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Tuesday, November 9, 1993

Presidential Documents

Title 3—

The President

Executive Order 12878 of November 5, 1993

Bipartisan Commission on Entitlement Reform

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and in order to establish a Bipartisan Commission on Entitlement Reform, it is hereby ordered as follows:

Section 1. *Establishment.* (a) There is established the Bipartisan Commission on Entitlement Reform ("Commission"). The Commission shall comprise 30 members to be appointed by the President. Ten members shall be Senators, five each from the Democratic and Republican parties. Ten members shall be Members of the House of Representatives, five each from the Democratic and Republican parties. Ten members shall be individuals from either the public or private sector who have experience and expertise in the areas to be considered by the Commission.

(b) The President shall designate a Chairperson and Vice-Chairperson from among the members of the Commission.

Sec. 2. *Functions.* (a) The Commission shall recommend potential long-term budget savings measures involving (1) revisions to statutory entitlement and other mandatory programs; and (2) alternative tax reform proposals. The Commission shall report its recommendations respecting potential entitlement and other mandatory program savings and tax system revisions to the National Economic Council and to the Congressional leadership by May 1, 1994.

(b) The Commission shall decide by a three-fifths vote which recommendations to include in the report. At the request of any Commission member, the report will include that Commission member's dissenting views or opinions.

(c) The Commission may, for the purpose of carrying out its functions, hold such hearings and sit and act at such times and places, as the Commission may find advisable.

Sec. 3. *Administration.* (a) To the extent permitted by law, the heads of executive departments, agencies, and independent instrumentalities shall provide the Commission, upon request, with such information as it may require for the purposes of carrying out its functions.

(b) Upon request of the Chairperson of the Commission, the head of any Federal agency or instrumentality shall, to the extent possible and subject to the discretion of such head, (1) make any of the facilities and services of such agency or instrumentality available to the Commission; and (2) detail any of the personnel of such agency or instrumentality to the Commission, to assist the Commission in carrying out its duties.

(c) Members of the Commission shall serve without compensation for their work on the Commission. While engaged in the work of the Commission, members appointed from among private citizens of the United States may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707) to the extent funds are available for such purposes.

(d) To the extent permitted by law and subject to the availability of appropriations, the Department of Health and Human Services shall provide the Commission with administrative services, funds, facilities, staff, and other support services necessary for the performance of the Commission's functions. The Secretary of Health and Human Services shall perform the functions of the President under the Federal Advisory Committee Act, as amended (5 U.S.C. App.) ("Act"), except that of reporting to the Congress, in accordance with the guidelines and procedures established by the Administrator of General Services.

(e) The Commission shall adhere to the requirements set forth in the Act. All executive branch officials assigned duties by the Act shall comply with its requirements with respect to the Commission.

Sec. 4. *General Provision.* The Commission shall terminate 30 days after submitting its report.

William J. Clinton

THE WHITE HOUSE,
November 5, 1993.

[FR Doc. 93–27733
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Rules and Regulations

Federal Register
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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 335 and 511

RIN 3206–AF09

Promotion and Internal Placement

AGENCY: Office of Personnel Management.

ACTION: Final rulemaking.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations that authorize agencies to make time-limited promotions in the competitive service. This authority replaces existing temporary and term promotion authorities with a single time-limited promotion authority for up to 5 years, eliminates the need for agencies to enter into a written delegation agreement or seek OPM prior approval to make a time-limited promotion for more than 2 years, eliminates the requirement to make these promotions in 1-year increments, and requires the agency to notify the employee in writing of the conditions of the time-limited promotion.

EFFECTIVE DATE: December 9, 1993.

FOR FURTHER INFORMATION CONTACT: Leota Shelkey Edwards on 202–606–0960 (FAX 202–606–2329).

SUPPLEMENTARY INFORMATION: On October 15, 1992, OPM issued proposed regulations to authorize time-limited promotions for up to 5 years in the competitive service (57 FR 47279). We received written comments from eight agencies, two employee organizations, and two individuals. All but three supported the proposal.

Currently, 5 CFR part 335 permits agencies to make time-limited promotions in the competitive service under two separate authorities. Section 335.102 (f) permits an agency to promote an employee temporarily to meet a temporary need for up to 1 year and to extend the promotion for no more than 1 additional year. Further extensions require OPM prior approval.

Section 335.102(g) permits agencies, after entering into a formal written agreement with OPM, to promote an employee for a limited term in excess of 2 years but not more than 4 years to complete a designated project or as part of a planned rotational system. The agency may request OPM approval for extension for a total of 5 years.

