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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 214, 317, 319, 359, and 534

RIN 3206-AG14

Executive Positions and Employment

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations governing employment procedures for Senior Executive Service, senior-level, and scientific and professional positions as part of the implementation of Federal Personnel Manual (FPM) sunset. The regulations incorporate certain requirements that existed only in the provisionally retained FPM, which was sunset on December 31, 1994.

EFFECTIVE DATE: February 2, 1995.

FOR FURTHER INFORMATION CONTACT:
Neal Harwood at 202-606-2826.

SUPPLEMENTARY INFORMATION: On October 18, 1994, OPM issued proposed regulations [59 FR 52459] affecting Senior Executive Service (SES), senior-level (SL), and scientific and professional (ST) positions and employment. The proposed regulations continued (in some cases in modified form) certain requirements and authorities that would go out of existence when the provisionally retained FPM was sunset on December 31, 1994, because they were not specified in other regulations or statute. The proposed regulations also clarified certain existing regulatory provisions and deleted out-of-date provisions.

The comment period, which was 60 days from the date of publication, ended on December 19, 1994. Written comments were received from seven agencies and the Senior Executives Association (SEA).

Before reviewing the comments on specific provisions, we want to note that three agencies and SEA included comments supporting the regulations in general. One agency wanted to substantially reduce what was included in the regulations. SEA, on the other hand, in its comments on specific provisions recommended in a number of places that the regulations be made more restrictive.

As we stated in the proposed regulations, we have tried to take into account the recommendations in the Report of the National Performance Review to allow agencies more flexibility in managing their personnel system, while maintaining a "corporate approach to managing executive resources." Under such an approach, there are some basic features of executive personnel systems that need to be administered uniformly on a Governmentwide basis.

We have tried to hold these requirements to a minimum; but as we said in the proposed regulations "a basic regulatory framework (including certain procedural requirements) is necessary to assure an executive personnel system that meets statutory requirements and carries out merit system principles."

We recognize that different parties will have different views as to what are the basic requirements that need to be maintained. We believe the regulations provide an appropriate balance between agency flexibility and Governmentwide requirements. (As we pointed out in the proposed regulations, no requirements are imposed on agencies under the regulations that did not exist in the former FPM; and a number have been deleted or modified.) We will continue, however, to see how these requirements work in practice and will make necessary modifications in the future if there are problems that arise.

Part 317—Employment in the Senior Executive Service

(1) Section 317.501, Recruitment and Selection for Initial SES Career Appointment

Paragraph (b)(2) requires that vacancies must be included in an OPM listing of SES vacancies for at least 14 calendar days. One agency recommended that agencies be allowed to use a shorter period if they had a legitimate reason, and another agency recommended not having any minimum

period. We believe the 14-day notice period is needed to assure full and open competition and does not place an undue delay on any agency in filling its positions.

Subsequent to publication of the regulations a question arose whether the reannouncement of an SES vacancy after the original announcement has closed must also be included in OPM's listing for at least an additional 14 days. The regulations apply to all announcements, including reannouncements.

(2) Section 317.502. Qualifications Review Board (QRB) Certification

Paragraph (b) is revised to eliminate time limits on the submission of QRB cases. Currently, cases must be received by OPM within 9 months from the closing date of the vacancy announcement. The proposed regulations would have extended the deadline to 12 months. Elimination of the deadline for the submission of QRB cases responds to agency requests for more flexibility to make decisions on executive selections. Although OPM will not prescribe a deadline, we expect that most QRB cases will be submitted within 9 months of the closing date of the vacancy announcement. Agencies may, of course, establish internal deadlines to facilitate timely processing of QRB cases.

Paragraph (d) clarifies OPM's authority regarding the disposition of QRB cases when an agency head has changed or will be changing, or when there is a Presidential transition. One agency felt that a moratorium on QRB actions should not apply to it because of its national security functions and because the Deputy by law exercises the full powers of the agency head in the absence of the Secretary. The regulatory provision give OPM authority to hold or return QRB cases, but does not require such action. Particular situations can be addressed with the agency involved depending on the circumstances.

Paragraph (e) states that OPM will not submit to a QRB the conversion of a noncareer SES employee to a career SES appointment in the employee's own position or a successor to that position. One agency wanted to broaden the restriction to cover substantially similar positions. Another agency recommended eliminating the provision on the basis that it is a disenfranchising of the right to apply and be selected for

a position. The restriction is in the regulation because in this situation there is no genuine vacancy for which to compete since the position is currently occupied. Therefore, we do not believe it appropriate to extend the restriction to other positions that are vacant, even though they may be similar, or to eliminate the restriction.

(3) Section 317.601, Limited Appointments

The section provides a pool of limited appointment authorities equal to 2 percent of an agency's SES position allocation (with a minimum of one authority for each agency) that agencies can use without getting prior OPM approval as long as the appointee is currently a career or career-type appointee outside the SES.

