. 11222, 3 CFR, 1964-1965 Comp., p. 306; E.O. 11491, 3 CFR, 1968-1970 Comp., p. 861.

Subpart A—Scope

§ 731.101 Purpose.

The purpose of this part is to establish criteria and procedures for making determinations of suitability for employment in positions in the competitive service and for career appointments in the Senior Executive Service (hereinafter in this part, "competitive service") pursuant to 5 U.S.C. 3301 and E.O. 10577. Section 3301 of title 5, United States Code, directs consideration of "age, health, character, knowledge, and ability for the employment sought." E.O. 10577 directs OPM to examine "suitability" for competitive Federal employment. This part concerns only determinations of "suitability" based on an individual's character or conduct that may impact the efficiency of the service by jeopardizing an agency's accomplishment of its duties or responsibilities, or by interfering with or preventing effective service in the position applied for or employed in, and determinations that there is a statutory or regulatory bar to employment. Determinations made under this part are distinct from determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 or similar authorities.

§ 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability under

this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation.

(b) Policies, procedures, criteria, and guidance for the implementation of this part shall be set forth in issuances of the Federal Personnel Manual System or other appropriate instruments. Agencies exercising authority under this part by delegation from OPM shall conform to such policies, procedures, criteria, and guidance.

§ 731.103 Delegation to agencies.

(a) *Direct Hires.* The head of each agency is delegated authority for adjudicating suitability under this part for applicants filing directly with the agency outside a civil service register.

(b) OPM may in its discretion delegate to the heads of agencies authority for adjudicating suitability in other cases involving applicants and eligibles for, and appointees to, competitive service positions in the agency.

(c) Paragraphs (a) and (b) of this section notwithstanding, OPM may exercise its jurisdiction under this part in any case when deemed necessary.

(d) Any applicant, eligible, or appointee who is found unsuitable by any agency having delegated authority from OPM under this part for any reason named in § 731.202 may appeal to the Merit Systems Protection Board under the Board's regulations.

Subpart B—Suitability Determinations

§ 731.201 Standard.

Subject to subpart C of this part, OPM may deny an applicant examination, deny an eligible appointment, and direct an agency to remove an appointee or employee when OPM determines the action will promote the efficiency of the service.

§ 731.202 Criteria.

(a) *General.* In determining whether its action will promote the efficiency of the service, OPM or an agency to which OPM has delegated authority under § 731.103 of this chapter, shall make its determination on the basis of:

(1) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, efficient service in the position applied for or employed in; or

(2) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties or responsibilities; or

(3) Whether a statutory or regulatory bar prevents the lawful employment of the individual in the position in question.

(b) *Specific factors.* When making a determination under paragraph (a) of this section, any of the following reasons may be considered a basis for finding an individual unsuitable:

(1) Misconduct or negligence in prior employment which would have a bearing on efficient service in the position in question, or would interfere with or prevent effective accomplishment by the employing agency of its duties and responsibilities;

(2) Criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee, or to that person's service in the position or the service of other employees;

(3) Intentional false statement or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by § 5.4 of this chapter;

(5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;

(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) *Additional considerations.* In making a determination under paragraphs (a) and (b) of this section, OPM and agencies shall consider the following additional factors to the extent that they deem these factors pertinent to the individual case:

(1) The kind of position for which the person is applying or in which the person is employed, including the degree of public trust or risk in the position;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the person involved at the time of the conduct;

(6) Contributing societal conditions;

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

Subpart C—Suitability Rating Actions**§ 731.301 Jurisdiction.**

(a) *Appointments subject to investigation.* (1) In order to establish an appointee's suitability for employment in the competitive service, every appointment to a position in the competitive service is subject to investigation by OPM, except:

- (i) Promotion;
- (ii) Demotion;
- (iii) Reassignment;
- (iv) Conversion from career-conditional to career tenure;

(v) Appointment, or conversion to an appointment, made by an agency of an employee of that agency who has been serving continuously with that agency for at least one year in one or more positions under an appointment subject to investigation; and

(vi) Transfer, provided the one-year, subject-to-investigation period applied to the previous appointment has expired.

(2) Appointments are subject to investigation to continue OPM's jurisdiction to investigate the suitability of an applicant after appointment and to authorize OPM to require removal when it finds the appointee is unsuitable for Federal employment. The subject-to-investigation condition may not be construed as requiring an employee to serve a new probationary or trial period or as extending the probationary or trial period of an employee.

(b) *Duration of condition.* The subject-to-investigation condition expires automatically at the end of one year after the effective date of appointment, except in a case involving intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony.

§ 731.302 Risk designation and investigative requirements.

(a) *Risk designation.* Agency heads shall designate every competitive service position within the agency at either a High, Moderate, or Low risk level as determined by the position's potential for adverse impact to the efficiency of the service.

(b) *Investigative requirements.* Persons receiving an appointment made subject to investigation shall undergo a background investigation, the scope and coverage of which shall be determined by OPM in accordance with the level of risk determined by the agency.

(c) *Suitability reinvestigations.* (1) Every incumbent of a competitive service position:

(i) Designated High Risk under paragraph (a) of this section, or

(ii) That is a law enforcement or public safety position designated Moderate Risk under paragraph (a) of this section, shall be subject to a periodic reinvestigation of a scope established by OPM 5 years after placement, and at least once each succeeding 5 years.

(2) Periodic reinvestigations required by paragraph (c)(1) of this section may be adjudicated by the employing agency according to the procedures in this part, if applicable.

§ 731.303 Actions by OPM and other agencies.

(a) For a period of one year after the effective date of an appointment subject to investigation under § 731.301, OPM may instruct an agency to remove an appointee when it finds that the appointee is unsuitable for any of the reasons cited in § 731.202.

(b) Thereafter, OPM may require the removal of an employee on the basis of either intentional false statement or deception or fraud in examination or appointment; or refusal to furnish testimony; or statutory or regulatory bar.

(c) An action to remove an appointee or employee taken pursuant to an instruction by OPM is not an action under part 752, or §§ 315.804 through 315.806 of part 315, of this chapter.

(d) When OPM instructs an agency to remove an appointee or employee under this part it shall notify the agency and the appointee or employee of its decision in writing.

(e) Before OPM, or any agency having delegated authority from OPM under this part, shall take a final suitability action against an applicant, eligible, appointee, or employee under this part, the person against whom the action is proposed shall be given notice of the proposed action (including the availability for review, upon request, of the materials relied upon), an opportunity to answer, notice of the final decision on the action, and notice of rights of appeal, if any, all in accordance with this part.

§ 731.304 Debarment.

(a) When OPM finds a person unsuitable for any reason named in § 731.202, OPM, in its discretion, may deny that person examination for and appointment to a competitive position for a period of not more than 3 years from the date of determination of unsuitability.

(b) On expiration of a period of debarment, a person who has been debarred may not be appointed to any position in the competitive service until

OPM has redetermined that person's suitability for appointment.

