

**OFFICE OF PERSONNEL
MANAGEMENT**
5 CFR Parts 451, 530, 534, and 575
RIN 3206-AK34
**Senior Executive Service Pay and
Performance Awards and Aggregate
Limitation on Pay**
AGENCY: Office of Personnel
Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to implement statutory provisions that establish a new performance-based pay system for the Senior Executive Service (SES) and a higher aggregate limitation on pay for SES members and employees in senior-level (SL) and scientific or professional (ST) positions. These regulations prescribe the criteria for the administration of rates of basic pay and performance awards under the SES performance-based pay system and the rules for applying the aggregate limitation on pay.

DATES: Comments must be received on or before August 30, 2004.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; by FAX at (202) 606-0824; or by e-mail at *pay-performance-policy@opm.gov*.

FOR FURTHER INFORMATION CONTACT: Jo Ann Perrini by telephone at (202) 606-2858; by FAX at (202) 606-0824; or by email at *pay-performance-policy@opm.gov*.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing proposed regulations to implement two statutory provisions that strengthen the linkage between the performance and pay of an agency's Senior Executive Service (SES), senior-level (SL), and scientific or professional (ST) employees. The new SES performance-based pay system requires agencies to make decisions on setting and adjusting rates of basic pay for SES members based on individual performance and/or contribution to the agency's performance as determined under a rigorous performance management system. OPM, jointly with the Office of Management and Budget (OMB), also is issuing regulations to prescribe the criteria and procedures for obtaining certification of an agency's performance appraisal system(s) for SES members and SL/ST employees.

Agencies must receive certification of their performance appraisal systems to use the higher base pay limitation for SES members and to use the higher aggregate limitation on pay for SES and SL/ST employees. In these regulations, we interchangeably use the terms "SES members" and "senior executives" to mean members of the Senior Executive Service. In addition, we refer to SL/ST employees as "senior professionals."

On January 13, 2004, OPM issued interim regulations to establish the new SES performance-based pay system (69 FR 2048). In those interim regulations, OPM established the structure of the SES rate range, rules for conversion to the new pay system, and the criteria for providing pay adjustments to SES members on or after the first applicable pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). OPM has issued additional guidance on the SES pay system at <http://www.opm.gov/oca/compmemo/index.asp>. In these proposed regulations, we are prescribing rules for establishing and adjusting SES rates of basic pay, paying performance awards to senior executives, and applying the aggregate limitation on pay if an agency receives certification of an applicable performance appraisal system under 5 U.S.C. 5307(d).

**New SES Performance-Based Pay
System**

Section 1125 of Public Law 108-136 (November 24, 2003) amended 5 U.S.C. 5382 to establish a new performance-based pay system for the SES that has an "open-range" pay band. Each member of the SES will be paid at one of the rates within the SES rate range. In the interim regulations issued on January 13, 2004, OPM established the minimum rate of basic pay for the SES rate range at the rate of basic pay (excluding locality payments) payable under 5 U.S.C. 5376 for senior-level positions (\$104,927 in 2004). OPM established the maximum rate of basic pay for the SES rate range at the rate for level III of the Executive Schedule (\$145,600 in 2004). These proposed regulations establish the maximum rate of basic pay for the SES rate range at the rate for level II of the Executive Schedule (\$158,100 in 2004) for those agency senior executive performance appraisal systems that have been certified by OPM, with OMB concurrence, in accordance with 5 U.S.C. 5307 and OPM's regulations at 5 CFR part 430, subpart D. To receive certification, an agency must demonstrate that the applicable performance appraisal system makes

meaningful distinctions based on relative performance.

The minimum rate of basic pay for the SES rate range will increase consistent with any increase in the minimum rate of basic pay for senior-level positions under 5 U.S.C. 5376, and the maximum rate of basic pay for the SES rate range will increase with any increase in the rates for levels II and III of the Executive Schedule. Section 534.404(f) allows agencies to review an initial determination to adjust a rate of basic pay and grant an additional increase, if warranted, to a senior executive if there is an additional increase in the rates for the Executive Schedule that is made effective on the first day of the first pay period beginning on or after January 1 of that year. Such additional adjustments in pay must be made effective as of the effective date of the initial determination to adjust the senior executive's rate of basic pay.

Conversion to the New SES Pay System

On January 13, 2004, OPM issued interim regulations on conversion to the new SES pay system. In these proposed regulations, we have revised § 534.406 to further clarify the rules for converting senior executives to the new system. Generally, upon conversion to the new SES pay system, an SES member was entitled to a new rate of basic pay equal to the existing rate of basic pay plus any applicable locality payment to which the employee was entitled immediately before the first day of the first applicable pay period beginning on or after January 1, 2004 (January 10, 2004, for most employees). However, under section 1125(c)(2) of Public Law 108-136, an SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, may not be reduced for 1 year after the first day of the first applicable pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). If an SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, is higher than the rate in effect on January 10, 2004, the agency must use the higher rate for the purpose of converting the SES member to the SES pay system.

On January 11, 2004, certain SES members who were assigned to positions that have geographic mobility requirements and who were assigned outside the 48 contiguous States and the District of Columbia continued to receive their rate of basic pay in effect on January 10, 2004, or, if higher, the

rate of basic pay in effect on November 23, 2003. However, upon reassignment to a position in the 48 contiguous States or the District of Columbia, these employees are entitled to have their rates of basic pay converted to a new SES rate of basic pay that equals their current rate of basic pay, plus the amount of locality pay authorized under 5 U.S.C. 5304 for the applicable locality pay area. A senior executive who is reassigned to a locality pay area is not automatically entitled to a rate of basic pay that is higher than the rate for level III of the Executive Schedule. If the senior executive's rate of basic pay did not exceed the rate for level III of the Executive Schedule while assigned to a position outside the 48 contiguous States or the District of Columbia, the senior executive's converted rate of basic pay may not exceed the rate for level III of the Executive Schedule upon reassignment to a locality pay area. Of course, an agency may choose to consider the applicable locality payment when setting or adjusting the rate of basic pay of a senior executive who transfers to a position within the 48 contiguous States, but whose position is not subject to a geographic mobility requirement.

On January 11, 2004, an SES law enforcement officer (LEO) continued to receive his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509) to which he or she was entitled on January 10, 2004, or, if higher, his or her rate of basic pay plus the LEO special geographic pay adjustment in effect on November 23, 2003. On March 3, 2004, the President issued Executive Order 13332, which increased General Schedule rates of pay and locality-based comparability payments effective on the first day of the first applicable pay period beginning on or after January 1, 2004 (January 11, 2004, for most employees). As a result, the remaining LEO special geographic pay adjustment in Boston was terminated as of January 11, 2004, because a higher locality pay percentage now applies to LEOs. Agencies must correct the rate of basic pay for SES law enforcement officers in Boston and base any pay adjustments approved on or after January 11, 2004, on the senior executive's newly reconstructed rate of basic pay. (See <http://www.opm.gov/oca/compmemo/2004/2004-05.asp>.) The newly reconstructed rate is the senior executive LEO's rate of basic pay.