This final regulation replaces the temporary and term promotion authorities in § 335.102 (f) and (g) with a single authority for time-limited promotions of up to 5 years. Our purpose in doing so is to increase the usefulness of the time-limited promotion mechanism and to eliminate the overlap between these two similar authorities and the resulting confusion over their use. Following is a summary of the comments received.

a. New Time Limit

One commenter expressed concern that this regulation would allow for extended employment of individuals without the full range of employees benefits such as health benefits, leave, etc. However, this is not so. The employees covered by this regulation are those under career, career-conditional, status quo, indefinite, term, and overseas limited indefinite/term appointments—all of which provide the full range of employee benefits. An employee's time-limited promotion while serving under one of these appointment types has no effect on the employee's continuing eligibility for benefits.

One commenter suggested we retain the existing requirement that temporary promotions be made in 1-year increments, and another favored retaining OPM approval for extensions. We have not adopted either suggestion. While temporary promotions now are limited to 1-year periods, term promotions are not; and elimination of increments in the new authority was intended to avoid additional personnel actions when an agency knows at the outset that the need is limited, but will be for more than 1 year. Furthermore, an agency has the authority, if it wishes, to adopt internal implementing policies that limit use of the authority to shorter periods or 1-year increments, and to require prior approval of higher agency levels for extensions.

One commenter suggested we spell out the types of situations that warrant a promotion for 3–5 years to assure proper use. We have included appropriate uses for time-limited promotions in the regulation, but we have not specified the circumstances for particular time periods. Our intent is to provide agencies with the authority to cover legitimate management needs and the discretion to determine the situations that warrant a longer time period. If an agency wishes to restrict the authority further, it may do so.

The proposed regulation provided that an agency could make a time-limited promotion retroactively only with OPM's prior approval. Two commenters were confused over this provision, and another noted that it should not prevent an agency from correcting unwarranted or unjustified personnel actions. We agree and have dropped the OPM prior approval provision from the final regulation. Agencies could use this authority to effect retroactive temporary promotions consistent with the back pay law.

We wish to clarify several additional issues about the time limit. The 5-year limit applies to the total continuous time an employee is temporarily promoted without new competition. If an employee is promoted temporarily and later competes and is selected for a second temporary promotion (either at the same or a higher grade), the 5-year period starts running anew with the second temporary promotion. Also, if an employee is noncompetitively promoted for 120 days, and the promotion is extended after competition has been held, the first 120 days counts towards the 5-year limit.

If a legitimate need were to extend beyond 5 years, OPM could approve an extension of a promotion. However, the 5-year limit should satisfy the great majority of agency situations. If a need appears to extend beyond 5 years, agencies should consider whether a permanent promotion is more appropriate.

b. Agency Delegation

The proposed regulation did not require agencies to enter into written delegation agreements with OPM, as is now the case for term promotions. We received no comments on this issue. The final regulation, as proposed, grants the authority to all agencies without the need for individual delegations.

c. Employee Notice

The proposed regulation required agencies to give employees advance written notice of the conditions of a time-limited promotion. One commenter suggested that agencies should obtain an employee's written acknowledgement of receipt of this notice. We have not adopted this suggestion. Other provisions where advance notice is required, such as proposed adverse action, do not require agencies to obtain written acknowledgement, and we think such a requirement is not necessary here either. The final regulation leaves to agency discretion the decision of how it would show that advance notice was given, should this become necessary. If an agency obtains a written acknowledgement, the acknowledgement would be a temporary document appropriate for filing on the left side of the employee's Official Personnel Folder.

In some situations, it will not be possible to give advance notice of the conditions of a time-limited promotion. For example, an agency's policy may require it to temporarily promote an employee who has served in a position on detail for a particular period of time. Compliance with these nondiscretionary provisions sometimes requires agencies to make temporary promotions before they can provide an advance notice. The final regulation provides that in these situations an agency should give the notice as soon as possible after the promotion is made.

We have also changed the final regulation to require that the reason for making the promotion time limited be included in the notice along with the requirement for competition for promotions beyond 120 days, where applicable.

d. Documentation

The proposed regulation require agencies to document the specific reason for the time-limited promotion on the SF 50, Notification of Personnel Action, documenting the action. One commenter found this requirement unnecessary since the employee receives advance notice of the conditions, while another commenter found this documentation to be insufficient. We agree that a remark on the SF 50 is not necessary if the written notice to the employee provides it. We have changed the regulation accordingly.

e. Right To Return to Former Grade

The proposed regulation provided that a time-limited promotion could be ended at any time an employee returned to the position from which promoted, or to a different position of equivalent grade and pay, without following the procedures in 5 CFR parts 351, 432, 752, or 771, if advance notice of the conditions had been given to the employee.