Subpart D—Suitability Actions**§ 731.401 Scope.**

(a) *Coverage.* This subpart sets forth the procedures to be followed when OPM, acting under authority of this part, proposes to take or to instruct an agency to take, a final suitability ineligibility action, including removal, against an applicant or eligible for appointment in, or an appointee or employee in, the competitive service. This subpart does not apply to an action taken by an agency to which OPM has delegated authority under § 731.103.

(b) *Definition.* In this subpart, "days" means calendar days.

§ 731.402 Notice of proposed action.

(a) OPM shall notify the applicant, eligible, appointee, or employee (hereinafter, the "respondent") in writing of the proposed action and of the charges against the respondent. The notice shall state the reasons, specifically and in detail, for the proposed action. The notice shall also state that the respondent has the right to answer this notice in writing. If the respondent is an employee the notice shall further state that the employee may also make an oral answer, as specified in § 731.403(a). The notice shall further inform the respondent of the time limits for answer as well as the address to which such answer should be made.

(b) OPM shall send a copy of this notice to the agency, if any, that is involved. The notice shall be served upon the respondent by being mailed to the respondent's last known residence or duty station no less than 30 days prior to the effective date of the proposed adverse action. If the respondent is employed in the competitive service on the date the notice is served, the respondent shall be entitled to be retained in pay status during the notice period.

§ 731.403 Answer.

(a) *Respondent's answer.* A respondent may answer the charges in writing and furnish affidavits in support of the response. A respondent who is an employee may answer orally. The respondent may be represented by a representative of the respondent's choice, and such representative shall be designated in writing to OPM. To be timely, a written answer shall be made to OPM no more than 30 days after the date of the notice of proposed action. In the event that an employee requests to make an oral answer, OPM shall

determine the time and place thereof. OPM shall consider any answer that the respondent makes in reaching a decision.

(b) *Agency's answer.* In actions proposed by OPM under 5 CFR 5.3, the agency may also answer the notice of proposed action. The time limit for filing an answer is 30 days from the date of the notice. OPM shall consider any answer that the agency makes in reaching a decision.

§ 731.404 Decision.

OPM shall notify the respondent and the agency of the decision. The decision shall be in writing, be dated, and inform the respondent of the reasons for the decision. Removal of appointees or employees will be effective 30 days following the date of the decision. The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart E of this part.

Subpart E—Administrative Review and Appeal

§ 731.501 OPM Review Panel.

(a) *Composition.* The OPM Review Panel (the Panel) is composed of 3 members. The Director of OPM in his/her sole discretion shall appoint the members of the Panel from among employees of OPM and shall designate one of them Chairman. The Chairman and members of the Panel shall be individuals who, by demonstrated ability, background, training, or experience in dealing with appellate matters or suitability issues are qualified to review OPM suitability determinations. This subpart does not apply to an action taken by an agency to which OPM has delegated authority under § 731.103, but agencies may establish similar procedures at their option.

(b) *Function.* The Panel's function is to review OPM determinations that an individual is unsuitable for employment in the competitive service and to affirm, reverse, or affirm as modified the OPM determination.

(c) *Decisions.* The Panel shall make the decision by majority vote.

§ 731.502 Procedures.

(a) *Time of filing.* When OPM issues a decision that an individual is unsuitable for employment, the individual may appeal the decision to the Panel within 30 days of the date of the decision.

(b) *Untimely filing.* If the 30-day time limit is not met the Panel will dismiss the appeal as untimely filed unless good cause for the untimely filing is demonstrated.

(c) *Computation of time.* In computing the number of days allowed for filing an appeal, the first day counted is that day after the date of the decision. If the date that would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the individual may file his/her appeal on the first workday after the date.

§ 731.503 Content of appeal.

(a) *Who may appeal.* Only an individual whom OPM has determined to be unsuitable for employment or his/her representative may file an appeal with the panel.

(b) *Content of appeal.* An appeal must include:

(1) The name, address, and telephone number of the appellant.

(2) A statement of the reasons why the appellant believes OPM's determination of unsuitability was incorrect together with any supporting documentation that he/she wishes the Panel to consider.

(c) *Service.* An appeal shall be served by personal delivery or by United States Mail to the Office of Personnel Management Suitability Review Panel, 1900 E Street, NW., room 800E, Washington, DC 20415, or P.O. Box 886, Washington, DC 20044. If the appeal concerns an individual employed at a Federal agency, the individual shall also serve a copy of the appeal upon the agency at which the action took place.

§ 731.504 Representation.

An individual may represent himself/herself or may designate a representative. An employing agency may disallow the choice of an individual as a representative that would result in a conflict of interest of position, that would conflict with the needs of the agency, or that would give rise to unreasonable costs to the Government. Before accepting a designation as representative, employees in the executive branch should consult 18 U.S.C. 205. An applicant may not be represented by an employee of an agency.

§ 731.505 Pay status.

When an employee or appointee whom OPM has determined to be unsuitable files an appeal the employing agency shall retain him or her in a pay status until the Panel issues its decision. If the Panel affirms OPM's decision, the employing agency shall remove the employee or appointee from the rolls within 5 days of receipt of the Panel's decision.

§ 731.506 Decision.

(a) After reviewing the record, the Panel shall prepare a written decision, affirming, reversing, or affirming as modified OPM's decision. The decision, if adverse, will inform the respondent of the right to appeal to the Merit Systems Protection Board under § 731.508 below.

(b) The Panel, in its discretion, may remand the case for additional investigation or consideration of relevant factors as it deems appropriate.

§ 731.507 Scope of review.

The Panel shall review de novo the OPM decision on the record. OPM bears the burden of proving by a preponderance of the record evidence that its decision would promote the efficiency of the service. If an issue of timeliness is raised, the individual appealing the OPM decision bears the burden of proving that his/her appeal was filed in a timely manner.

§ 731.508 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* An individual whom the Panel has decided is unsuitable for employment may appeal the Panel's decision to the Merit Systems Protection Board (the Board).

(b) *Exhaustion of remedies.* An individual may not appeal a determination of unsuitability to the Board unless he/she has perfected an appeal with the Panel and has received a decision from the Panel that he/she is unsuitable for Federal employment.

(c) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of title 5, Code of Federal Regulations.

Subpart F—Reemployment Eligibility

§ 731.601 Reemployment eligibility of certain former Federal employees.

(a) *Request for suitability determination.* When an employee has been removed by an agency on charges (other than security or loyalty) or has resigned on learning the agency planned to prefer charges, or while charges were pending, the former employee may request OPM to determine his or her suitability for further employment in the competitive service. OPM shall consider the request only if the former employee:

(1) Has completed any required probationary period;

(2) Has basic eligibility for reinstatement; and

(3) Includes a sworn statement with the request which sets forth fully and in detail the facts surrounding the removal or resignation.

(b) *Action by OPM.* (1) OPM, after appropriate consideration, including any investigation OPM deems necessary, shall inform the former employee of his or her current suitability for employment in the competitive service.