Two agencies wanted to use the pool to make appointments from outside the Government. We have restricted the pool to career and career-type appointees to assure that it is used appropriately and not for noncareer or political-type appointments. As we noted in the proposed regulations, where appropriate OPM could still give an agency a separate quota for use in making limited appointments on its own under specified circumstances, e.g., to make appointments to scientific positions where there was a critical or emergency need.

(4) Section 317.901, Reassignments

Paragraph (d) states the authority of agencies to run 15-day (nongeographic) and 60-day (geographic) advance notices on reassignments of career SES appointees concurrently with the 120-day moratorium on involuntary reassignments following the appointment of a new agency head or noncareer supervisor (5 U.S.C. 3395(e)).

SEA stated that under 5 U.S.C. 3395(e) advance notices should not be issued until after the 120 days have expired. SEA argued that the intent of the law is to assure that the noncareer supervisor has at least 120 days to observe the performance of the career appointee before making a reassignment decision. We noted in the proposed regulations that if the notice could not be issued until after the moratorium, the moratorium in effect would be extended by the length of the notice period. SEA stated that the agency could detail the employee immediately after the moratorium expired until the notice period was over. That still extends by up to 60 days, however, the time before an official reassignment could be made.

Allowing the advance notice to run during the moratorium is not new. The authority had been explicitly stated in the former FPM since 1989. We see no conflict with the statutory provision on

moratoriums, which governs when the reassignment can be effected. We want to note that agencies are still free to wait until after the moratorium to issue the advance notice, or to cancel a proposed reassignment before it is effected if the notice is issued during the moratorium.

(5) Section 317.903, Details

Paragraph (b) modifies time limits on details that previously existed in the FPM in order to reduce paperwork, provide greater flexibility for the SES as a separate service, and protect the rights of employees.

One agency recommended eliminating all regulations on the duration of details. SEA, on the other hand, recommended retaining the current provisions.

SEA argued as follows. Allowing details of SES members to unclassified duties for up to 240 days (in lieu of the current 120 days) would permit political appointees to place career SES appointees "on the shelf" for the prolonged periods. Allowing non-SES employees to be detailed to the SES noncompetitively for up to 240 days (in lieu of the current 120 days) violates the concept of equal pay for equal work. Requiring OPM approval of the details of non-SES employees to the SES only if the detail exceeds 240 days (in lieu of the current 120 days) and only if the person on detail supervises other SES employees (in lieu of also including nonsupervisory details) will encourage agencies to use details, which involve no adjustment in pay, rather than limited SES appointments for temporary assignments.

We understand SEA's concerns. Details, however, are a legitimate method of temporarily staffing a position. Providing additional flexibility in personnel operations, one of the stated goals of the National Performance Review, does not automatically mean that agencies will abuse their increased authority. We believe these provisions still adequately protect employee rights. As we noted in the proposed regulations, we believe changes we have made in the regulations on limited SES appointments will in fact lead to greater use of those appointments in lieu of details.

Part 319—Employment in Senior-Level and Scientific and Professional Positions

(1) Subpart D, Recruitment and Examination

The subpart delegates authority to agencies to recruit and examine applicants and establish civil service registers for SL positions in the competitive service in accordance with criteria prescribed in the regulations.

The criteria implement provisions in statute (5 U.S.C. chapter 33, subchapter I) and elsewhere in the regulations for examination, certification, and selection of individuals who do not have status in the competitive service.

One agency said that all the procedures should be issued as guidance rather than incorporated in the regulations. Under 5 U.S.C. 1104, however, OPM is required to establish standards which shall apply to the activities of any agency under delegated authority.

Two agencies specifically recommended that the requirement to use a numerical rating scale of 100 points with 70 as passing in establishing a civil service register for competitive appointment be deleted. They said agencies should have the freedom to use any examining method they deem appropriate, provided all legal requirements are met.

The procedures in the regulations for staffing senior-level positions are based on existing statutory and regulatory provisions that govern the selection of non-status persons for competitive service positions. OPM is considering a number of proposed statutory and regulatory changes in the competitive examining system to make it less prescriptive in light of the National Performance Review recommendations on Federal staffing. One of the proposed changes would authorize agencies to examine for jobs using either the existing system of ranking candidates based on numerical ratings or a new method of placing candidates in quality groups based on qualifications (veterans would receive preference within quality groups). Under current law, numerical rating and ranking is required for competitive examining.

In order to simplify the regulations, however, we have deleted from subpart D the specific provisions in the proposed regulations covering establishment of a roster of eligibles, selection, and applicant rights. These provisions are covered elsewhere in 5 CFR where competitive examining for the civil service in general is discussed (e.g., section 337.101 on using a numerical rating scale of 100, section 332.404 on selecting from the highest three eligible on a certificate and section 300.104 on handling applicant complaints.)

Part 359—Removal From the SES; Guaranteed Placement in Other Personnel Systems

(1) Subpart F, Reduction in Force
Sections 359.603(a)(1) and (d)(2) are revised to permit the agency head to delegate to an official at the Assistant

Secretary level or above in departments, or an equivalent official above the director of personnel in other agencies, the authority to certify to OPM that the agency does not have a vacant SES position for a RIF'd employee or that a RIF'd employee referred by OPM is not qualified for the referred position.