Setting and Adjusting Rates of Pay for SES Members

The new subpart D in 5 CFR part 534 prescribes the rules for setting and adjusting rates of basic pay and granting awards to SES members. Section 534.404(g) requires agencies to establish a plan for setting and adjusting rates of basic pay for their senior executives. The agencies' plans may establish policies on the minimum increase in pay that may be offered to current employees upon initial appointment to the SES. An agency may set and adjust a senior executive's rate of basic pay at any rate within the applicable SES rate range, based on individual performance and/or contribution to the agency's performance, as determined under a rigorous performance management system. In this regard, agencies may consider any unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's mission, as well as the individual's current responsibilities. Agencies must ensure that only those senior executives who have demonstrated the highest levels of individual performance and/or made the greatest contributions to the agency's performance or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, receive the highest rates of basic pay and pay adjustments.

Setting rates of basic pay higher than level III of the Executive Schedule. Rates of basic pay higher than the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally should be reserved for those senior executives who have demonstrated the highest levels of individual performance and/or made the greatest contributions to agency performance, as determined by the agency through the administration of its applicable performance appraisal system for senior executives, or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, consistent with the agency's strategic human capital plan. For example, rates of pay higher than the rate for level III of the Executive Schedule should be reserved for a senior executive with an exceptionally meritorious accomplishment, for a senior executive who is assigned to a position with substantially greater scope and responsibility, or for a senior executive who is critical to the mission of the agency. In all cases, setting pay above the rate for level III of the Executive Schedule must be approved

by the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) (oversight of senior executive appraisal process and communication of performance assessment and evaluation guidelines).

Setting pay upon initial appointment to the SES. Upon initial appointment to an SES position, an authorized agency official may set an SES member's rate of basic pay at any rate within the SES rate range consistent with the restrictions on setting pay above the rate for level III of the Executive Schedule. The authorized agency official must determine the new senior executive's appropriate rate of basic pay based on the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the requirements of the SES position, as well as the individual's current responsibilities.

Adjusting SES rates of basic pay. A senior executive who receives an annual summary rating of outstanding must be considered for an annual pay increase. A senior executive who receives a summary performance rating of less than fully successful may not receive an increase in pay for the current performance appraisal period. Subject to the 1-year prohibition in 5 U.S.C. 5382(c) on reducing a senior executive's rate of basic pay (see § 534.406(b)), an authorized agency official may reduce a senior executive's rate of basic pay for performance and/or disciplinary reasons. Such a reduction in pay for a career senior executive may not exceed 10 percent (compared to the former limitation on reductions in pay of one SES rate, or approximately 5 percent of basic pay). Any pay reduction may be appealed to the head of the agency. The agency head's decision is final and non-reviewable.

12-Month rule. Generally, an authorized agency official may adjust (*i.e.*, increase or reduce) the rate of basic pay of a senior executive not more than once in any 12-month period. The setting of pay upon initial appointment or reappointment to the SES and adjusting an SES rate of basic pay are considered pay adjustments for this purpose. However, under § 534.404(c)(4), an authorized agency official may approve an increase in a senior executive's rate of basic pay more than once during a 12-month period where the head of an agency or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) determines that an additional increase is warranted (1) for an exceptionally meritorious accomplishment, (2) for a senior executive who is reassigned to a position with substantially greater scope and responsibility, (3) for a senior

executive who is critical to the mission of the agency and who would be likely to leave the agency in the absence of a pay increase, or (4) to align a senior executive with the agency's senior executive appraisal and pay adjustment cycle (e.g., in the case of a senior executive who was appointed to an SES position within the past 12 months or a senior executive who was transferred to an SES position from an agency with a different senior executive appraisal and pay adjustment cycle within the past 12 months).

OPM recognizes that as the rate of basic pay for levels II and III of the Executive Schedule are increased, the maximum rate of the SES rate range for an SES performance appraisal system also increases, which disadvantages agencies that have already granted pay increases to their senior executives following their SES performance appraisal periods. We therefore solicit the views of commenters on a proposal to establish an additional exception to the 12-month rule that would permit agencies, at their discretion, to grant an additional pay increase to a senior executive whose rate of basic pay is equivalent to the rate for level II or level III when the applicable maximum rate is increased and becomes effective after an agency has already granted a pay increase to the senior executive. An additional pay increase under this circumstance would not be considered a pay adjustment for the purpose of applying the 12-month rule.

Adjustments in pay prior to certification of performance appraisal system(s). Section 534.404(d) authorizes agencies to increase a senior executive's rate of basic pay on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter. Prior to obtaining certification of the agency's performance appraisal system(s) for senior executives under 5 CFR part 430, subpart D, an agency may increase a senior executive's rate of basic pay up to the rate for level III of the Executive Schedule where the individual's performance and/or contributions so warrant and the senior executive is otherwise eligible for such a pay increase (i.e., he or she did not receive a pay adjustment during the previous 12-month period). On January 20, 2004, the Director of OPM delegated to the heads of agencies the authority to make limited exceptions to the 12-month rule. (See <http://www.opm.gov/oca/compmemo/2004/2004-04.asp>.)

Because we are proposing to provide agencies, in these regulations, with authority to make exceptions to the 12-month rule under certain conditions,

the Director of OPM intends to withdraw this delegated authority upon issuance of final regulations on SES pay and performance awards. An adjustment in pay prior to certification is considered a pay adjustment for the purpose of applying § 534.404(c).

Adjustments in pay after certification of performance appraisal system(s). Section 534.404(e) authorizes an agency that receives certification of its performance appraisal system(s) for senior executives under 5 CFR part 430, subpart D, to increase a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule if warranted and the senior executive is otherwise eligible for such a pay increase (i.e., he or she did not receive a pay adjustment during the previous 12-month period). In § 534.404(c)(4), OPM has provided agencies with authority to make exceptions to the 12-month rule under certain limited conditions. Agencies must comply with the limitations in § 534.403(a)(2) for setting a senior executive's rate of basic pay higher than the rate for level III of the Executive Schedule and reserve these higher rates of pay for those senior executives who have demonstrated the highest levels of individual performance and/or made the greatest contributions to the agency's performance or, in the case of a newly-appointed senior executive, those who possess superior leadership or other competencies. A post-certification adjustment in pay is considered a pay adjustment for the purpose of applying § 534.404(c).

No reduction in pay upon transfer to another agency or suspension of certification. A senior executive whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay as a result of transfer from an agency with a maximum SES rate of basic pay equal to the rate for level II of the Executive Schedule to an agency with a maximum SES rate of basic pay equal to the rate for level III of the Executive Schedule (§ 534.404(h)(2)) or as the result of a decision to suspend certification of the applicable performance appraisal system under 5 CFR part 430, subpart D (§ 534.403(b)). The senior executive will continue to receive his or her current SES rate and is not eligible for a pay increase until the employing agency's applicable performance appraisal system is certified.