(2) If the former employee is found unsuitable and has had an opportunity to comment on the reasons for this finding, or has furnished comments to OPM, then OPM may cancel his or her reinstatement eligibility if that eligibility was obtained through fraud. In addition, OPM may prescribe a period of debarment from the competitive service not to exceed 3 years from the date of determination of unsuitability.

Subpart G—Savings Provision

§ 731.701 Savings provision.

No provision of these regulations shall be applied in such a way as to affect any administrative proceeding pending at the effective date of such provision. An administrative proceeding is deemed to be pending from the date of the "notice of proposed action" described in § 731.303 of this part.

PART 732—NATIONAL SECURITY POSITIONS

2. Part 732 is revised to read as follows:

Subpart A—Scope

Sec.

732.101 Purpose.

732.102 Definition and applicability.

Subpart B—Designation and Investigative Requirements

732.201 Sensitivity level designations and investigative requirements.

732.202 Waivers and exceptions to investigative requirements.

732.203 Periodic reinvestigation requirements.

Subpart C—Due Process and Reporting

732.301 Due process.

732.302 Reporting to OPM.

Subpart D—Security and Related Determinations

732.401 Reemployment eligibility of certain former Federal employees.

Authority: 5 U.S.C. 3301, 3302, 7312; 50 U.S.C. 403; E.O. 10450, 3 CFR, 1949-1953 Comp., p. 936.

Subpart A—Scope

§ 732.101 Purpose.

This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450—Security Requirements for Government Employment (April 27, 1953), 18 FR 2489,

3 CFR 1949-1953 Comp., p. 936, as amended.

§ 732.102 Definition and applicability.

(a) For purposes of this part, the term "national security position" includes: (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and (2) positions that require regular use of, or access to, classified information. Procedures and guidance provided in FPM chapter 732 and related issuances apply.

(b) The requirements of this part apply to competitive service positions, and to Senior Executive Service positions filled by career appointment, within the Executive Branch, and agencies may apply them to excepted service positions within the Executive Branch.

Subpart B—Designation and Investigative Requirements

§ 732.201 Sensitivity level designations and investigative requirements.

(a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

(b) Investigative requirements for each sensitivity level are provided in FPM chapter 732.

§ 732.202 Waivers and exceptions to investigative requirements.

(a) *Waivers.*—(1) *General.* A waiver of the preappointment investigative requirement contained in section 3(b) of Executive Order 10450 for employment in a sensitive national security position may be made only for a limited period: (i) In case of emergency if the head of the department or agency concerned finds that such action is necessary in the national interest; and (ii) when such finding is made a part of the records of the department or agency.

(2) *Specific waiver requirements.* (i) The preappointment investigative requirement may not be waived for appointment to positions designated Special-Sensitive under this part.

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by

§ 732.202(a)(1) of this part shall show what decision was made on obtaining prewaiver checks, as follows: (A) The nature of the emergency precluded obtaining prewaiver checks; or (B) checks were initiated but not all responses were received within 5 days; or (C) checks made and favorably completed are listed.

(iii) The waiver restriction is optional for positions designated Noncritical-Sensitive under this part.

(iv) When waiver is authorized, the required investigation must be initiated within 14 days of placement of the individual in the position.

(b) *Exceptions to investigative requirements.* (1) Pursuant to section 3(a) of E.O. 10450, the following positions are exempt from the investigative requirements of E.O. 10450, providing that the employing agency conducts such checks as it deems appropriate to insure that the employment or retention of individuals in these positions is clearly consistent with the interests of the national security:

(i) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days in either a single continuous appointment or series of appointments; or

(ii) Positions filled by aliens employed outside the United States.

(2) Other positions that OPM, in its discretion, deems appropriate may be made exempt based on a written request to OPM by the agency head in whose department or agency the positions are located.

§ 732.203 Periodic reinvestigation requirements.

The incumbent of each position designated Special-Sensitive or Critical-Sensitive under this part shall be subject to periodic reinvestigation of a scope prescribed by OPM 5 years after placement, and at least once each succeeding 5 years. The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security.

Subpart C—Due Process and Reporting

§ 732.301 Due process.

When an agency makes an adjudicative decision under this part based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative favorable placement or

clearance decision to an unfavorable decision, the agency must:

(a) Insure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in any determination.

(b) Comply with all applicable administrative due process requirements, as provided by law, rule, or regulation.

(c) At a minimum, provide the individual concerned:

(1) Notice of the specific reason(s) for the decision; and

(2) An opportunity to respond; and

(3) Notice of appeal rights, if any.

(d) Consider all available information in reaching its final decision.

(e) Keep any record of the agency action required by OPM as published in the Federal Personnel Manual and related issuances.

§ 732.302 Reporting to OPM.

(a) In accordance with section 9(a) of E.O. 10450, each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated.

(b) In accordance with section 14(c) of E.O. 10450, agencies shall report to OPM the action taken with respect to individuals investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

Subpart D—Security and Related Determinations

§ 732.401 Reemployment eligibility of certain former Federal employees.

(a) *Request.* A former employee who was terminated, or who resigned while charges were pending, from a department or agency of the Government under a statute or executive order authorizing termination in the interest of national security or on grounds relating to loyalty, and authorizing OPM to determine the eligibility for employment in another department or agency of the Government, may request OPM in writing to determine whether the individual is eligible for employment in another department or agency of the Government.

(b) *Action by OPM.* (1) OPM shall determine, and will notify the former employee, after appropriate consideration of the case, including such investigation as it considers necessary, whether the individual may be employed in another department or agency of the Government.

(2) If a former Federal employee found ineligible under this section has had an opportunity to comment on the reasons for the action, or has furnished them to OPM or to the former employing agency, OPM may cancel the reinstatement eligibility if the eligibility resulted from the last Federal employment and was obtained through fraud, and OPM may prescribe a period of debarment not to exceed 3 years.

PART 736—PERSONNEL INVESTIGATIONS

3. Part 736 is revised to read as follows:

Subpart A—Scope

Sec.

736.101 Purpose and definitions.

736.102 Notice of investigative sources.

736.103 Protecting the identity of a source.

736.104 Public availability of investigative files.

Subpart B—Investigative Requirements

736.201 Responsibilities of OPM and other Federal agencies.

Authority: Pub. L. 93-579; (5 U.S.C. 552a).

Subpart A—Scope

§ 736.101 Purpose and definitions.

(a) *Purpose.* The purpose of this part is to specify certain requirements for personnel investigations conducted by OPM, and for those conducted under delegated authority from OPM. The requirements of this part apply to suitability and national security investigations conducted under parts 731 and 732 of this chapter; they also apply to investigations to determine eligibility or qualifications not covered in parts 731 and 732 of this chapter. The requirements of this part apply to employees in the civil service of the Executive Branch and to persons performing contract, voluntary or indirect services for the Federal Government, as set forth in subsection (b) below.

(b) *Definitions.* For the purposes of this part, (1) *Federal employment* includes the following range of services performed for the Federal government: (i) All employment in the competitive or excepted service or the Senior Executive Service in the Executive Branch; (ii) appointments, salaried or unsalaried, to Federal Advisory Committees or to membership agencies; (iii) cooperative work assignments in which the individual has access to Federal materials such as examination booklets, or performs service for, or under supervision of, a Federal agency while being paid by another organization such as a State or local government; (iv) volunteer arrangements in which the

individual performs service for, or under the supervision of, a Federal agency; and (v) volunteer or other arrangements in which the individual represents the United States Government or any agency thereof.

(2) *Agency* means any authority of the Government of the United States, whether or not it is within or subject to review by another agency, and includes any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government, or any independent regulatory agency.

(3) *Personnel investigation* means an investigation conducted by written or telephone inquiries or through personal contacts to determine the suitability, eligibility, or qualifications of individuals for Federal employment, for work on Federal contracts, or for access to classified information or restricted areas.

§ 736.102 Notice to investigative sources.

(a) The agency investigator will notify the source from whom information is requested, whether in person or by telephone, of the purpose for which the information is being sought and of the uses that may be made of the information. The interviewing agent must notify each person interviewed and each custodian of records contacted that all information provided, including the record source's identity, may be disclosed upon the request of the subject of the investigation.

(b) The interviewing agent may grant a pledge to keep confidential the identity of an information source upon specific request by the source. In addition, the agent has discretion to offer the source a pledge of confidentiality where the agent believes that such a pledge is necessary to obtain information pertinent to the investigation. A pledge of confidentiality may not be assumed by the source. The interviewing agent may not suggest to a source that the source request confidentiality.

(c) Where information is requested by written inquiry, the form, instructions, or correspondence used by an agency will include: (1) Notification that all information furnished by the source, including the source's identity, except for custodians of law enforcement or educational records, may be disclosed upon the request of the subject of the investigation; and (2) Space for the information source to request a pledge that the source's identity will not be disclosed to the subject of the investigation; or (3) An offer to make

special arrangements to obtain significant information which the source feels unable to furnish without a promise that the source's identity will be kept confidential.

(d) A pledge of confidentiality, if granted, extends only to the identity of the source, and to any information furnished by the source that would reveal the identity of the source.

§ 736.103 Protecting the identity of a source.

When a source is granted a promise that the source's identity will be kept confidential, the investigative agency and all other agencies that receive information obtained under the promise are required to take all reasonable precautions to protect the source's identity. Each agency will prepare for its investigators and agents implementing instructions consistent with this part.

§ 736.104 Public availability of investigative files.

(a) Investigative files are records subject to the Privacy Act and the

Freedom of Information Act and are made available to requesters in accordance with the provisions of those Acts.

(b) Requests for investigative records are to be submitted to the Office of Personnel Management, Federal Investigations Processing Center, FOI/PA, Boyers, Pennsylvania 16018.

Subpart B—Investigative Requirements

§ 736.201 Responsibilities of OPM and other Federal agencies.

(a) Unless provided otherwise by law, the investigation of persons entering or employed in the competitive service, or by career appointment in the Senior Executive Service, is the responsibility of OPM.

(b) Requests for delegated investigating authority. Agencies may request delegated authority from OPM to conduct or contract out investigations of persons entering or employed in the

competitive service or by career appointment in the Senior Executive Service. Such requests shall be made in writing by agency heads, or designees, and specify the reason(s) for the request.

(c) Timing of investigations. Investigations required for positions must be initiated within 14 days of placement in the position except for: Positions designated Critical-Sensitive under part 732 of this chapter must be completed preplacement, or post-placement with approval of a waiver in accordance with § 732.202(a) of this chapter; and for positions designated Special-Sensitive under part 732 of this chapter must be completed preplacement.

PART 754—[REMOVED AND RESERVED]

4. Part 754 is removed and reserved.

[FR Doc. 91-9501 Filed 4-22-91; 8:45 am]

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April 23, 1991

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APRIL 23, 1991

Part VI

**Office of Personnel
Management**

5 CFR Parts 9 et al.

**Senior-Level and Senior Executive
Service Positions; Interim Rule With
Request for Comments**

**OFFICE OF PERSONNEL
MANAGEMENT**

5 CFR Parts 9, 213, 214, 300, 305, 317, 319, 353, 534, 536, 591, and 630

Senior-Level and Senior Executive Service Positions

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations governing pay setting and employment procedures for certain senior-level positions, as well as Senior Executive Service positions, under the Federal Employees Pay Comparability Act of 1990 (FEPCA). FEPCA abolished grades GS-16, 17, and 18 of the General Schedule; made changes affecting the pay of positions formerly at these grades, scientific and professional positions established under 5 U.S.C. 3104, and Senior Executive Service positions; and also made certain changes affecting these positions and their incumbents. The regulations are intended to assure that all rights and benefits are maintained for affected employees.

DATES: The interim regulations set forth below and the amendments made by the following sections of FEPCA are effective on the first day of the first pay period beginning on or after April 23, 1991: (1) Section 101(b)(9) (A), (B), (C), (D), (E), (G), (I), (J), and (K), relating to the abolishment of grades GS-16, 17, and 18 of the General Schedule; (2) Section 101(c)(1)(A), concerning references in other laws to the rates of pay for grades GS-16, 17, and 18; (3) Section 101(c)(2)(B), concerning agencies' authority to fix pay under 5 U.S.C. 5376; (4) Section 101(d), which authorizes OPM to prescribe regulations governing the conversion or adjustment of rates of pay, where necessary because of the abolishment of grades GS-16, 17, and 18; and (5) Section 102, which establishes a new senior-level pay system for positions classified above GS-15 and scientific or professional positions established under 5 U.S.C. 3104. Comments on the interim regulations must be received on or before June 24, 1991.

ADDRESSES: Send or deliver written comments to Assistant Director, Office of Executive and Management Policy, HRDG, room 6R48, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT:
Neal Harwood at 202-606-1610 (FTS 266-1610).

SUPPLEMENTARY INFORMATION: The Federal Employees Pay Comparability Act of 1990 (FEPCA), Public Law 101-509 of November 5, 1990, and implementing Executive Order 12748 of February 1, 1991, make a number of changes affecting the pay and employment conditions of executive positions and personnel. Described below are the regulatory revisions that have been made to implement these changes.

Senior Executive Service (SES) Positions

FEPCA revises the definition of an SES position in 5 U.S.C. 3132(a)(2) to state that the position must be classified above GS-15 of the General Schedule (in lieu of being in GS-16, 17, or 18 of the General Schedule), or in level IV or V of the Executive Schedule. Grades GS-16, 17, and 18 are abolished under section 101(b)(1) of FEPCA. In determining whether a position is classified above GS-15 for purposes of placing a position in the SES, agencies should use the guidance in section S4-4 of FPM Supplement 920-1, Operations Handbook for the Senior Executive Service.

FEPCA also changes the lowest rate of basic pay that may be set by the President for the SES. Previously it was GS-16/1. Under revised 5 U.S.C. 5382(b), the lowest rate is 120 percent of GS-15/1. (The highest rate of basic pay that may be set by the President remains level IV of the Executive Schedule.) Since the lowest SES pay rate (ES-1) of \$87,000 is currently above the new minimum rate that may be set for the SES (120 percent of GS-15/1 is \$73,972), there is no need to adjust the rate of basic pay of any individual in the SES upon implementation of FEPCA.

