

(2) As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(d) Employee representatives will be provided with access to information, including research, to make their participation in the continuing collaboration process productive.

(e) Any written comments submitted by employee representatives regarding proposed final draft implementing directives will become part of the record and will be forwarded to the Secretary or designee for consideration in making a final decision.

(f) Nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

(g) In accordance with 5 U.S.C. 9701(e)(2), any procedures necessary to carry out this section will be established by the Secretary and the Director jointly as internal rules of Departmental procedure which will not be subject to review.

**§ 9701.106 Relationship to other provisions.**

(a)(1) The provisions of title 5, U.S. Code, are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical mission of the Department. Each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary or designee. The interpretation of the regulations in this part by DHS and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including

paragraph (c) of this section) or in DHS implementing directives. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), DHS employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DHS employees (notwithstanding coverage under subparts B through G of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521-4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b;

(iii) Differentials for duty involving physical hardship or hazard under 5 U.S.C. 5545(d);

(iv) Recruitment, relocation, and retention payments under 5 U.S.C. 5753-5754;

(v) Physicians' comparability allowances under 5 U.S.C. 5948; and

(vi) The higher cap on relocation bonuses for law enforcement officers established by section 407 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509).

(2) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9701.706(h).

(3) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart E of this part (dealing with labor relations), the reference in section 5596(b)(5) to section 7116 (dealing with unfair labor practices) is considered to be a reference to a modified section 7116 that is consistent with § 9701.517.

(c) When a specified category of employees is covered by a classification

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and pay system established under subparts B and C of this part, the following provisions do not apply:

(1) Time-in-grade restrictions that apply to competitive service GS positions under 5 CFR part 300, subpart F;

(2) Supervisory differentials under 5 U.S.C. 5755; and

(3) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509).

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DHS will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

### §9701.107 Program evaluation.

(a) DHS will establish procedures for evaluating the regulations in this part and their implementation. DHS will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives under this section will occur at the following stages:

(1) Identification of the scope, objectives, and methodology to be used in program evaluation; and

(2) Review of draft findings and recommendations.

(c) Involvement in the evaluation process does not waive the rights of any party under applicable law or regulations.

## Subpart B—Classification

EDITORIAL NOTE: At 73 FR 58435, Oct. 7, 2008, the application of subpart B to part 9701 was rescinded.

### GENERAL

#### §9701.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DHS employees

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and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle of equal pay for work of equal value.

(b) Any classification system prescribed under this subpart must be established in conjunction with the pay system described in subpart C of this part.

### §9701.202 Coverage.

(a) This subpart applies to eligible DHS employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under §9701.102(b).

(b) The following employees and positions are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

(3) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376; and

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to §9701.102(d).

### §9701.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346, and related regulations, are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §9701.106, and §9701.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS-15, is not waived.

### §9701.204 Definitions.

In this subpart:

*Band* means a work level or pay range within an occupational cluster.