One commenter questioned OPM's authority to allow promotions for extended periods and then to end the promotions without due process or procedures of statute. The commenter noted that statutory law does not cite as an exception to either the adverse action or reduction in force procedures the right to avoid those laws by using a temporary promotion status.

OPM believes this regulation is within its authority and is consistent with applicable case law. This regulation reflects *Phipps* v. *Department of Health and Human Services*, 767 F.2d 895 (Fed. Cir. 1985). In that case, the U.S. Court of Appeals for the Federal Circuit held that if agencies had informed employees in advance that a promotion was only temporary, they are not required to follow adverse action procedures when terminating a temporary promotion at any time.

OPM notes also that the term promotion authority—which allows agencies to promote employees for 4 years, and longer with OPM approval—has been in effect since 1980 and has withstood legal challenge. Also, the Merit Systems Protection Board has affirmed and applied Phipps in the case of *Mosley* v. *Department of the Navy*, 31 M.S.P.R. 689 (1986). In *Mosley*, the employee was returned to his former position after termination of a temporary promotion of approximately 3 years and 3 months. In citing Phipps, the Board found the employee had not been the subject of an adverse action appealable to the Board.

Another commenter noted that the Supplementary Information, which accompanied the proposed regulation, seemed to suggest that temporary promotions and the termination of temporary promotions are not subject to labor agreements or negotiated grievance procedures. The regulation itself does not refer to any grievance procedure negotiated under 5 U.S.C. 7121 or to any negotiated agreements concerning temporary promotions. The revision of § 335.102(f) does not relieve an agency of its obligation to comply with any applicable contract provision.

Several commenters suggested that we discuss, either in regulation or elsewhere, how an employee's pay is set on return to the grade from which promoted. On return to the former grade, an agency, may set an employee's pay based on:

(1) The highest previous rate rule, provided that the employee's time-limited promotion lasted for 1 year or more in a General Schedule position (see 5 CFR 531.203(c)); or

(2) The step in the former grade the employee would have held had he or she remained in that grade (see 5 CFR 531.407(c)(5) and 532.417).

An employee is not eligible for grade retention or pay retention on return to the former grade (see 5 CFR 536.105(b)).

f. Noncompetitive Actions

In the notice of proposed rulemaking, OPM invited comment on the existing requirement that time-limited promotions for more than 120 days are subject to merit promotion competition. OPM proposed to revise Federal Personnel Manual Chapter 335 to provide that prior service during the preceding 12 months must be counted toward the 120 days only when it was under a noncompetitive time-limited promotion or detail to a higher grade. Time served after competitive selection would not be included.

All three commenters who specifically addressed this change supported it. OPM is adopting the change as proposed to be effective on the same date as this final regulation. We also issue notice of the change through the Federal Personnel Manual.

One commenter suggested that the 120-day limit should apply only to assignments to the same or identical position or duties. We have not adopted this suggestion. The noncompetitive 120-day period is intended to help meet the needs of management to obtain the services of an employee quickly while at the same time assuring that an employee does not gain an undue advantage over other candidates if the position is filled later on a permanent basis.

One commenter suggested the 120-day period should start anew for a detail or time-limited promotion above a grade to which an employee has been permanently promoted or received a competitive time-limited promotion. We agree. Another commenter suggested allowing additional noncompetitive 120-day periods at successively higher grade levels. We have not adopted this suggestion because it would allow subsequent noncompetitive promotions to multiple grade levels for periods much longer than 120 days.

OPM notes also that an agency may noncompetitively promote an employee on a time-limited basis if it can take the same action on a permanent basis. Examples: When an employee previously held the grade on a

permanent basis in the competitive service and did not lose it for performance or conduct reasons; when an employee is in a career ladder and has higher grade promotion potential; or when an employee's position is reclassified at a higher grade because of additional duties and responsibilities.

g. Miscellaneous

One commenter suggested that service under a time-limited promotion should count toward satisfying supervisory or managerial probation. The Federal Personnel Manual allows agencies to require probation for temporary promotions of more than 120 days to supervisory or managerial positions. Agencies also may credit time under temporary promotion toward satisfying supervisory or managerial probation.

One commenter was concerned that an employee who is compensably disabled while on a time-limited promotion would be returned to the former grade level, resulting in injury compensation at the lower salary. This is not correct. The Office of Workers' Compensation Programs, Department of Labor, advises that injury compensation is computed based on the grade of the position held at the time of an injury.