FEPCA eliminates in section 102(b)(2) the Governmentwide ceiling in 5 U.S.C. 5108 of 10,777 on the number of SES and GS-16, 17, and 18 positions combined. However, the requirement remains in 5 U.S.C. 3133 that OPM, in consultation with OMB, allocate a total number of SES positions to each agency on a biennial basis.

FEPCA also establishes in 5 U.S.C. 5307 a limitation on aggregate compensation of level I of the Executive Schedule as of the end of the calendar year. This limitation includes basic pay, allowances (including physicians comparability allowances and retention allowances), differentials, bonuses (including recruitment and relocation bonuses), awards (including SES performance and rank awards), and

other similar cash payments. We have interpreted the limitation in 5 U.S.C. 5307 as impliedly superseding the limitation on aggregate compensation that was in 5 U.S.C. 5383(b)(1) for SES employees alone because 5 U.S.C. 5307 is the broader, more general, and more recent law. Note that whereas the limitation in 5 U.S.C. 5383(b)(1) was applied on a fiscal year basis, the limitation in 5 U.S.C. 5307 will be applied on a calendar year basis. Section 534.402 of title 5, Code of Federal Regulations, is revised to state that senior executives are subject to the aggregate compensation limitations in the new 5 CFR part 530, subpart B, which implements 5 U.S.C. 5307.

Senior-Level Positions Classified above GS-15 and ST Positions
(1) Pay Provisions

FEPCA establishes a new 5 U.S.C. 5376 on pay setting for two categories of executive positions. The first category is senior-level positions classified above GS-15. These are positions formerly graded at GS-16, 17, and 18. These grade levels are abolished by section 102(b)(1) of FEPCA. Administrative law judge positions formerly at those grade levels are now paid under a separate pay system (5 U.S.C. 5372). Positions of members of agency boards of contract appeals formerly at those grade levels are also now paid under a separate pay system (5 U.S.C. 5372a). The remaining GS-16, 17, and 18 positions will be paid under 5 U.S.C. 5376. These positions are primarily positions that are in agencies excluded from the SES or are positions that do not meet the functional criteria (e.g., managerial or supervisory responsibilities) for inclusion in the SES. In determining whether a position is classified above GS-15, agencies should, as appropriate, compare proposed positions with existing positions classified above GS-15 or other comparable executive positions, extend existing classification standards, and/or use existing classification guides, such as the "Guide for Appraisal of Scientific Positions Proposed for GS-16, 17, and 18."

The second category of positions paid under 5 U.S.C. 5376 is scientific and professional (ST) positions engaged in research and development and established under 5 U.S.C. 3104. These positions were formerly paid under 5 U.S.C. 5371.

The regulations established a new subpart E of part 534 to cover pay for these two categories of positions. Subpart C of Part 534, which previously covered ST pay, is abolished.

Pay for positions subject to 5 U.S.C. 5376 may be no less than 120 percent of GS-15/1 and no more than level IV of the Executive Schedule. Agencies must adopt written procedures to show how pay for employees subject to 5 U.S.C. 5376 will be set. Pay may not be increased until agency written procedures are established, except to meet the minimum rate established by the section. There is no requirement for prior OPM approval of agency procedures, but a copy of the procedures must be available for OPM review.

In structuring their pay system for setting the pay of individual employees, agencies may use any dollar amount within the minimum and maximum amounts established by 5 U.S.C. 5376, establish a fixed number of specific rates, or establish a series of pay ranges. The method chosen by the agency must be shown in its written procedures.

The procedures must indicate what criteria will be used to assign rates of pay to individual employees. Current guidelines in subchapter 3 of FPM Chapter 534 on the setting of pay for ST positions provide that for initial appointment agencies should consider alignment with other positions and incumbents with comparable responsibilities and qualifications. The guidelines for pay adjustments after appointment include changes in position content, performance, length of service, and increased professional stature.

Agencies may continue to apply these guidelines for ST positions and may also use them for senior-level positions classified above GS-15. Agencies may also take into consideration other relevant factors, including pay for comparable private sector personnel. In setting the pay of individual senior-level and ST employees, agencies also should take into account the relationship to pay for employees in executive positions.

The procedures must provide for a reasonable distribution of individuals within the pay range provided by law (currently \$73,972 to \$108,300). New appointees generally should have their pay set within approximately the first third of the pay range (currently \$73,972 to \$85,415), depending on such factors as the individual's current rate of pay, qualifications, and position to which appointed. (For a GS-15/10 at \$80,138, an increase to \$85,415 would be 6.6%). Agencies should reserve pay that would exceed level V of the Executive Schedule (currently \$101,300) to highly unusual situations where the position is especially important to the agency and/or the qualifications of the individual are unusually high.

The regulations provide that pay for individual employees shall be set by the

head of the agency, or his or her designee, in accordance with the agency's written procedures. Those procedures must state who has authority within the agency to set pay and what management controls will be applied to assure compliance with the procedures.

Prior approval of OPM in setting the rate of pay for individual employees is not necessary, but all pay changes must continue to be reported to the Office of Executive and Management Policy on OPM Form 1390 (Executive Personnel Transaction).

Like the SES, the regulations provide that pay for senior-level and ST employees may be adjusted only once every 12 months, starting with the initial adjustment under the 5 U.S.C. 5376 provisions. Pay setting upon conversion to the 5 U.S.C. 5376 provisions is not considered an adjustment if the employee's current pay rate is not changed or is changed to meet the minimum rate established by the section (\$73,972).

(2) Abolishment of the Executive Assignment System

About three-fourths of the approximately 250 GS-16, 17, and 18 supergrade positions in the executive branch (not including administrative law judge and boards of contract appeals positions) were in the Executive Assignment System (EAS), which was established under Civil Service Rule IX. The EAS was based on the existing supergrade structure. In view of the abolishment of the GS-16, 17, and 18 grades under FEPCA, the President has revoked Rule IX by section 8 of Executive Order 12748 of February 1, 1991, and has authorized OPM to take such action as OPM may determine necessary to provide for the orderly termination of the EAS and the appropriate conversion of employees serving under the System. The Director is taking such action concurrent with the issuance of the regulations implementing the senior-level pay authority under 5 U.S.C. 5376. At the same time, 5 CFR part 305, the implementing regulation for the EAS, is also being abolished.

With the abolishment of the EAS, positions and incumbents will be subject to the normal procedures governing the competitive and excepted services, except where special procedures are provided in regulation or the Federal Personnel Manual. See section (3) below.

Instructions for converting from the EAS will be issued in the Federal Personnel Manual. It should be noted that under § 319.103(b) of the regulations, individuals in career executive assignments will convert to

career or career-conditional appointments in the competitive service as appropriate; and individuals in noncareer executive assignments will convert to Schedule C appointments in the excepted service. Individuals in limited executive assignments, who currently may serve not more than 5 years, will convert to term appointments in the competitive service for a period not to exceed 5 years from the initial limited executive assignment. New term appointees, however, will be subject to the 4-year limit in § 316.301.

(3) Employment Procedures

A new part 319 is established covering employment procedures for ST positions and senior-level positions classified above GS-15 in the executive branch.

(a) Position allocations. Under 5 U.S.C. 3104, the total number of ST positions Governmentwide may not exceed 517; and such positions may be established only by action of the OPM Director. In view of the statutory limit on the total number of ST positions, it is necessary that OPM continue its allocation of ST positions.

Under 5 U.S.C. 5108, OPM may, for an executive agency, establish the maximum number of senior-level positions that may at any one time be classified above GS-15. OPM may also establish standards and procedures as to which positions may be classified above GS-15 (including the authority to require agencies to obtain prior approval of OPM). In keeping with the requirements for SES and ST positions, the regulations provide that OPM will also allocate senior-level positions in executive agencies. Once an agency has an OPM allocation, it may establish within the allocation a senior-level position that is properly classified above GS-15 without OPM approval. Agency senior-level position allocations at the time of conversion will be the same as their GS-16, 17, and 18 allocations immediately prior to conversion.

(b) Qualifications standards. The regulations provide that agencies may establish qualifications standards for ST positions and senior-level positions classified above GS-15 in accordance with criteria established by OPM.

(c) Qualifications approval. By law, the Director of OPM must approve the qualifications of appointees to senior-level positions classified above GS-15 (5 U.S.C. 3324) and to ST positions (5 U.S.C. 3325). In most cases, OPM in the past has delegated the approval authority to agencies by individual delegation agreements. Under OPM's authority in 5 U.S.C. 1104, the approval authority is delegated on a

Governmentwide basis to the heads of agencies in § 319.102(c). Subpart C of part 300 requiring prior OPM approval of qualifications of ST appointees is abolished.

Other Executive Positions

(1) Positions where pay is fixed by administrative action.

FEPCA amends 5 U.S.C. 5373 to provide that the limitation on pay fixed by administrative action will be level IV of the Executive Schedule. The previous limitation had been GS-18. This provision was implemented by Federal Register notice of February 14, 1991 (56 FR 6212).

(2) Pay fixed outside title 5 of the United States Code.

Some agencies have positions where statutes other than title 5, United States Code, currently set the pay equivalent to, or not to exceed the maximum rate for, GS-16, 17, or 18. Section 101(c) of FEPCA contains instructions on pay setting for these positions now that the GS-16, 17, and 18 grades are abolished.

Miscellaneous

A number of additional changes have been made in the regulations to take into account the abolishment of grades GS-16, 17, and 18. These include:

- Sections 213.3301(b) and 213.3302(a)—Schedule C positions. Applicability of sections is extended to all Schedule C positions instead of just Schedule C positions at GS-15 and below.
- Section 214.201—Definition of an "Equivalent position" to an SES position. Editorial change.
- Section 353.305—Restoration rights of TAPER employees. Editorial change.
- Sections 536.102, 536.105, 536.208, 536.209, and 536.305—Grade and pay retention.

(1) Upon the implementation of 5 U.S.C. 5376, employees in positions classified above GS-15 or in scientific and professional (ST) positions will not be eligible for grade retention if placed in the General Schedule since under 5 U.S.C. 5376 they are in an ungraded pay system. They would be eligible, however, for pay retention. This provision parallels the existing Part 536 regulation for employees in the SES, which is also ungraded.

(2) For employees at GS-15 or below who are subject to grade retention at GS-16 or above (e.g., a former GS-16 employee who was reduced to GS-15) at the time grades GS-16, 17, and 18 are abolished, their entitlement to grade retention under Part 536 will cease on the day before the new senior-level pay system under 5 U.S.C. 5376 takes effect.

The employees, however, will be subject to the pay retention provisions of Part 536.

(3) For employees at GS-16 or GS-17 who are subject to grade or pay retention (e.g., a former GS-17 employee reduced to GS-16) at the time grades GS-16, 17, and 18 are abolished, their entitlement to grade and pay retention under part 536 will cease on the day before the new pay system takes effect. This is because under § 536.506(b), the pay of these employees under the new senior-level pay system may not be less than the rate they were receiving immediately before converting to the new system; and, therefore, there is no need for pay retention.

—Section 591.203—Cost-of-living allowances and post differentials. The section is amended to make clear that individuals in senior-level and scientific and professional positions paid under 5 U.S.C. 5376 who are employed in an area covered by a nonforeign area cost-of-living allowance (COLA) or post differential will continue to receive that benefit.

—Section 630.211—Exclusion of annual and sick leave coverage for Presidential appointees. Editorial changes. Presidential appointees in positions where the rate of basic pay is equal to or exceeds the pay for level V of the Executive Schedule (other than senior-level positions paid under 5 U.S.C. 5376) continue to be excluded from annual and sick leave coverage. Presidential appointees in other positions, including senior-level positions paid under 5 U.S.C. 5376, continue to have annual and sick leave coverage, unless excluded by the President, OPM, or an agency in accordance with § 630.211.

Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to section 553(d)(3) of title 5 of the United States Code, I find that good cause exists to make this amendment effective in less than 30 days. The senior-level pay provisions of the Federal Employees Pay Comparability Act of 1990, Public Law 101-509 (November 5, 1990) must be made effective between 90 and 180 days after enactment. The notice is being waived and the regulation is being made effective in less than 30 days to give affected employees the benefits of the new pay provisions at the earliest practicable date.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will only affect Federal Government employees who are in executive positions.

List of Subjects

5 CFR parts 213, 214, 300, 305, 317, 319, 353, 536, and 630

Government employees.

5 CFR parts 534 and 591.

Government employees, wages.

U.S. Office of Personnel Management.
Constance Berry Newman,
Director.

Accordingly, OPM is amending 5 CFR parts 9, 213, 214, 300, 305, 317, 319, 353, 534, 591, and 630 as follows:

PART 9—EXECUTIVE ASSIGNMENT SYSTEM FOR POSITIONS IN GRADES GS-16, 17, AND 18 OF THE GENERAL SCHEDULE (RULE IX) [REMOVED]

1. Part 9 is removed.

PART 213—EXCEPTED SERVICE

2. The authority for part 213 continues to read as follows:

Authority: 5 U.S.C. 3301 and 3302, E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; sec. 213.101 also issued under 5 U.S.C. 2103; sec. 213.102 also issued under 5 U.S.C. 1104, Pub. L. 95-454, sec. 3(5); sec. 213.3102 also issued under 5 U.S.C. 3301, 3302 (E.O. 12364, 47 FR 22931), 3307, 8337(h) and 8457.

3. In subpart C, the "Schedule C" center heading is republished and § 213.3301b and the introductory text of paragraph (a) in § 213.3302(a) are revised to read as follows:

Subpart C—Excepted Schedules

* * * * *

Schedule C

* * * * *

§ 213.3301b Revocation of exceptions.