Current regulations do not permit any delegation.

SEA commented that since the law states that the "agency head" shall make these determinations, there is no authority under the law for any delegation. There is general authority in title 5 of the U.S. Code, however, for agency heads to delegate personnel authorities. Under 5 U.S.C. 302(b), "the head of an agency may delegate to subordinate officials the authority vested in him—(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency * * *." Delegation would be prohibited only if a law governing a particular authority specifically stated that the authority could not be delegated, or if OPM in exercising its regulatory authority under a law stated there could be no delegation.

SEA also wanted to have the agency head make the determinations because it believed that an official at the Assistant Secretary level would be subject to peer pressures that could preclude a correct determination. Individuals at the Assistant Secretary level make many decisions that affect managers throughout the agency (such as those affecting budget and personnel), and we believe these officials will be able to act in an impartial manner and protect employee rights, absent any facts to the contrary.

Waiver of Delay in Effective Date

I find that good cause exists for making this rule effective on February 2, 1995. The delay in the effective date of this rule is being waived since the requirements established in the rule are not new. They previously were contained in the provisionally retained Federal Personnel Manual, which sunset on December 31, 1994. The regulations need to be made effective immediately to avoid any significant break in the application of the affected requirements.

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 214, 317, 319, and 359

Government employees.

5 CFR Part 534

Government employees, hospitals, students, wages.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending 5 CFR parts 214, 317, 319, 359, and 534 as follows:

PART 214—SENIOR EXECUTIVE SERVICE

1. The authority citation for part 214 continues to read as follows:

Authority: 5 U.S.C. 3132.

2. In subpart B, § 214.203 and § 214.204 are added to read as follows:

Subpart B—General Provisions

§ 214.203 Reporting requirements.

Agencies shall report such information as may be requested by OPM relating to positions and employees in the Senior Executive Service.

§ 214.204 Interchange agreements.

(a) In accordance with 5 CFR 6.7, OPM and any agency with an executive personnel system essentially equivalent to the Senior Executive Service (SES) may, pursuant to legislative and regulatory authorities, enter into an agreement providing for the movement of persons between the SES and the other system. The agreement shall define the status and tenure that the persons affected shall acquire upon the movement.

(b) Persons eligible for movement must be serving in permanent, continuing positions with career or career-type appointments. They must meet the qualifications requirements of any position to which moved.

(c) An interchange agreement may be discontinued by either party under such conditions as provided in the agreement.

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

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

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

4. In subpart C, § 317.301 is amended by redesignating paragraph (a)(4) as paragraph (a)(5) and by adding a new paragraph (a)(4) to read as follows:

Subpart C—Conversion to the Senior Executive Service

§ 317.301 Conversion coverage.

(a) * * *

(4) The implementation of the SES in a formerly excluded agency when OPM determines that the agency is an "Executive agency" under 5 U.S.C. 3132(a)(1).

* * * * *

5. In subpart D, the current paragraph in § 317.401 is designated as paragraph (a), and paragraph (b) is added to read as follows:

Subpart D—Qualifications Standards

§ 317.401 General.

* * * * *

(b) A written qualification standard must be established for a position before any appointment is made to the position. If a position is being filled competitively, the standard must be established before the position is announced.

6. In subpart E, § 317.501 is amended by revising the last sentence of paragraph (a), revising paragraph (b)(2), and by adding paragraph (f) to read as follows:

Subpart E—Career Appointments

§ 317.501 Recruitment and selection for initial SES career appointment.

(a) * * * The ERB shall, in accordance with the requirements of this section, conduct the merit staffing process for initial SES career appointment.

(b) * * *

(2) Announcements of SES vacancies to be filled by initial career appointment must be included in the OPM SES vacancy announcement system for at least 14 calendar days, including the date of publication.

* * * * *

(f) *OPM review.* OPM may review proposed career appointments to ensure that they comply with all merit staffing requirements and are free of any impropriety. An agency shall take such action as OPM may require to correct an action contrary to any law, rule, or regulation.

7. Section 317.502 is amended by removing the last sentence of paragraph (b), revising paragraph (d), redesignating paragraph (e) as paragraph (f), and by adding a new paragraph (e) to read as follows:

§ 317.502 Qualifications Review Board certification.

* * * * *

(d) OPM may determine the disposition of agency QRB requests

where the QRB has not yet acted if the agency head leaves office or announces an intention to leave office, if the President has nominated a new agency head, or if there is a Presidential transition.

(e) OPM will not submit to a QRB any action to convert a noncareer SES employee to a career SES appointment in the employee's current position or a successor to that position.

* * * * *

8. Section 317.503 is amended by removing the last sentence in paragraph (b), redesignating paragraphs (c) and (d) as paragraphs (d) and (e) respectively, and adding a new paragraph (c) and paragraph (f) to read as follows:

§ 317.503 Probationary period.

* * * * *

(c) The following conditions apply to crediting service towards completion of the probationary period.

(1) Time on leave with pay while in an SES position is credited. Earned leave for which the employee is compensated by lump-sum payment upon separation is not credited.

(2) Time in a nonpay status while in an SES position is credited up to a total of 30 calendar days (or 22 workdays). After 30 calendar days, the probationary period is extended by adding to it time equal to that served in a nonpay status.

(3) Time absent on military duty or due to compensable injury is credited upon restoration to the SES when no other break in SES service has occurred.

(4) Time following transfer to an SES position in another agency is credited, i.e., the individual does not have to start a new probationary period.

* * * * *

(f) An individual who separated from the SES during the probationary period and who has been out of the SES more than 30 calendar days must serve a new 1-year probationary period upon reappointment and may not credit previous time in a probationary period. In the following situations, however, there is an exception and the individual is only required to complete the remainder of the previously served probationary period.

(1) The individual left the SES without a break in service for a Presidential appointment and is exercising reinstatement rights under 5 U.S.C. 3593(b).

(2) The individual left the SES without a break in service for other civilian employment that provides a statutory or regulatory reemployment right to the SES when no other break in service occurred.

(3) The break in SES service was the result of military duty or compensable

injury, and the time credited under paragraph (c)(3) of this section was not sufficient to complete the probationary period.

9. In subpart F, the heading for the subpart is revised to read as follows:

Subpart F—Noncareer and Limited Appointments

10. Section 317.601 is revised to read as follows:

§ 317.601 Authorization.

(a) An agency may make a noncareer or limited appointment only to a general position.

(b) Each use of a noncareer appointment authority must be approved individually by the Office of Personnel Management, and the authority reverts to the Office upon departure of the incumbent, unless otherwise provided by the Office.

(c) Use of a limited appointment authority is subject to the conditions in this paragraph.

(1) Agencies are provided a pool of limited appointment authorities equal to 2 percent of their Senior Executive Service (SES) position allocation, or one authority, whichever is greater. An agency may use the pool to make a limited appointment only of an individual who has a career or career-conditional appointment (or an appointment of equivalent tenure) in a permanent civil service position outside the SES. If necessary, the Office of Personnel Management may suspend use of the pool authority.

(2) Each use of a limited appointment authority other than under paragraph (c)(1) of this section must be approved individually by the Office, and the authority reverts to the Office upon departure of the incumbent, unless otherwise provided by the Office.

11. Section 317.602 is amended by revising the heading and removing the first sentence in paragraph (a) to read as follows:

§ 317.602 Conditions of a limited appointment.

* * * * *

12. Section 317.603 is amended by revising the heading and the first sentence to read as follows:

§ 317.603 Selection.

An agency may make a noncareer or limited appointment without the use of merit staffing procedures. * * *

13. Section 317.604 is amended by revising the heading, redesignating paragraphs (a) and (b) as paragraphs (b)(1) and (b)(2) respectively, designating the introductory text of the section as the introductory text of

paragraph (b), and by adding a new paragraph (a) to read as follows:

§ 317.604 Reassignment.

(a) An agency may reassign a noncareer appointee only with the prior approval of the Office unless otherwise provided by the Office.

* * * * *

14. Section 317.605 is amended by revising paragraphs (a) and (b) to read as follows:

§ 317.605 Tenure of appointees.

(a) A noncareer or limited appointee does not acquire status within the Senior Executive Service on the basis of the appointment.

(b) An agency may terminate a noncareer or limited appointment at any time, unless a limited appointee is covered under 5 CFR 752.601(c)(2). The agency must give the noncareer or limited appointee a written notice at least 1 day prior to the effective date of the removal.

* * * * *

15. In subpart G, § 317.703 is amended by designating the text of paragraph (a) as paragraph (a)(1) and adding a new paragraph (a)(2) to read as follows:

Subpart G—SES Career Appointment by Reinstatement

§ 317.703 Guaranteed reinstatement: Presidential appointees.

(a) * * *

(2) If an individual is serving under a Presidential appointment with reinstatement entitlement and receives another Presidential appointment without a break in service between the two appointments, the individual continues to be entitled to be reinstated to the SES following termination of the second appointment. If there is an interim period between the two Presidential appointments, the individual must be reinstated as an SES career appointee before the effective date of the second appointment to preserve reinstatement entitlement following termination of the second appointment.

* * * * *

16. In subpart H, § 317.801 is amended by revising the heading for paragraph (b), designating the text of paragraph (b) as paragraph (b)(1), adding paragraphs (b)(2) and (b)(3), and by removing paragraph (d) to read as follows:

Subpart H—Retention of SES Provisions

§ 317.801 Retention of SES Provisions

* * * * *

(b) *Election.* * * *

(2) The appointing agency is responsible for advising the appointee of the election opportunity. The election decision must be in writing.

(3) If an appointee elects to retain SES basic pay, the appointee is entitled to receive locality-based comparability payments under 5 CFR, part 531, subpart F, if such pay is applicable to SES employees in the locality pay area, and any applicable special pay adjustment for a law enforcement officer under 5 CFR part 531, subpart C, even though the appointee may be in an Executive Schedule position otherwise excluded from such payments.

* * * * *

17. In subpart I, § 317.901 is amended by adding paragraph (d) to read as follows:

Subpart I—Reassignments, Transfers, and Details**§ 317.901 Reassignments.**

* * * * *

(d) A 15 or 60-day advance notice described in paragraph (b) of this section may be issued during the 120-day moratorium on the involuntary reassignment of a career appointee described in paragraph (c) of this section, but an involuntary reassignment may not be effected until the moratorium has ended.

18. Section 317.903 is amended by revising paragraph (b)(2) and by adding paragraphs (b)(3) and (b)(4) to read as follows:

§ 317.903 Details.

* * * * *

(b) * * *

(2) An agency may not detail an SES employee to unclassified duties for more than 240 days.

(3) An agency must use competitive procedures when detailing a non-SES employee to an SES position for more than 240 days unless the employee is eligible for a noncompetitive career SES appointment.

(4) An agency must obtain OPM approval for a detail of more than 240 days if the detail is of:

(i) a non-SES employee to an SES position that supervises other SES positions; or

(ii) An SES employee to a position at the GS-15 or equivalent level or below.

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

19. Part 319 is revised to read as follows:

Subpart A—General

Sec.

- 319.101 Coverage.
- 319.102 Senior-level positions.
- 319.103 Scientific and professional positions.
- 319.104 Applicable instructions.
- 319.105 Reporting requirements.

Subpart B—Position Allocations and Establishment

- 319.201 Coverage.
- 319.202 Allocation of positions.
- 319.203 Establishment of positions.

Subpart C—Qualifications Requirements

- 319.301 Qualifications standards.
- 319.302 Individual qualifications.

Subpart D—Recruitment and Examination

- 319.401 Senior-level positions.
- 319.402 Scientific and professional positions.

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

Subpart A—General**§ 319.101 Coverage.**

(a) This part covers senior-level (SL) and scientific and professional (ST) positions that are classified above GS-15 and are paid under 5 U.S.C. 5376. See 5 CFR part 534, subpart E, for pay provisions.

(b) Positions that meet the criteria for placement in the Senior Executive Service (SES) under 5 U.S.C. 3132(a) may not be placed in the SL or ST system and are not covered by this part.

§ 319.102 Senior-level positions.

(a) SL positions are positions classified above GS-15 pursuant to 5 U.S.C. 5108 that are not covered by other pay systems (e.g. the SES and ST systems).

(b) Positions in agencies that are excluded from 5 U.S.C. chapter 51 (Classification) under section 5102(a), or positions that meet one of the exclusions in section 5102(c), are excluded from the SL system.

(c) SL positions in the executive branch are in the competitive service unless the position is excepted by statute, Executive order, or the Office of Personnel Management (OPM).

§ 319.103 Scientific and professional positions.

(a) ST positions are established under 5 U.S.C. 3104 to carry out research and development functions that require the services of specially qualified personnel.

(b) Research and development functions are defined in The Guide to Personnel Data Standards under the data element "Functional Classification." The guide is available for inspection at the Office of Personnel

Management library, 1900 E Street, NW., Washington DC 20415.

(c) An ST position must be engaged in research and development in the physical, biological, medical, or engineering sciences, or a closely related field.

(d) ST positions are in the competitive service.

§ 319.104 Applicable instructions.

Provisions in statute, Executive order, or regulations that relate in general to competitive and excepted service positions and employment apply to positions and employment under the SL and ST systems unless there is a specific provision to the contrary.

§ 319.105 Reporting requirements.

Agencies shall report such information as may be requested by OPM relating to SL and ST positions and employees.

Subpart B—Position Allocations and Establishment**§ 319.201 Coverage.**

This section applies to SL positions in an executive agency per 5 U.S.C. 5108 and ST positions in any agency per 5 U.S.C. 3104.

§ 319.202 Allocation of positions.

SL and ST positions may be established only under a position allocation approved by OPM.

§ 319.203 Establishment of positions.

(a) Prior approval of OPM is not required to establish individual SL and ST positions within an allocation, but the positions must be established in accordance with the standards and procedures in paragraph (b) of this section. OPM reserves the right to require the prior approval of individual positions if the agency is not in compliance with these standards and procedures.

(b) Before an SL or ST position may be established, an agency must:

(1) Prepare a description of the duties, responsibilities, and supervisory relationships of the position; and

(2) Determine, consistent with published position classification standards and guides and accepted classification principles, that the position is properly classified above GS-15. In addition, for an ST position an agency must determine that the position meets the functional research and development criteria described in § 319.103.

Subpart C—Qualifications Requirements**§ 319.301 Qualifications standards.**

(a) *General.* Agency heads are responsible for establishing qualifications standards in accordance with the criteria in this section.

(1) The standard must be in writing and identify the breadth and depth of the knowledges, skills, and abilities, or other qualifications, required for successful performance in the position.

(2) Each criterion in the standard must be job related.

(3) The standard may not include any criterion prohibited by law or regulation.

(b) *Standards for senior-level positions.* (1) The standard must be specific enough to enable applicants to be rated and ranked according to their degree of qualifications when the position is being filled on a competitive basis.

(2) The standard may not include a minimum length of experience or minimum education requirement beyond that authorized for similar positions in the General Schedule.

(c) *Standards for scientific and professional positions.* (1) Unless the agency obtains the approval of OPM, the standard must provide that the candidate have at least 3 years of specialized experience in, or closely related to, the field in which the candidate will work. At least 1 year of this experience must have been in planning and executing difficult programs of national significance or planning and executing specialized programs that show outstanding attainments in the field of research or consultation.

(2) Agencies may require that at least 1 year of the specialized experience must be at least equivalent to experience at GS-15.

(3) Agencies may require applicants to furnish positive evidence that they have performed highly creative or outstanding research where similar abilities are required in the ST position.

§ 319.302 Individual qualifications.

Agency heads are delegated authority to approve the qualifications of individuals appointed to SL and ST positions. The agency head must determine that the individual meets the qualifications standards for the position to which appointed.

Subpart D—Recruitment and Examination**§ 319.401 Senior-level positions.**

(a) *General.* SL positions may be in either the competitive or excepted

service. This section only applies to appointments in the competitive service from a civil service register. Reassignments, promotions, transfers, and reinstatements to SL positions in the competitive service shall be made in accordance with applicable statutory and regulatory provisions. Employment of SL employees in the excepted service is covered by 5 CFR, part 302.

(1) Agency heads are delegated authority to recruit and examine applicants for SL positions in the competitive service, establish competitor inventories, and issue certificates of eligibility in conformance with the requirements of this section, other applicable regulations, and statute.

(2) Agencies shall take such action as OPM may require to correct an action taken under delegated authority.

(3) Delegated authority may be terminated or suspended at any time by OPM for reasons such as, but not limited to:

(i) Evidence of unequal treatment of candidates; or

(ii) Identifiable merit system abuses.

(b) *Recruitment.* (1) A recruiting plan, with appropriate emphasis on affirmative recruitment, must be developed and followed.

(2) Vacancy announcements must remain open for a minimum of 14 calendar days. The closing date may not be a nonworkday.

(3) State Job Service offices must be notified of the vacancy in accordance with 5 CFR 330.102. Publication in OPM's listing of Senior Executive Service and other executive vacancies, which is provided to the offices, will satisfy this requirement.

(c) *Evaluation and selection.*

Examination and selection procedures, and rights of applicants, are subject to the same provisions in statute and regulation that govern civil service examinations and appointments in general.

(d) *Records.* (1) Agencies must maintain records sufficient to allow reconstruction of the merit staffing process.

(2) Records must be kept for 2 years after an appointment, or, if no appointment is made, for 2 years after the closing date of the vacancy announcement.

§ 319.402 Scientific and professional positions.

(a) ST positions are filled without competitive examination under 5 U.S.C. 3325.

(b) ST positions are not subject to the citizenship requirements in 5 CFR part 338, subpart A. Agencies, however,

must observe any restrictions on the employment of noncitizens in applicable appropriations acts.

(c) ST employees acquire competitive status immediately upon appointment. They are not required to serve a probationary or trial period.

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

20. The authority citation for part 359 continues to read as follows:

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

21. In subpart F, § 359.601 is amended by adding paragraph (b)(3) to read as follows:

Subpart F—Removal of Career Appointees as a Result of Reduction in Force**§ 359.601 General.**

* * * * *

(b) * * *

(3) *Agency* in this subpart means an executive department or an independent establishment.

* * * * *

22. Section 359.602 is amended by adding a sentence at the end of paragraph (a)(2) and by adding a new paragraph (a)(4) to read as follows:

§ 359.602 Agency reductions in force.

(a) * * *

(2) * * * When performance ratings are used, they shall be the final ratings under 5 CFR part 430, subpart C.

* * * * *

(4) Competitive procedures are not required if an agency is being abolished, without a transfer of functions, and all SES appointees will be separated at the same time or within 3 months of abolition.

23. Section 359.603 is amended by revising the last sentence in paragraph (a)(1), adding a new paragraph (a)(4), revising the last sentence in paragraph (d)(2), adding paragraph (d)(3), and by revising paragraph (f) to read as follows:

§ 359.603 OPM priority placement.

(a) * * *

(1) * * * This certification may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

* * * * *

(4) An individual remains a career SES appointee in his or her agency during the OPM placement period.

* * * * *

(d) * * *

(2) * * * The response may not be delegated below the Assistant Secretary level in a department, or an equivalent level above the director of personnel in other agencies.

(3) If an agency cancels a position while a referral to the position is pending, the appointee will be entitled to priority consideration for the position if it or a successor position is reestablished in the SES within 1 year of the cancellation date and the appointee has not been placed in another SES position.

* * * * *

(f) *Declination by employee.* If a career appointee declines a reasonable offer of placement, OPM's placement efforts will cease. The appointee may be removed from the SES at the expiration of the agency notice period.

24. Section 359.605 is revised to read as follows:

§ 359.605 Notice requirements.

(a) Each career appointee subject to removal under § 359.604(b) is entitled to a specific, written notice at least 45 calendar days before the effective date of the removal. The notice shall state, as a minimum—

(1) The action to be taken and its prospective effective date;

(2) The nature of the competition, including the appointee's competitive area, if less than the agency, and standing on the retention register;

(3) The place where the appointee may inspect the regulations and records pertinent to the action;

(4) Placement rights within the agency and through OPM, including how the employee can apply for OPM placement assistance; and

(5) The appointee's appeal rights, including the time limit for appeal and the location of the Merit Systems Protection Board office to which an appeal should be sent.

(b) A career appointee who has received a notice under paragraph (a) of this section is entitled to a second notice in writing at least 1 day before removal from the SES. The notice shall state, as a minimum—

(1) The basis for the removal, i.e., 5 U.S.C. 3595(b)(5) if the basis is expiration of the 45-day OPM placement period, or 5 U.S.C. 3595(b)(4) if the basis is declination of a reasonable offer of placement, in which case identify the position offered and the date on which it was declined;

(2) The effective date of the removal;

(3) Placement rights outside the SES and, when applicable, the appointee's eligibility for discontinued service retirement in lieu of placement; and

(4) Reminder of the appointee's appeal rights.

25. In subpart G, § 359.705 is amended by redesignating paragraph (b) as paragraph (d), by adding a new paragraph (b), and by adding paragraphs (c), and (e) to read as follows:

Subpart G—Guaranteed Placement

§ 359.705 Pay.

* * * * *

(b) An employee who is placed under this subpart in a position outside the SES in another agency is entitled to receive basic pay under the provisions of this section.

(c) An employee who is placed under this subpart in a General Schedule position is not subject to the limitation on General Schedule basic pay in 5 U.S.C. 5303(f) of level V of the Executive Schedule. The employee is subject, however, to the limitation on General Schedule basic pay plus locality-based comparability payments in 5 U.S.C. 5304(g)(1) of level IV of the Executive Schedule.

* * * * *

(e) Pay received under this section shall terminate if:

(1) The employee has a break in service of 1 workday or more; or

(2) The employee is demoted based on conduct or unacceptable performance or at the employee's request.

26. The authority citation for subpart H of part 359 continues to read as follows:

Authority: 5 U.S.C. 3133 and 3136.

27. Section 359.803 is amended by revising the first sentence to read as follows:

Subpart H—Furloughs in the Senior Executive Service

§ 359.803 Competition.

Any furlough for more than 30 calendar days, or for more than 22 workdays if the furlough does not cover consecutive calendar days, shall be made under competitive procedures established by the agency. * * *

PART 534—PAY UNDER OTHER SYSTEMS

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

Authority: 5 U.S.C. 1104, 5307, 5351, 5352, 5353, 5376, 5383, 5384, 5385, 5541, and 5550a.

29. Section 534.401 is amended by revising paragraph (c)(3) and paragraph (f) to read as follows:

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

§ 534.401 Definitions and setting individual basic pay.

* * * * *

(c) * * *

(3) An appointing authority may lower the pay for a senior executive only one rate at the time of an adjustment. Restrictions on reducing pay of career senior executives are in paragraph (f) of this section.

* * * * *

(f) *Restrictions on reducing pay of career senior executives.*

(1) The ES rate of a career senior executive may be reduced involuntarily in the appointee's agency or upon a transfer of function to another agency only:

(i) For performance reasons, i.e., the executive has received a less than fully successful performance rating under 5 CFR part 430, subpart C, or has been conditionally recertified or not recertified under 5 CFR 317.504; or

(ii) As a disciplinary action resulting from conduct related activity, e.g., misconduct, neglect of duty, or malfeasance.

(2) If the pay reduction is for performance reasons, the agency shall provide the executive at least 15 days' advance written notice.

(3) If the pay reduction is for disciplinary reasons, the agency shall:

(i) Provide the executive at least 30 days' advance written notice;

(ii) Provide a reasonable time, but not less than 7 days, for the executive to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(iii) Allow the executive to be represented by an attorney or other representative; and

(iv) Provide the executive a written decision and specific reasons therefor at the earliest practicable date.

30. Section 534.403 is amended by revising paragraph (a)(1), redesignating paragraph (a)(2) as paragraph (a)(3), adding new paragraphs (a)(2) and (a)(4), adding a sentence at the end of paragraph (c), and by adding a sentence at the end of paragraph (f) to read as follows:

§ 534.403 Performance awards.

(a) * * *

(1) To be eligible for an award, the individual must have been an SES career appointee as of the end of the performance appraisal period; and the individual's most recent performance rating of record under part 430, subpart

C, of this chapter for the appraisal period must have been "Fully Successful" or higher.

(2) Individuals eligible for a performance award include:

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the salary of the individual is above the ES-6 pay rate, the ES-6 rate is used for crediting the agency award pool under paragraph (b) of this section and the amount the individual may receive under paragraph (c) of this section.

(ii) A reemployed annuitant with an SES career appointment.

(iii) An SES career appointee who is on detail. If the detail is to another agency, eligibility is in the individual's official employing agency, i.e., the agency from which detailed. If the appointee is on a reimbursable detail, the agency to which the appointee is detailed may reimburse the employing agency for some or all of any award, as agreed upon by the two agencies; but the reimbursement does not affect the award pool for either agency as calculated under paragraph (b) of this section.

* * * * *

(4) The agency head must consider the recommendations of the Performance Review Board (PRB), but the agency head has the final authority as to who is to receive a performance award and the amount of the award.

* * * * *

(c) * * * The rate of basic pay does not include locality-based comparability payments under 5 U.S.C. 5304 and 5 CFR part 531, subpart F, or special law enforcement adjustments under section 404 of the Federal Employees Pay Comparability Act of 1990 and 5 CFR part 531, subpart C.

* * * * *

(f) * * * The full performance award, however, is charged against the agency bonus pool under paragraph (b) of this section for the fiscal year in which the initial payment was made.

31. Section 534.405 is added to subpart D to read as follows:

§ 534.405 Restrictions on premium pay and compensatory time.

(a) Under 5 U.S.C. 5541(2)(xvi) and 5 CFR 550.101(b)(18), members of the Senior Executive Service (SES) are excluded from premium pay, including overtime pay.

(b) Since SES members are not eligible for overtime pay, they also are not eligible for compensatory time in lieu of overtime pay for work performed as an SES member. SES members are eligible, however, for compensatory

time off for religious purposes under 5 U.S.C. 5550a and 5 CFR part 550, subject J.

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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RINs 3209-AA04, 3209-AA15

Further Grace Period Extension for Certain Existing Agency Standards of Conduct

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; technical amendment.

SUMMARY: The Office of Government Ethics is granting a further grandfathering grace period extension for up to eleven months for certain existing executive agency standards of conduct, dealing with financial interest prohibitions and prior approval for outside employment and activities, which have been temporarily preserved. This further action (one previous extension was granted last year) is necessary because many agencies have not been able to issue, with OGE concurrence and co-signature, interim or final supplemental regulations during the first two years' grace period. This further extension will help ensure that agencies which have submitted draft supplementals to OGE will have adequate time to issue, if they so desire, successor regulatory provisions to replace grandfathered financial interest prohibitions and prior approval requirements.

EFFECTIVE DATE: February 3, 1995.

FOR FURTHER INFORMATION CONTACT:

William E. Gressman, Office of Government Ethics, telephone: 202-523-5757, FAX: 202-523-6325.

SUPPLEMENTARY INFORMATION: The Office of Government Ethics is granting under the executive branch standards of ethical conduct a further extension of time for up to eleven months, until January 3, 1996, for certain agencies' existing conduct standards dealing with prohibited financial interests and prior approval for outside employment and activities. When OGE published its ethical conduct standards for executive branch employees in the **Federal Register** on August 7, 1992 (as now codified at 5 CFR part 2635), it provided that most existing individual agency standards of conduct would be superseded once the executive branch-wide standards took effect on February

3, 1993. However, OGE also provided, by means of notes following 5 CFR 2635.403(a) and 2635.803, that any existing agency standards dealing with the two types of restrictions noted above would be preserved for one more year, until February 3, 1994, or until the agency concerned issued (with OGE concurrence and co-signature) a supplemental regulation, whichever occurred first. See 57 FR 35006-35067, as corrected at 57 FR 48557 and 52583. Last year, OGE extended that original grace period for an additional year, until February 3, 1995 (or until agency issuance of a supplemental regulation), for those executive branch departments and agencies that had not yet had a chance to issue final or interim final successor rules. See 59 FR 4779-4780 (February 2, 1994) and, in particular, appendix A which was added to part 2635 at that time.

Through OGE's liaison efforts, the Office of the Federal Register (OFR) has assigned new chapters, including parts, at the end of title 5 of the Code of Federal Regulations to accommodate agencies' future supplemental standards regulations (on these two and other appropriate subject areas), as well as any supplemental agency regulations under OGE's executive branch-wide financial disclosure provisions at 5 CFR part 2634. Some 60 agencies have had such chapters reserved, including those which have by now already issued, with OGE concurrence and co-signature, interim final or final supplemental ethics regulations. However, many agencies have still not yet had the time to issue their planned supplemental standards regulations in interim or final form.

The Office of Government Ethics has therefore determined to permit a further preservation of existing agency regulatory standards of conduct setting forth financial interest prohibitions and outside employment and activities prior approval requirements for up to eleven more months, until January 3, 1996 (or until issuance by each agency of its supplemental regulation, whichever comes first), for those agencies which submitted draft supplemental standards regulations to OGE on or before January 25, 1995. This is the last grace period extension that OGE intends to grant. The agencies subject to this further grandfathering grace period extension, as provided in the notes (which are hereby being further amended) following 5 CFR 2635.403(a) and 2635.803, are enumerated at new appendix B which OGE is adding to part 2635. The agencies are listed in the order of the assignment of their chapter numbers at the end of 5 CFR. Agencies