Another commenter expressed a need for OPM guidance on whether an agency could permanently fill the position of an employee who is serving on a time-limited promotion. Under this regulation, an employee is entitled to be returned to his or her former position or one of equivalent grade and pay. Therefore, procedures for filling the former position would be addressed appropriately through agency administrative policy or negotiated agreement.

Another question was whether an individual selected for a second promotion while serving under a time-limited promotion must first be returned to the former grade level before the second promotion is processed. Unless the employee actually will return to the former position, there is no need or requirement to process a change to lower grade personnel action before processing the second promotion.

h. Parts 432 and 752 Exclusions

Although this authority to make time-limited promotions covers only employees in the competitive service, agencies may promote excepted service employees for temporary periods if the appointment authorities covering these employees permit it. Both parts 432 and 752 of 5 CFR exclude from covered actions the termination of "temporary or term promotions" where agencies have informed the employees that the promotions were to be of limited duration, and returned the employees to the positions from which they were temporarily promoted or to ones of equivalent grade and pay. These provisions apply to all competitive and excepted service employees covered by parts 432 and 752. (See 5 CFR 432.102(b)(13) and 752.401(b)(12).)

The reference to "temporary or term promotions" under parts 432 and 752 includes time-limited promotions and, thus, excludes time-limited promotions under this regulation. Conforming language changes will be made in the future.

i. Extension of Current Temporary and Term Promotions

For employees under temporary or term promotions of less than 5 years on the effective date of this regulation, agencies are authorized to extend their promotions for up to a total of 5 years. However, time served prior to such extension counts towards the total 5-year limit.

j. Conforming Change in Part 511

A conforming change, that was not included in the proposed regulation, is made in 5 CFR part 511 dealing with position classification appeals. Under part 511, an employee may request an OPM decision on the series or grade of the employee's position, although certain classification-related matters may not be the subject of an appeal or grievance. Under § 511.607(b)(3), an employee may not appeal to OPM or grieve the class, grade, or pay system of a position to which detailed or temporarily promoted, but an employee on a term promotion for more than 2 years may appeal the classification of the position to OPM. OPM has made a conforming change in § 511.607(b)(3) to give the equivalent right to employees who have served under time-limited promotions for 2 years or more.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined in 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 affects only certain Federal employees.

List of Subjects

5 CFR Part 335

Government employees.

5 CFR Part 511

Administrative practice and procedure, Freedom of information, Government employees, Wages.

Office of Personnel Management.

Lorraine A. Green,

Deputy Director.

Accordingly, OPM is amending parts 335 and 511 of title 5, Code of Federal Regulations, as follows:

PART 335—PROMOTION AND INTERNAL PLACEMENT

1. The authority citation for part 335 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR 1954–58 Comp. p. 218.

2. In § 335.102, the introductory text is republished for the convenience of the reader, paragraph (g) is removed, introductory text is added to paragraph (f), and paragraph (f)(1) is revised to read as follows:

§ 335.102 Agency authority to promote, demote, or reassign.

Subject to § 335.103 and, when applicable, to part 319 of this chapter, an agency may:

* * * * *

(f) Make time-limited promotions to fill temporary positions, accomplish project work, fill positions temporarily pending reorganization or downsizing, or meet other temporary needs for a specified period of not more than 5 years, unless OPM authorizes the agency to make and/or extend time-limited promotions for a longer period.

(1) The agency must give the employee advance written notice of the conditions of the time-limited promotion, including the time limit of the promotion; the reason for a time limit; the requirement for competition for promotion beyond 120 days, where applicable; and that the employee may be returned at any time to the position from which temporarily promoted, or to a different position of equivalent grade and pay, and the return is not subject to the procedures in parts 351, 432, 752, or 771 of this chapter. When an agency effects a promotion under a nondiscretionary provision and is unable to give advance notice to the employee, it must provide the notice as soon as possible after the promotion is made.

* * * * *

PART 511—CLASSIFICATION UNDER THE GENERAL SCHEDULE

3. The authority citation for part 511 continues to read as follows:

Authority: 5 U.S.C. 5115, 5338. 5351.

4. In § 511.607, paragraph (b) introductory text and paragraph (b)(3) are revised to read as follows:

§ 511.607 Nonappealable issues.

* * * * *

(b) The following issues are neither appealable nor reviewable:

* * * * *

(3) The class, grade, or pay system of a position to which the employee is detailed or promoted on a time-limited basis, except that employees serving under time-limited promotion for 2 years or more may appeal the classification of their positions to the Office under these procedures.