(a) The exception from the competitive service for each position listed in Schedule C by OPM is revoked immediately upon the position becoming vacant.

(b) An agency shall notify the Office of Personnel Management within 3 workdays after a Schedule C position has been vacated.

§ 213.3302 Temporary Schedule C positions during a Presidential transition, as a result of changes in department or agency heads, or at the time of a creation of a new department or agency.

(a) An agency may establish temporary Schedule C positions necessary to assist a department or agency head during the period immediately following a change in presidential administration, when a new department or agency head has entered on duty, or at the time of the creation of a new department or agency. Such positions shall be either:

* * * *

PART 214—SENIOR EXECUTIVE SERVICE

4. The Authority for part 214 continues to read as follows:

Authority: 5 U.S.C. 3132.

5. The definition of "equivalent position" in § 214.201 is revised to read as follows:

§ 214.201 Definitions.

* * * *

Equivalent position as used in section 3132(a)(2) of title 5, United States Code, means a position under any pay system where the level of the duties and responsibilities of the position and the rate of pay are comparable to that of a position above GS-15 or at Executive Level IV or V.

* * * *

PART 300—EMPLOYMENT (GENERAL)

6. The authority for part 300 is revised to read as follows:

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

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

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

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

Sec. 300.603 also issued under 5 U.S.C. 1104.

§ 300.301 (Subpart C)—[Removed]

7. Subpart C (§ 300.301) is removed and reserved.

PART 305—EXECUTIVE ASSIGNMENT SYSTEM—[REMOVED]

8. Part 305 is removed.

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

9. The authority for part 317 continues to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3393a, 3395, 3397, 3593, and 3595.

10. The heading for part 317 is revised to read as set forth above.

11. Part 319 is added to read as follows:

PART 319—EMPLOYMENT IN SENIOR-LEVEL AND SCIENTIFIC AND PROFESSIONAL POSITIONS

Subpart A—General Provisions

Sec.

319.101 Coverage.
319.102 Procedures.
319.103 Conversion.

Subpart B—Senior-Level Positions Classified above GS-15

319.201 Position establishment.

Subpart C—Scientific and Professional Positions

319.301 Position establishment.

Authority: 5 U.S.C. 1104, 3104, 3324, 3325, 5108, and 5376.

Subpart A—General Provisions

§ 319.101 Coverage.

This part covers positions paid under 5 U.S.C. 5376 and includes—

(a) Senior-level positions classified above GS-15 pursuant to 5 U.S.C. 5108; and

(b) Scientific or professional (ST) positions established under 5 U.S.C. 3104.

§ 319.102 Procedures.

The following procedures apply to positions subject to this part:

(a) Positions must be established in accordance with standards and procedures established by OPM.

(b) Agency heads are responsible for establishing qualifications standards for the positions in accordance with criteria established by OPM in the Federal Personnel Manual.

(c) Agency heads are delegated authority to approve the qualifications of individuals appointed to the positions.

(d) Pay is subject to subpart E of part 534 of this chapter.

§ 319.103 Conversion.

(a) *Applicability.* This section applies to employees who are occupying positions subject to § 319.101 of this part and are converted to the pay system established by 5 U.S.C. 5376.

(b) *Pay.* See § 534.506 of this chapter for setting pay upon conversion to the pay system under 5 U.S.C. 5376.

(c) *Appointing authority.* (1) All individuals in ST positions remain in the competitive service under their current appointing authority.

(2) Individuals in senior-level positions classified above GS-15 remain under their current appointing authority, except that individuals who were formerly under the Executive Assignment System in 5 CFR part 305 will convert as follows:

(i) Individuals who formerly held career executive assignments will convert to career or career-conditional appointments, as appropriate, in the competitive service;

(ii) Individuals who formerly held noncareer executive assignments will convert to Schedule C appointments in the excepted service; and

(iii) Individuals who formerly held limited executive assignments will convert to term appointments in the competitive service for a period not to exceed 5 years from the initial appointment to the limited executive assignment.

(d) *Conversion instructions.* Conversion is subject to instructions issued by OPM in the Federal Personnel Manual.

Subpart B—Senior-Level Positions Classified above GS-15

§ 319.201 Position establishment.

Positions may be established only under a position allocation approved by OPM. Prior approval of OPM is not required to establish individual positions within the allocation. OPM reserves the right, however, to require the prior approval of individual positions if the agency is not in compliance with standards and procedures prescribed by OPM under § 319.102 of this part.

Subpart C—Scientific and Professional Positions

§ 319.301 Position establishment.

Positions may be established only under a position allocation approved by OPM. Prior approval of OPM is not required to establish individual positions within the allocation. OPM reserves the right, however, to require the prior approval of individual positions if the agency is not in compliance with standards and procedures prescribed by OPM under § 319.102 of this part.

PART 353—RESTORATION TO DUTY FROM MILITARY SERVICE OR COMPENSABLE INJURY

12. The authority citation for part 353 continues to read as follows:

Authority: 38 U.S.C. 2021, et seq., and 5 U.S.C. 8151.

13. In subpart C, § 353.305 is revised to read as follows:

Subpart C—Agency Obligation to Restore

§ 353.305 Restoration rights of TAPER employees.

An employee serving in the competitive service under a TAPER appointment under § 316.201 of this chapter (other than an employee serving in position classified above GS-15) is entitled to be restored to the position he or she left, or an equivalent position in the same commuting area.

PART 534—PAY UNDER OTHER SYSTEMS

14. The authority for part 534 is revised to read as follows:

Authority: 5 U.S.C. 1104, 5307, 5351, 5352, 5353, 5376, 5383, 5384, and 5385.

§ 534.301 (Subpart C) [Removed]

15. Subpart C (§ 534.301) is removed and reserved.

16. In subpart D, § 534.402 is revised to read as follows:

Subpart D—Pay and Performance Awards Under the Senior Executive Service

§ 534.402 Aggregate compensation.

Senior executives are subject to the aggregate compensation limitations in subpart B of part 530 of this chapter.

17. Subpart E is added to read as follows:

Subpart E—Pay for Senior-Level and Scientific and Professional Positions

Sec.

534.501 Coverage.

534.502 Pay range.

534.503 Pay setting.

534.504 Annual adjustment in pay.

534.505 Pay related matters.

534.506 Conversion provisions.

Subpart E—Pay for Senior-Level and Scientific and Professional Positions

§ 534.501 Coverage.

(a) This subpart implements 5 U.S.C. 5376 and applies to—

(1) Senior-level positions classified above GS-15 pursuant to 5 U.S.C. 5108; and

(2) Scientific or professional (ST) positions established under 5 U.S.C. 3104.

(b) This subpart does not apply to—

(1) Senior Executive Service positions established under 5 U.S.C. 3132, unless the incumbent of the position declined to convert to the SES and under § 317.303 of this chapter remained at

grade GS-16, 17, or 18 or under the ST pay system;

(2) Positions in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, Defense Intelligence Executive Service, or Senior Cryptologic Executive Service; or

(3) Positions where pay is fixed by administrative action and is limited to level IV of the Executive Schedule under 5 U.S.C. 5373.

§ 534.502 Pay range.

A pay rate fixed under this subpart shall be—

(a) Not less than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule; and

(b) Not greater than the rate of basic pay payable for level IV of the Executive Schedule.

§ 534.503 Pay setting.

(a) Each agency with positions subject to this subpart shall establish written procedures for setting the pay of incumbents of the positions in accordance with the provisions of law, OPM regulations, and the Federal Personnel Manual. The head of each agency, or his or her designee, shall set the rate of pay of individuals under this subpart in accordance with the agency's written procedures.

(b) The agency's written procedures shall include—

(1) A description of the structure of the pay system;

(2) The criteria that will be used to assign rates of pay to individual employees;

(3) The 12-month waiting period on pay adjustments, as provided in paragraph (c) of this section;

(4) The designation of the official or officials who will have authority to set pay; and

(5) The management controls that will be applied to assure compliance with the procedures and a reasonable distribution of pay within the pay range.

(c) Pay of an individual may not be adjusted by an agency more than once in any 12-month period. An annual adjustment in pay under § 534.504 of this subpart shall not be considered to start a new 12-month period if it does not exceed the average General Schedule adjustment.

(d) Any reduction in the basic pay of an individual is subject to the provisions of subparts C and D of Part 752 of this chapter.

§ 534.504 Annual adjustment in pay.

Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which

an adjustment takes effect under 5 U.S.C. 5303 in the rates of pay under the General Schedule, each rate of pay established under this subchapter shall be adjusted by such amount as the head of the agency considers appropriate, in accordance with the provisions of § 534.503 of this part.

§ 534.505 Pay related matters.

(a) *Aggregate compensation.* Limits on aggregate compensation, including basic pay, are in 5 U.S.C. 5307 and part 530, subpart B, of this chapter.

(b) *Performance awards.* Performance awards may be paid under 5 U.S.C. 4505a and implementing OPM regulations.

§ 534.506 Conversion provisions.

(a) This section covers initial conversion to the pay system under 5 U.S.C. 5376 as of the effective date of these regulations.

(b) The rate of basic pay for any individual converting to a pay system under 5 U.S.C. 5376 shall be at least equal to the rate payable to that individual immediately before such conversion, including any interim geographic adjustment authorized by Schedule 9 of Executive Order 12736 of December 12, 1990.

(c) If there is an increase in an individual's rate of basic pay upon conversion, other than to the minimum rate under 5 U.S.C. 5376, the increase must be approved by the head of the agency or his or her designee.

PART 536—GRADE AND PAY RETENTION

18. The authority citation for part 536 continues to read as follows:

Authority: 5 U.S.C. 5361-5366; § 536.307 is also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502.

19. In subpart A, § 536.102 is amended by revising paragraph (1) of the definition of "representative rate," and § 536.105 is amended by revising paragraph (c) to read as follows:

Subpart A—Definitions, Coverage and Applicability

§ 536.102 Definitions.

Representative rate means:

(1) The fourth rate of the grade in the case of a position under the General Schedule, including the fourth rate of the corresponding grade of the General Schedule in the case of a position under the Performance Management and Recognition System established by

chapter 54 of title 5, United States Code, or the individual's rate under the Senior Executive Service or a position subject to the senior-level pay authority in 5 U.S.C. 5376;

* * * * *

§ 536.105 Exclusions.

(c) Grade retention under § 536.103(a)(1) or (b) shall not apply to a member of the Senior Executive Service or an individual in a position subject to the senior-level pay authority in 5 U.S.C. 5376 who is placed in a position in a covered pay schedule.

20. In subpart B, § 536.208 is amended by adding a new paragraph (d), and § 536.209(b)(1) is revised to read as follows:

Subpart B—Determination of Retained Grade and Rate of Basic Pay; Loss of, or Termination of Eligibility

* * * * *

§ 536.208 Termination of grade retention.

(d) Grade retention terminates on the day before the first day of the first pay period beginning on or after April 23, 1991 in the case of an employee who, on that date, becomes subject to the senior-level pay system established under 5 U.S.C. 5376 and subpart E of part 534 of this chapter.

§ 536.209 Loss of eligibility for, or termination of, pay retention.

* * * * *

(b) * * *

(1) The day before placement or conversion if the termination is the result of the employee's placement in another position or conversion to the senior-level pay system established under 5 U.S.C. 5376 and subpart E of part 534 of this chapter.

21. In subpart C, § 536.305 is removed and reserved.

PART 591—ALLOWANCES AND DIFFERENTIALS

22. The authority citation for part 591 continues to read as follows:

Authority: 5 U.S.C. 5941; E.O. 10,000; 3 CFR 1943-1948 Comp. p. 792; E.O. 12,510; 3 CFR 1985 Comp. p. 338.

23. In Subpart B, § 591.203 is amended by revising paragraph (a)(1) and adding new paragraphs (a) (5) and (6) to read as follows:

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

* * * * *

§ 591.203 Agencies and employees covered.

(a) * * *

(1) General Schedule (including the Performance Management and Recognition System and employees in positions authorized by 5 CFR 213.3102(w) whose rates of basic pay are established under the General Schedule).

* * * * *

(5) Senior Executive Service.

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

* * * * *

PART 630—ABSENCE AND LEAVE

24. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; § 630.303 also issued under 5 U.S.C. 6133(a); § 630.501 and Subpart F also issued under E.O. 11228; Subpart G also issued under 5 U.S.C. 6305; Subpart H issued under 5 U.S.C. 6328; Subpart I also issued under 5 U.S.C. 6332 and Pub. L. 100-566; Subpart J also issued under 5 U.S.C. 6362 and Pub. L. 100-566; Subpart J

also issued under 5 U.S.C. 6362 and Pub. L. 100-566.

25. In subpart B, paragraph (a) of § 630.211 is revised, the heading for paragraph (b) is republished, and paragraph (b)(2) is revised to read as follows:

Subpart B—Definitions and General Provisions for Annual and Sick Leave

* * * * *

§ 630.211 Exclusion of Presidential appointees.

(a) *Authority.* (1) Section 6301(2)(xi) of title 5, United States Code, authorizes the President to exclude certain Presidential appointees in the executive branch or the government of the District of Columbia from the annual and sick leave provisions of subchapter I of chapter 63 of title 5, United States Code, and from the related provisions of this part.

(2) The President, by Executive Order 10540, as amended, has delegated to the Office of Personnel Management the responsibility for making exclusions under section 6301(2)(xi), and the Office of Personnel Management has delegated responsibility to the head of each agency consistent with the provisions of this section.

(3) Presidential appointees in positions where the rate of basic pay is equal to or exceeds the rate for level V of the Executive Schedule are already excluded from the annual and sick leave provisions by 5 U.S.C. 6301(2)(x). Therefore, no further action by an agency is necessary to exclude these appointees.

(b) *Criteria for exclusions.* * * *

(2) The officer is not a United States attorney or United States marshal; and

* * * * *

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