Setting rates of basic pay following a break in SES service. Upon reappointment to the SES, an agency may set the rate of basic pay of a former senior executive at any rate within the SES rate range if there has been a break

in SES service of more than 30 days. If there has been a break in SES service of 30 days or less, the senior executive's rate of basic pay must be set at a rate at least equivalent to the employee's former SES rate of basic pay.

Performance Awards. As a result of the implementation of the new SES performance-based pay system, the limit on the total amount of performance awards that may be granted in a fiscal year and the actual amount of an individual performance award that may be granted will be greater than in the past, since both are derived from an SES rate of basic pay that now includes any applicable locality payment. To determine the total amount of performance awards that may be granted in FY 2004, agencies must include any applicable locality payments in effect at the end of FY 2003 for the purpose of applying the limitations in § 534.405(b)(1) and (2).

Additional Payments. Agencies must review any determination to provide additional payments to a senior executive that are calculated based on the senior executive's rate of basic pay (e.g., retention allowances and extended assignment incentives). As a result of conversion to the new SES pay system, a senior executive's rate of basic pay has increased significantly to include locality payments. Payments that are calculated based on a senior executive's rate of basic pay also may have increased significantly.

Aggregate Limitation on Pay

Higher aggregate limitation on pay for senior executives and senior professionals. Section 1322 of the Chief Human Capital Officers Act of 2002 (Pub. L. 107-296, Title XIII, November 25, 2002) added a new paragraph (d) to 5 U.S.C. 5307 that permits agencies with certified appraisal systems for their senior executives and senior professionals, as applicable, to apply a higher annual aggregate limitation on pay to those employees. The higher annual aggregate limitation on pay is equivalent to the total annual compensation payable to the Vice President, under 3 U.S.C. 104, on the last day of the applicable calendar year (\$203,000 in 2004). Agencies that are not covered by the performance appraisal system requirements set forth in 5 U.S.C., chapter 43, but which are subject to the aggregate limitation in 5 U.S.C. 5307, also must have a certified appraisal system in order to apply the higher aggregate limitation on pay to their senior executives and senior professionals.

Agencies without certification must continue to apply an annual aggregate

limitation on pay equivalent to the rate for level I of the Executive Schedule (\$174,500 in 2004). The level I aggregate limitation also continues to apply to (1) other employees covered by 5 U.S.C. 5307; (2) employees paid under the Executive Schedule established under 5 U.S.C., chapter 53, subchapter II; and (3) equivalent categories of employees whose pay is linked directly to a rate of pay under the Executive Schedule. In addition, section 1322 of the Act increases the annual aggregate limitation on pay for judicial branch employees paid under 28 U.S.C. 332(f), 603, and 604. It also authorizes the Director of the Administrative Office of the United States Courts to prescribe regulations to implement the higher annual aggregate limitation on pay. The law requires the regulations of the Administrative Office of the United States Courts to be consistent with OPM's and OMB's regulations regarding certification.

Definitions. In § 530.202, we have revised the definition of *aggregate compensation* to clarify that it excludes student loan repayments under 5 U.S.C. 5379 and nonforeign area cost-of-living allowances under 5 U.S.C. 5941(a)(1). We have added a definition of *aggregate limitation* to avoid repeated extended references to the two statutory limitations—*i.e.*, the limitation in effect at the end of the calendar year that is equal to the rate for level I of the Executive Schedule or the rate payable to the Vice President, whichever limitation applies to the employee. Finally, we have revised the definition of *estimated aggregate compensation* to clarify that the term refers to the estimated compensation an employee would receive but for the application of the aggregate limitation to future payments. At any point during a calendar year, an agency may estimate the aggregate compensation that would be received but for application of the aggregate limitation to future payments. Excess amounts already deferred for payment at the beginning of the next calendar year are not considered in computing the current estimate, since those payments are not projected to be received in the current calendar year.

Also in § 530.202, we have added extended assignment incentives authorized under 5 U.S.C. 5757 to the list of payments that are covered by the definition of *aggregate compensation* and *discretionary payments*. Extended assignment incentives, which were established by section 207 of Public Law 107-273 (November 2, 2002), permit the head of an Executive agency to pay an extended assignment incentive to certain Federal employees assigned to

positions located in a territory or possession of the United States, the Commonwealth of Puerto Rico, or the Commonwealth of the Northern Mariana Islands.

Deferring Discretionary Payments. We have clarified § 530.203(d) to require that a retention allowance must be reduced or terminated before deferring any other discretionary payment, consistent with 5 CFR 575.307(a). However, for a discretionary payment to be considered deferred, its payment in the current calendar year must be required by a mandatory personnel policy or it must have been officially approved to be paid within the current calendar year. Otherwise, the setting of the payment date for a discretionary payment in the next calendar year is not a deferral under these regulations and has no effect on the payment of retention allowances in the current year.

Overestimating an Employee's Aggregate Compensation. In § 530.203, we have added a new paragraph (h) to address situations where an agency overestimates an employee's aggregate annual compensation for the calendar year at an earlier point in the year and, as a result, unnecessarily defers payments. In this case, an agency may make corrective payments in the current calendar year rather than waiting to make the payments at the beginning of the next calendar year.

Change in Aggregate Limitation on Pay. In § 530.203(g) and (h), we have provided rules for taking corrective actions when the aggregate limitation is increased or decreased during a calendar year as a result of gaining or losing certification of a senior executive performance appraisal system.

Lump-Sum Payments in Excess of Aggregate Limitation on Pay. We have amended § 530.204(c) to require that if an employee transfers to another agency, the gaining agency is responsible for making any lump-sum payment in excess of the aggregate limitation. The previous employing agency must provide the gaining agency with documentation regarding the employee's excess amount. The previous employing agency must provide a fund transfer equal to the total cost of the lump-sum payment to the gaining agency through the Department of the Treasury's Intra-Governmental Payment and Collection System. If an employee leaves Federal service, the current employing agency is responsible for making the lump-sum payment to the employee as provided in § 530.204(d).

Recordkeeping. In § 530.205, we have added a number of specific recordkeeping requirements that deal

with the source and payment of deferred excess amounts, consistent with other provisions in the regulations.

Plain Language. OPM is also taking this opportunity to revise and reorganize part 530, subpart B, Aggregate Limitation on Pay, to improve its readability. We also have made some substantive changes to the regulations to assist agencies in administering them. In addition, we have replaced the verb "shall" with "must" for added clarity and readability. In this regard, any provision using the verb "must" is intended to have the same meaning and effect as previous provisions using "shall."

Extended Award Authority

The Federal Employees Pay Comparability Act of 1990 established a specific authority to pay performance-based cash awards to employees paid under the General Schedule (GS) (5 U.S.C. 4505a). This law specifies that the President may extend application of this authority to groups of employees not covered by the General Schedule at the request of the agency head. This extension authority was delegated by E.O. 12828 to the Director of OPM. Over the years some agencies have incorrectly cited this law as the authority under which they pay performance-based awards to non-GS employees. OPM is extending by regulation the provisions of 5 U.S.C. 4505a to non-GS employees covered by 5 U.S.C. chapter 45 and 5 CFR part 451 who are not otherwise eligible for performance-based cash awards under another specific statutory authority, including 5 U.S.C. 5384 (SES performance awards). Extending this authority will avoid incorrect references and citations and provide agencies with a specific authority to grant performance-based cash awards to their SL/ST (and other non-GS) employees.

Recruitment and Relocation Bonuses and Retention Allowances

We have made technical amendments to the regulations on recruitment and relocation bonuses and retention allowances in 5 CFR part 575 to conform to the changes made to the aggregate limitation on pay in 5 CFR part 531, subpart B.

Regulatory Flexibility Act

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

E.O. 12866, Regulatory Review

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

List of Subjects in parts 451, 530, 534, 575

Decorations, medals, awards, Government employees, Law Enforcement Officers, Reporting and recordkeeping requirements, Hospitals, Students, and Wages.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, OPM is proposing to amend parts 451, 530, 534, and 575 of title 5 of the Code of Federal Regulations as follows:

PART 451—EMPLOYEE AWARDS**Subpart A—Agency Awards**

1. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 12828.

2. In § 451.101 paragraph (d), remove the reference “§ 534.403” and add the reference “§ 534.405” in its place, and add a new paragraph (e) to read as follows:

§ 451.101 Authority and coverage.

* * * * *

(e) An agency may grant performance-based cash awards (*i.e.*, on the basis of a rating of record) under the authority of 5 U.S.C. 4505a and the provisions of this part to eligible non-GS employees who are covered by 5 U.S.C. chapter 45 and this part, and who are not otherwise covered by an explicit statutory authority for the payment of such awards, including 5 U.S.C. 5384 (SES performance awards).

§ 451.104 [Amended]

3. In § 451.104(a)(3), remove the reference “§ 534.403” and add the reference “§ 534.405” in its place.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

4. In part 530, the authority citation is revised to read as follows:

Authority: 5 U.S.C. 5305 and 5307; E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under secs. 302(c) and 404(c), Public Law 101–509, 104 Stat. 1462 and 1466 (5 U.S.C. 5304 note, 5305 note).

Subpart C also issued under sec. 4, Public Law 103–89, 107 Stat. 983 (5 U.S.C. 5401 note); and sec. 1322, Title XIII, Public Law 107–296, 116 Stat. 2297 (5 U.S.C. 5307).

4a. Subpart B of Part 430 is revised to read as follows:

Subpart B—Aggregate Limitation on Pay

Sec.

530.201 Purpose.

530.202 Definitions.

530.203 Administration of aggregate limitation on pay.

530.204 Payment of excess amounts.

530.205 Records.

Subpart B—Aggregate Limitation on Pay**§ 530.201 Purpose.**

This subpart establishes regulations for limiting an employee’s aggregate annual compensation. An employee’s aggregate compensation received in any given calendar year may not exceed the rate of pay for level I of the Executive Schedule or the rate payable to the Vice President at the end of the calendar year, whichever is applicable to the employee based on the certification status of the performance appraisal system covering that employee under 5 CFR part 430, subpart D. These regulations must be applied in conjunction with 5 U.S.C. 5307.

§ 530.202 Definitions.

In this subpart:

Agency means an executive agency as defined at 5 U.S.C. 105.

Aggregate compensation means the total of—

(1) Basic pay received as an employee of the executive branch or as an employee outside the executive branch to whom the General Schedule applies;

(2) Locality payments under 5 U.S.C. 5304; continued rate adjustments under 5 CFR part 531, subpart G; or special pay adjustments for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509);

(3) Premium pay under 5 U.S.C.

chapter 53, subchapter IV;

(4) Premium pay under 5 U.S.C.

chapter 55, subchapter V;

(5) Incentive awards and performance-based cash awards under 5 U.S.C. chapters 45 and 53;

(6) Recruitment and relocation bonuses under 5 U.S.C. 5753;

(7) Retention allowances under 5 U.S.C. 5754 and extended assignment incentives under 5 U.S.C. 5757;

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

(9) Post differentials under 5 U.S.C. 5925;

(10) Danger pay allowances under 5 U.S.C. 5928;

(11) Post differentials based on environmental conditions for employees stationed in nonforeign areas under 5 U.S.C. 5941(a)(2);

(12) Physicians’ comparability allowances under 5 U.S.C. 5948;

(13) Continuation of pay under 5 U.S.C. 8118;

(14) Lump-sum payments in excess of the aggregate limitation on pay as required by § 530.204; and

(15) Other similar payments authorized under title 5, United States Code, excluding—

(i) Overtime pay under the Fair Labor Standards Act of 1938, as amended, and 5 CFR part 551;

(ii) Severance pay under 5 U.S.C. 5595;

(iii) Lump-sum payments for accumulated and accrued annual leave upon separation under 5 U.S.C. 5551 or 5552;

(iv) Back pay awarded to an employee under 5 U.S.C. 5596 because of an unjustified personnel action;

(v) Student loan repayments under 5 U.S.C. 5379; and

(vi) Nonforeign area cost-of-living allowances under 5 U.S.C. 5941(a)(1).

Aggregate limitation means the limitation on aggregate compensation received in any given calendar year as established by 5 U.S.C. 5307. For an executive branch employee (including employees in Senior Executive Service positions paid under 5 U.S.C. 5383 and employees in senior-level or scientific or professional positions paid under 5 U.S.C. 5376), a General Schedule employee in the legislative branch, or General Schedule employee in the judicial branch (excluding those paid under 28 U.S.C. 332(f), 603, and 604), the limitation on aggregate compensation is equal to the rate for level I of the Executive Schedule in effect at the end of the applicable calendar year. For an employee in a Senior Executive Service position paid under 5 U.S.C. 5383 and an employee in a senior-level or scientific or professional position paid under 5 U.S.C. 5376 covered by an applicable performance appraisal system that has been certified under 5 CFR part 430, subpart D, the limitation on aggregate compensation is equal to the total annual compensation payable to the Vice President under 3 U.S.C. 104 at the end of a calendar year.

Basic pay means the total amount of pay received at a rate fixed by law or administrative action for the position held by an employee, before any deductions. Basic pay includes night and environmental differentials for prevailing rate employees under 5 U.S.C. 5343(f) and 5 CFR 532.511. Basic pay excludes additional pay of any other kind, including locality payments under 5 U.S.C. 5304.

Discretionary payment means a payment an agency has discretion to make or not to make to an employee. A retention allowance under 5 U.S.C. 5754 and an extended assignment incentive under 5 U.S.C. 5757 are discretionary payments. However, other payments that are preauthorized to be made to an employee at a regular fixed rate each pay period are not discretionary payments.

Employee has the meaning given that term in 5 U.S.C. 2105.

Estimated aggregate compensation means the agency's projection of the aggregate compensation an employee actually would receive during a calendar year but for application of the aggregate limitation to future payments. This projection must be based upon known factors. Estimated aggregate compensation includes—

(1) The total amount of basic pay the employee will receive during the calendar year;

(2) Any lump-sum payment of excess amounts from a previous calendar year, as described in § 530.204;

(3) The total amount of nondiscretionary payments the employee would be entitled to receive during the calendar year; and

(4) The total amount of discretionary payments the employee would be authorized to receive during the calendar year.

§ 530.203 Administration of aggregate limitation on pay.

(a) Except as provided in paragraph (b) of this section, no executive branch employee or General Schedule employee in the legislative branch (or General Schedule employee in the judicial branch, excluding those paid under 28 U.S.C. 332(f), 603, and 604), may receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic pay (whether received under title 5, United States Code, or otherwise), would cause the employee's aggregate compensation to exceed the rate for level I of the Executive Schedule on the last day of that calendar year (*i.e.*, the aggregate limitation).

(b)(1) Subject to paragraph (b)(2) of this section, an employee in a Senior Executive Service position paid under 5 U.S.C. 5383 and an employee in a senior-level or scientific or professional position paid under 5 U.S.C. 5376 may not receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic

pay, would cause the employee's aggregate compensation to exceed the rate of pay for level I of the Executive Schedule.

(2) An employee covered by a performance appraisal system that has been certified under 5 CFR part 430, subpart D, may not receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic pay, would cause the employee's aggregate compensation to exceed the total annual compensation payable to the Vice President under 3 U.S.C. 104 on the last day of that calendar year (*i.e.*, the aggregate limitation).

(3) An agency must make corrective actions as provided in paragraphs (g) and (h) of this section if the agency underestimated or overestimated an employee's aggregate compensation in a calendar year as a result of receiving or losing certification of its applicable performance appraisal system under 5 CFR part 430, subpart D.

(c) The aggregate limitations described in paragraphs (a) and (b) of this section apply to the aggregate compensation an employee actually received during the calendar year without regard to when the compensation was earned.

(d) When an agency authorizes a discretionary payment for an employee, the agency must defer any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the employee's aggregate compensation during the calendar year to exceed the applicable aggregate limitation. Any portion of a discretionary payment deferred under this paragraph must be available for payment as provided in § 530.204.

Special rules apply to the authorization and payment of a retention allowance, which may not be deferred. (*See* 5 CFR 575.306(b) and 575.307(a).) A retention allowance must be reduced or terminated before deferring any other type of discretionary payment, as long as the other discretionary payment is required to be paid within the current calendar year under a mandatory personnel policy or has been officially approved by an authorized agency official for payment within the current calendar year. When a discretionary payment is authorized but not required to be paid in the current calendar year, an agency official's decision to set the payment date in the next calendar year is not considered a deferral under this paragraph.

(e) An agency may not defer or discontinue nondiscretionary payments for any period of time to make a discretionary payment that would otherwise cause an employee's pay to exceed the applicable aggregate limitation. An agency may not defer or discontinue basic pay under any circumstance.

(f) If, after an agency defers discretionary payments as required by paragraph (d) of this section, the estimated aggregate compensation to which an employee is entitled exceeds the applicable aggregate limitation, the agency must defer all nondiscretionary payments (other than basic pay) as necessary to avoid payments in excess of that limitation. An agency must defer all nondiscretionary payments at the time when otherwise continuing to pay such payments would cause an employee's estimated aggregate compensation for that calendar year to exceed the applicable aggregate limitation. An agency must pay any portion of a nondiscretionary payment deferred under this paragraph at a later date, as provided in § 530.204.

(g)(1) If an agency determines that it underestimated an employee's aggregate compensation at an earlier date in the calendar year, or the aggregate limitation applicable to the employee is reduced during the calendar year, the sum of the employee's remaining payments of basic pay may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable aggregate limitation. In such cases, the employee will become indebted to the Federal Government for any amount paid in excess of the applicable aggregate limitation. The head of the agency may waive the debt under 5 U.S.C. 5584, if warranted.

(2) To the extent that any excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, an agency must extinguish the excess amount on January 1 of the next calendar year. As part of the correction of the error, the agency must deem the excess amount to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment, as described in § 530.204, and must consider this deemed deferred excess payment to be part of the employee's aggregate compensation for the new calendar year.

(3) To the extent that any excess amount is attributable to retention allowances that the agency inadvertently did not reduce or terminate under 5 CFR 575.307(a), the

employee will become indebted to the Federal Government for any amount attributable to retention allowance payments that were paid in excess of the applicable aggregate limitation. The head of the agency may waive the debt under 5 U.S.C. 5584, if warranted.

(h) If an agency determines that it overestimated an employee's aggregate compensation at an earlier date in the calendar year, which caused the agency to defer payments unnecessarily under this section, or the aggregate limitation applicable to the employee is increased during the calendar year, the agency may make appropriate corrective payments to the employee during the calendar year, notwithstanding § 530.204.

§ 530.204 Payment of excess amounts.

(a) An agency must pay the amounts that were deferred because they were in excess of the aggregate limitation (as described in § 530.203) as a lump-sum payment at the beginning of the following calendar year, except as otherwise provided in this section. This payment is part of the employee's aggregate compensation for the new calendar year.

(b) If a lump-sum payment under paragraph (a) of this section causes an employee's estimated aggregate compensation to exceed the aggregate limitation in the current calendar year, an agency must consider only the employee's basic pay that is expected to be paid in the current year in determining the extent to which the lump-sum payment may be paid. An agency must defer all other payments, as provided in § 530.203, in order to pay as much of the lump-sum excess amount as possible. Any payments deferred under this paragraph, including any portion of the lump-sum excess amount that was not payable, are payable at the beginning of the next calendar year, as provided in paragraph (a) of this section.

(c) If an employee transfers to another agency, the gaining agency is responsible for making any lump-sum payment required by paragraph (a) of this section. The previous employing agency must provide the gaining agency with documentation regarding the employee's excess amount, as provided in § 530.205. The previous employing agency must provide a fund transfer equal to the total cost of the lump-sum payment to the gaining agency through the Department of the Treasury's Intra-Governmental Payment and Collection System. If an employee leaves Federal service, the employing agency is responsible for making the lump-sum

payment to the employee as provided in paragraph (d) of this section.

(d) An agency must pay any excess amount regardless of the calendar year limitation under the following conditions:

(1) If an employee dies, the employing agency must pay the entire excess amount as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(2) If an employee separates from Federal service, the employing agency must pay the entire excess amount following a 30-day break in service. If the individual is reemployed in the Federal service within the same calendar year as the separation, any previous payment of an excess amount must be considered part of that year's aggregate compensation for the purpose of applying the aggregate limitation for the remainder of the calendar year.

§ 530.205 Records.

An agency must maintain appropriate records to administer this subpart and must transfer such records to any agency to which an employee may transfer. An agency must make such records available to any agency that may employ the employee later during the same calendar year. An agency's records must document the source of any deferred excess amount remaining to the employee's credit at the time of separation from the agency. In the case of an employee who separates from Federal service for at least 30 days, the agency records also must document any payment of a deferred excess amount made by the agency after separation.

PART 534—PAY UNDER OTHER SYSTEMS

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

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125, Public Law 108-136, 117 Stat. 1392.

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

6. Section 534.401 is revised to read as follows:

§ 534.401 Purpose.

This subpart contains the rules for setting and adjusting rates of basic pay and granting performance awards for members of the Senior Executive Service (SES), as provided by 5 U.S.C. 5382, 5383, and 5384. An agency must set and adjust the rate of basic pay for an SES member on the basis of the employee's performance and/or

contribution to the agency's performance, as determined by the agency through the administration of its performance management systems for senior executives. These regulations must be read in combination with applicable statutes and with the regulations for the approval of an SES performance management system under 5 CFR part 430, subpart C, and certification of an SES performance appraisal system under 5 CFR part 430, subpart D.

7. Section 534.402 is revised to read as follows:

§ 534.402 Definitions.

In this subpart—

Agency means an executive agency or military department, as defined by 5 U.S.C. 105 and 102.

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned. The agency's Inspector General is the *authorized agency official* for senior executive positions in the Office of the Inspector General, consistent with the requirements in section 3(a) of the Inspector General Act of 1978.

Outstanding performance means performance that substantially exceeds the normally high performance expected of any senior executive, as evidenced by exceptional accomplishments or contributions to the agency's performance.

PRB means Performance Review Board, as described in § 430.310.

Rate of basic pay means the rate of pay fixed by law or administrative action for the senior executive, within the established SES rate range or, in the case of a senior executive entitled to pay retention, the employee's retained rate of pay, excluding any applicable locality-based comparability payments under 5 U.S.C. 5304, but before any deductions and exclusive of additional pay of any other kind.

Senior executive means a member of the Senior Executive Service (SES).

SES or ES rate means a rate of basic pay within the SES or ES rate range assigned to a member of the SES under § 534.403(a).

SES or ES rate range means the range of rates of basic pay established for the SES under 5 U.S.C. 5382 and § 534.403(a).

§§ 534.403 and 534.405 [Redesignated as §§ 534.405 and 534.408]

8. Redesignate §§ 534.403 and 534.405 as §§ 534.405 and 534.408 respectively.

9. Add new § 534.403 to read as follows:

§ 534.403 SES rate range.

(a) *SES rate range.* (1) On the first day of the first applicable pay period beginning on or after January 1, 2004, the minimum rate of basic pay of the SES rate range is set at an amount equal to the minimum rate of basic pay under 5 U.S.C. 5376 for senior-level positions (excluding any locality-based comparability payment under 5 U.S.C. 5304). An SES member may not receive less than the minimum rate of the SES rate range. Except as provided in paragraph (a)(2) of this section, the maximum rate of basic pay of the SES rate range is set at the rate for level III of the Executive Schedule. An SES member's rate of basic pay must be set at one of the rates within the SES rate range based on the senior executive's performance and/or contribution to the agency's performance.

(2) The maximum rate of basic pay of the SES rate range is set at the rate for level II of the Executive Schedule for senior executives in an agency who are covered by a performance appraisal system that makes meaningful distinctions based on relative performance, as certified by the Office of Personnel Management (OPM), with concurrence by the Office of Management and Budget (OMB), under 5 U.S.C. 5307(d) and 5 CFR part 430, subpart D. A senior executive's rate of basic pay may not exceed the maximum rate of the applicable SES rate range, except as provided in § 534.404(h)(2).

(3) Rates of basic pay higher than the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally are reserved for those senior executives who have demonstrated the highest levels of individual performance and/or made the greatest contributions to the agency's performance, as determined by the agency through the administration of its performance appraisal system for senior executives, or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, consistent with the agency's strategic human capital plan.

(b) *Suspension of certification of performance appraisal system.* A senior executive whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay because his or her agency's applicable performance appraisal system certification is suspended under 5 CFR 430.405(h). The senior executive will continue to receive his or her current SES rate and is not eligible for a pay adjustment until the senior executive is assigned to a

position that would allow the employee to receive a pay adjustment or until certification of the employing agency's applicable performance appraisal system is reinstated under 5 CFR part 430, subpart D. The SES rate of pay is not considered a retained rate of pay for the purpose of applying 5 U.S.C. 3594 and 5 CFR part 359, subpart G, or 5 U.S.C. 5363 and 5 CFR 536.104.

10. Section 534.404 is revised to read as follows:

§ 534.404 Setting and adjusting pay for senior executives.

(a) *Setting pay upon initial appointment to the SES.* An authorized agency official may set the rate of basic pay of an individual at any rate within the SES rate range upon initial appointment to the SES, subject to the limitation on the maximum rate of basic pay in § 534.403(a)(2). Rates of basic pay above the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally are reserved for those newly appointed senior executives who possess superior leadership or other competencies, as determined by the agency as part of its strategic human capital plan. In setting a new senior executive's rate of basic pay, an agency must consider the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the requirements of the SES position, as well as the individual's current responsibilities.

(b) *Adjusting the pay of SES members.* (1) An authorized agency official may adjust (increase or reduce) the rate of basic pay of a senior executive consistent with the agency's plan for setting and adjusting SES rates of basic pay under paragraph (g) of this section.

(2) An agency may provide an increase in pay only upon a determination by the authorized agency official that the senior executive's individual performance and/or contributions to agency performance so warrant. In assessing a senior executive's performance and/or contribution to the agency's performance, the authorized agency official may consider such things as unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's performance, as well as the senior executive's current responsibilities. Senior executives who demonstrate the highest levels of individual performance and/or make the greatest contributions to the agency's performance, as determined by the agency through the administration of its

performance appraisal system, or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, as determined by the agency as part of its strategic human capital plan, must receive the highest rates of basic pay and pay adjustments.

(3) A senior executive who receives an annual summary rating of outstanding performance must be considered for an annual pay increase, subject to the limitation on the maximum rate of basic pay in § 534.403(a)(2).

(4) A senior executive who receives a summary rating of less than fully successful may not receive an increase in pay for the current appraisal period.

(5) An authorized agency official may reduce the rate of basic pay of a senior executive for performance and/or disciplinary reasons, consistent with the restrictions on reducing the rate of basic pay of a career senior executive in paragraph (j) of this section and in § 534.406(b).

(c) *12-month rule.* (1) An authorized agency official may adjust (*i.e.*, increase or reduce) the rate of basic pay of a senior executive not more than once during any 12-month period, except as provided in paragraph (c)(4) of this section.

(2) The following pay actions are considered pay adjustments for the purpose of applying this paragraph:

(i) The setting of an individual's rate of basic pay upon initial appointment or reappointment to the SES under paragraphs (a) and (i)(1) of this section and upon reinstatement to the SES under paragraph (i)(2)(ii) of this section; and

(ii) Any adjustment (increase or reduction) in an SES rate of basic pay granted to a senior executive prior to certification of the applicable agency performance appraisal system as provided in paragraph (d) of this section or after certification of the applicable agency performance appraisal system as provided in paragraph (e) of this section.

(3) The following pay actions are not considered pay adjustments for the purpose of applying this paragraph:

(i) The conversion of senior executives to the new SES pay system under § 534.406 and the conversion of other employees to equivalent senior executive positions;

(ii) A determination by an authorized agency official to make a zero adjustment in pay after reviewing a senior executive's annual summary rating; and

(iii) A zero adjustment in pay made during the 12-month period preceding

the first day of the first applicable pay period beginning on or after January 1, 2004, caused by the former limitation on basic pay plus locality-based comparability payments under 5 U.S.C. 5304(g)(2) for a senior executive who was granted an increase in his or her rate of basic pay that did not result in an actual increase in pay.

(4) An authorized agency official may approve increases in a senior executive's rate of basic pay more than once during a 12-month period if the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) determines that—

(i) The senior executive's exceptionally meritorious accomplishment significantly contributes to the agency's performance;

(ii) The senior executive is reassigned to a position with substantially greater scope and responsibility;

(iii) The retention of the senior executive is critical to the mission of the agency and the senior executive would be likely to leave the agency in the absence of a pay increase; or

(iv) Such action conforms to an otherwise applicable executive appraisal and pay adjustment cycle (*e.g.*, in the case of a senior executive who was appointed to an SES position within the past 12 months or a senior executive who was transferred to an SES position from an agency with a different senior executive appraisal and pay adjustment cycle within the past 12 months).

(5) Any pay adjustment made as a result of a determination under paragraph (b)(4) of this section is considered a pay adjustment for the purpose of applying § 534.404(c) and begins a new 12-month period.

(d) *Adjustments in pay prior to certification of applicable performance appraisal system.* An authorized agency official may increase a senior executive's rate of basic pay converted under § 534.406 on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter prior to obtaining certification under 5 CFR part 430, subpart D, but only up to the rate for level III of the Executive Schedule. The authorized agency official may provide such an increase if warranted under the conditions prescribed in paragraph (b)(2) of this section and the senior executive is otherwise eligible for such a pay increase (*i.e.*, he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). An adjustment in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(e) *Adjustments in pay after certification of applicable performance appraisal system.* In the case of an agency that obtains certification of a performance appraisal system for senior executives under 5 CFR part 430, subpart D, an authorized agency official may increase a covered senior executive's rate of basic pay up to the rate for level II of the Executive Schedule, consistent with the limitation on increasing pay above the rate for level III of the Executive Schedule in § 534.403(a)(2). The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b)(2) of this section if the senior executive is otherwise eligible for such a pay increase (*i.e.*, he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). The agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) may make exceptions to the 12-month rule in paragraph (c) of this section under certain limited conditions prescribed in paragraph (c)(4) of this section. An increase in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(f) *Effect of Additional increases in Executive Schedule rates of pay.* If there is an additional increase in the rates for the Executive Schedule in a calendar year, and if that increase becomes effective on the first day of the first pay period beginning on or after January 1 (*i.e.*, the date prescribed in 5 U.S.C. 5318), an agency may review any previous determination to adjust the pay of a senior executive that was made effective on or after the effective date of the first increase in the rates for the Executive Schedule to determine whether, and to what extent, an additional pay increase may be warranted for senior executives based on the same criteria used for the previous determination. If the agency determines that an additional pay increase is warranted, that increase must be made effective as of the effective date of the previous pay increase and is not considered a pay adjustment for the purpose of applying § 534.404(c).

(g) *Agency plan for setting and adjusting SES rate of basic pay.* Each agency must establish a plan for setting and adjusting the rates of basic pay for SES members. The agency's plan must require that any decisions to adjust pay must reflect meaningful distinctions among senior executives based on individual performance and/or

contribution to agency performance and must include—

(1) The criteria that will be used to set and adjust a senior executive's rate of basic pay;

(2) The criteria that will be used to set and adjust a senior executive's rate of basic pay at a rate that exceeds the rate for level III of the Executive Schedule if the applicable agency performance appraisal system has been certified under 5 CFR part 430, subpart D;

(3) The designation of the authorized agency official who has authority to set and adjust SES rates of pay for individual senior executives, subject to the requirement that the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) must approve any determination to set a senior executive's rate of basic pay higher than the rate for level III of the Executive Schedule and must approve any determination to increase a senior executive's rate of basic pay more than once in any 12-month period; and

(4) The administrative and management controls that will be applied to ensure compliance with applicable statutes, OPM's regulations, the agency's plan, and, where applicable, the certification requirements set forth in 5 CFR 430, subpart D, and the limitation on the maximum rate of basic pay in § 534.403(a)(2).

(h) *Setting pay upon transfer.* (1) An authorized agency official may set the pay of a senior executive transferring from another agency at any rate within the SES rate range, subject to the limitation on the maximum rate of basic pay in § 534.403(a)(2) and the restrictions on reducing the pay of career senior executives in paragraph (h)(2) of this section (upon transfer to an agency whose applicable performance appraisal system is not certified) and in § 534.406(b) (for 12 months following the effective date of the new SES pay system). If pay is set at the same SES rate the senior executive received in his or her former agency, the action is not considered a pay adjustment for the purpose of applying § 534.404(c).

(2) A senior executive whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay as a result of transferring from an agency with a maximum SES rate of basic pay equal to the rate for level II of the Executive Schedule to an agency with a maximum SES rate of basic pay equal to the rate for level III of the Executive Schedule. The senior executive will continue to receive his or her current SES rate and is not eligible for a pay adjustment until the senior executive is assigned to a

position that would allow the employee to receive a pay adjustment or the employing agency's applicable performance appraisal system is certified under 5 CFR part 430, subpart D. The SES rate of pay is not considered a retained rate of pay for the purpose of applying 5 U.S.C. 3594 and 5 CFR part 359, subpart G, or 5 U.S.C. 5363 and 5 CFR 536.104.

(i) *Setting pay following a break in SES service.* (1) *General.* Upon reappointment to the SES, an authorized agency official may set the rate of basic pay of a former senior executive at any rate within the SES rate range, subject to the limitations in § 534.403(a), if there has been a break in SES service of more than 30 days. If there has been a break in SES service of 30 days or less, the senior executive's rate of basic pay must be set at a rate at least equal to the employee's former SES rate of basic pay. Setting a rate of basic pay upon reappointment to the SES is considered a pay adjustment under § 534.404(c).

(2) *Reinstatement from a Presidential appointment requiring Senate confirmation.* The following provisions apply to a former career senior executive who is reinstated under 5 CFR 317.703:

(i) If the individual elected to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be adjusted upon reinstatement to the SES, whether in the agency where the individual held the Presidential appointment or in another agency, if at least 12 months have elapsed since the employee's last SES pay adjustment, unless a determination is made under § 534.404(c)(4) that an additional pay increase is warranted. Any pay adjustment must be made in accordance with paragraphs (b), (d), and (e) of this section and the agency's plan for adjusting SES rates of pay in paragraph (g) of this section.

(ii) If the individual did not elect to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be set upon reinstatement to the SES at any rate within the SES rate range, subject to the limitations in § 534.403(a).

(iii) Setting a rate of basic pay upon reinstatement to the SES under paragraphs (i)(2)(i) and (ii) of this section is considered a pay adjustment for the purpose of applying § 534.404(c).

(j) *Restrictions on reducing the pay of career senior executives.* (1) An authorized agency official may reduce a career senior executive's SES rate of basic pay by not more than 10 percent for performance or disciplinary reasons,

subject to the restriction on reducing the pay of career senior executives in § 534.406(b) or setting pay below the minimum rate of the SES rate range in § 534.403(a).

(2) The SES rate of basic pay of a career senior executive may be reduced without the employee's consent by the senior executive's agency or upon transfer of function to another agency only—

(i) If the senior executive has received a less than fully successful annual summary rating under 5 CFR part 430, subpart C, or has otherwise failed to meet the performance requirements for a critical element as defined in 5 CFR 430.303; or

(ii) As a disciplinary or adverse action resulting from conduct-related activity, including, but not limited to, misconduct, neglect of duty, or malfeasance.

(3) Prior to reducing a career senior executive's rate of basic pay, the agency must provide the senior executive with the following:

(i) Written notice of such reduction at least 15 days in advance of its effective date;

(ii) A reasonable period of time, but not less than 7 days, for the senior executive to respond to such notice orally and/or in writing and to furnish affidavits and other documentary evidence in support of that response;

(iii) An opportunity to be represented in the matter by an attorney or other representative;

(iv) A written decision and specific reasons for the pay reduction at the earliest practicable date after the senior executive's response, if any; and

(v) An opportunity to request, within 7 days after the date of that decision, reconsideration by the head of the agency, whose determination with respect to that request will be final and not subject to further review.

11. In newly redesignated § 534.405, revise paragraphs (a)(2)(i), (b), (c), and (f) to read as follows:

§ 534.405 Performance Awards.

(a) * * *

(2) * * *

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the rate of basic pay of the individual is higher than the maximum rate of basic pay for the applicable SES rate range, the maximum rate of that SES rate range 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.

* * * * *

(b)(1) The total amount of performance awards paid during a fiscal year by an agency may not exceed the greater of—

(i) Ten percent of the aggregate career SES rates of basic pay for the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made; or

(ii) Twenty percent of the average annual rates of basic pay for career SES appointees of the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made.

(2) In determining the aggregate career SES rates of basic pay and the average annual rate of basic pay as of the end of FY 2003 for the purpose of applying paragraph (b) of this section, agencies must use the annual rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 or special geographic pay adjustment established for law enforcement officers under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509), which the SES appointees were receiving at the end of FY 2003.

(c) The amount of a performance award paid to an individual career appointee may not be less than 5 percent nor more than 20 percent of the appointee's SES rate of basic pay as of the end of the performance appraisal period.

* * * * *

(f) Performance awards must be paid in a lump sum except in those instances when it is not possible to pay the full amount because of the applicable aggregate limitation on pay during a calendar year under 5 CFR part 530, subpart B. In that case, any amount in excess of the applicable aggregate limitation must be paid at the beginning of the following calendar year in accordance with 5 CFR part 530, subpart B. The full performance award, however, is charged against the agency bonus pool under § 534.405(b) for the fiscal year in which the initial payment was made.

12. A new § 534.406 is added to read as follows:

§ 534.406 Conversion to the SES pay system.

(a) On the first day of the first applicable pay period beginning on or after January 1, 2004, agencies must convert an existing SES rate of basic pay for a senior executive to an SES rate of basic pay that is equal to the employee's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 which the senior executive was receiving immediately before that date, except as provided in

paragraph (b) of this section. The newly converted rate is the senior executive's SES rate of basic pay. An agency's establishment of an SES rate of basic pay for a senior executive under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c).

(b) An SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, may not be reduced for 1 year after the first day of the first applicable pay period beginning on or after January 1, 2004. If an SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 23, 2003, is higher than the rate in effect immediately prior to the first day of the first applicable pay period beginning on or after January 1, 2004, the agency must use the higher rate for the purpose of converting SES members to the SES pay system.

(c) Certain SES members in positions that have geographic mobility requirements and who are assigned outside the 48 contiguous States and the District of Columbia to a position overseas or in Alaska, Hawaii, Guam or the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or other U.S. territories and possessions as of the first day of the first applicable pay period beginning on or after January 1, 2004, will be converted to a new rate of basic pay that equals their current rate of basic pay, plus the amount of locality pay authorized under 5 U.S.C. 5304 for the applicable locality pay area upon reassignment to a position in the 48 contiguous States or the District of Columbia. The adjustment will be prospective, not retroactive, and it will not be considered a pay adjustment for the purpose of applying § 534.404(c). If the senior executive's rate of basic pay did not exceed the rate for level III of the Executive Schedule while assigned to a position outside the 48 contiguous States or the District of Columbia, upon

reassignment to a locality pay area the senior executive's converted rate of basic pay may not exceed the rate for level III of the Executive Schedule consistent with the limitations in § 534.403(a)(2) on increasing a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule. The newly converted rate is the senior executive's SES rate of basic pay.

(d) On the first day of the first applicable pay period beginning on or after January 1, 2004, a law enforcement officer (LEO), as defined in 5 CFR 531.301, who is a member of the SES will have his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509) to which he or she was entitled immediately before that date, converted to a new SES rate of basic pay. The newly converted rate is the senior executive's SES rate of basic pay, and any pay adjustments approved on or after January 11, 2004, must be computed based on the senior executive's converted rate of basic pay. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.404(c).

13. Section 534.407 is added to subpart D to read as follows:

§ 534.407 Pay computation and aggregate compensation.

(a) Except as provided in paragraph (b) of this section, pay for members of the SES must be computed in accordance with 5 U.S.C. 5504(b).

(b) To determine the hourly rate of pay for members of the SES, divide the annual SES rate of basic pay by 2,087 and round to the nearest cent, counting one-half cent and over as a whole cent. To derive the biweekly rate, multiply the hourly rate by 80.

(c) Senior executives are subject to the applicable aggregate limitation on pay in 5 CFR part 530, subpart B.

14. In newly redesignated § 534.408, remove the word "subject" and add in its place the word "subpart" in the last sentence of paragraph (b).

PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS, AND EXTENDED ASSIGNMENT INCENTIVES

15. The authority citation for part 575 continues to read as follows:

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

Subpart C—Retention Allowances

16. In § 575.306, paragraph (b) is revised to read as follows:

§ 575.306 Payment of retention allowance.

* * * * *

(b) The head of an agency may not authorize a retention allowance for an employee if or to the extent that such an allowance, when added to the employee's estimated aggregate compensation, as defined in 5 CFR 530.202, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the applicable aggregate limitation on pay under 5 CFR part 530, subpart B, at the end of the calendar year.

* * * * *

17. In § 575.307, paragraph (a) is revised to read as follows:

§ 575.307 Reduction or termination of retention allowance.

(a) The agency must reduce or terminate the authorized amount of a retention allowance to the extent necessary to ensure that the employee's estimated aggregate compensation, as defined in 5 CFR 530.202, does not exceed the applicable aggregate limitation on pay under 5 CFR part 530, subpart B, at the end of the calendar year.

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