* * * * *

[FR Doc. 93–27384 Filed 11–8–93; 8:45 am]

BILLING CODE 6325–01–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 91–074–5]

Importation of Monterey Pine Logs From Chile and Monterey Pine and Douglas-Fir Logs From New Zealand

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule.

SUMMARY: We are amending our foreign quarantine regulations by adding restrictions on the importation of Monterey pine logs from Chile. This change requires that Monterey pine logs from Chile meet certain treatment, handling and other requirements to be eligible for importation into the United States. We are also making minor changes to the current regulations for importation of Monterey pine and Douglas-fir logs from New Zealand. These changes appear necessary because there is increased interest in importing large volumes of logs into the United States, and restrictions are necessary to control plant pest risks associated with importing these logs.

DATES: Interim rule effective November 2, 1993. Consideration will be given only to comments received on or before January 10, 1994.

ADDRESSES: Please send an original and three copies of your comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, room 804, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 91–074–5. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are encouraged to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Orr, Entomologist, Planning and Design, Plant Protection and Quarantine, APHIS, USDA, room 810, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–8939.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) published an interim rule in the **Federal Register** on February 16, 1993 (58 FR 8524–8533, Docket No. 91–074–4). That interim rule (referred to below as the New Zealand interim rule), which was effective January 19, 1993, established "Subpart—Logs From New Zealand," 7 CFR 319.40–1 through 319.40–8, to control the plant pest risks presented by the importation into the United States of Monterey pine and Douglas-fir logs from New Zealand.

As noted in an advance notice of proposed rulemaking published in the **Federal Register** on September 22, 1992 (57 FR 43628–43632, Docket No. 91–074–2), we are also developing comprehensive regulations to control the plant pest risks presented by the importation of logs, lumber, and other unmanufactured wood from anywhere in the world. We expect to propose these comprehensive regulations in the near future. However, in the course of developing the comprehensive regulations, we identified plant pest risks associated with current importations of logs from New Zealand, and also identified regulatory requirements that would control these pest risks. Therefore, to reduce these plant pest risks as soon as possible, we promulgated the interim rule imposing regulatory requirements for certain logs from New Zealand.

We have since identified plant pest risks associated with Monterey pine logs from Chile. We have determined that Monterey pine logs from Chile may be imported under conditions similar to those applicable to Monterey pine and Douglas-fir logs from New Zealand, without presenting a significant risk of introducing plant pests into the United States.

There are no APHIS regulations currently in effect restricting importation of Monterey pine logs from Chile. Requests to import these logs are being reviewed on a case-by-case basis, and any shipments arriving at United States ports are subject to inspection and any treatment or special handling that our inspectors find necessary. This interim rule will provide standard regulatory requirements for importing Monterey pine logs from Chile.

During the development of this rule, the Forest Service of the United States Department of Agriculture completed a pest risk assessment for the importation of Monterey pine from Chile[1] (referred to below as the Chile Assessment). APHIS employed a great deal of the information generated by this assessment in developing this rule. The study helped us expand and refine a model for addressing plant pest risks associated with importing Monterey pine logs from Chile.

We are, therefore, adding requirements to the regulations for importation of Monterey pine logs from Chile. In addition, we are making two minor changes to the regulations that will affect logs imported from both Chile and New Zealand. These changes, which are discussed below, concern storage of logs with other wood articles in vessel holds or containers during movement, and the heat treatment required for logs after they arrive in the United States.

We are also adding a provision, affecting log imports from both Chile and New Zealand, which requires the importer to give APHIS 7 days notice prior to the expected date of arrival of log shipments.

Requirements for Importation of Monterey Pine Logs From Chile

We have determined that the requirements for importing Monterey pine and Douglas-fir logs from New Zealand, if applied to importing Monterey pine logs from Chile, will be sufficient to prevent the introduction and dissemination of plant pests associated with these logs from Chile.

The importation requirements established for Monterey pine logs from Chile will control the plant pest risks identified in "Pest Risk Assessment of the Importation of *Pinus radiata, Nothofagus dombeyi* and *Laurelia philippiana* Logs from Chile" (the Chile assessment; see Footnote 1). The Chile

[1] "Pest Risk Assessment of the Importation of *Pinus radiata, Nothofagus dombeyi* and *Laurelia philippiana* Logs from Chile," USDA, Forest Service, Miscellaneous Publication No. 1517, September 1993. This publication can be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays