

## Office of Personnel Management

## § 534.202

the appropriate regular or special schedule or as an amendment to the schedule and shall indicate the wage area (or part thereof) and each occupation or occupational specialization and grade for which the rates are authorized. These rates shall be paid by all agencies having such positions in the wage area (or part thereof) specified.

[57 FR 57876, Dec. 8, 1992]

### PART 534—PAY UNDER OTHER SYSTEMS

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AUTHORITY: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, sec. 1125 of the National Defense Authorization Act for FY 2004, Pub. L. 108-136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207); and sec. 2 of Pub. L. 110-372, 122 Stat. 4043 (5 U.S.C. 5304, 5307, 5376).

#### Subpart A [Reserved]

#### Subpart B—Student-Employees in Government Hospitals

SOURCE: 44 FR 54693, Sept. 21, 1979, unless otherwise noted.

##### § 534.201 General.

Under subchapter V of chapter 53 of title 5, United States Code (U.S.C. 5351-5356), agencies may pay stipends and provide certain services to certain student-employees assigned or attached to hospitals, clinics, or medical or dental laboratories operated by agencies. Student-employees covered under the program are excluded from certain provisions of law relating to classification, General Schedule pay, premium pay, leave, and hours of duty. This subpart authorizes the coverage of certain positions under this program and establishes maximum stipends for student-employees in the program.

##### § 534.202 Coverage.

In addition to the student-employees specified in 5 U.S.C. 5351(2)(A), the following student-employees are covered under this program, provided they are assigned or attached principally for training purposes to a hospital, clinic, or medical or dental laboratory operated by an agency:

(1) Any student-employee whom an agency finds is properly covered under this program, provided that the student-employee is a registered student at an accredited academic institution and that the assignment or attachment

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for training purposes to the hospital, clinic, or medical or dental laboratory is a part of a medical or dental training program accredited by an appropriate accrediting body;

(2) Any student-employee whom an agency finds is properly covered under this program, provided that the student-employee, during the period of assignment or attachment to the hospital, clinic, or medical or dental laboratory, will receive experience or training that is required to obtain a certificate or license in a medical or dental field; or

(3) Any student-employee not otherwise covered under this program whom the Office of Personnel Management approves for coverage as a student-employee under this program.

[44 FR 54693, Sept. 21, 1979, as amended at 64 FR 68931, Dec. 9, 1999]

### § 534.203 Maximum stipends.

(a) Except as authorized under paragraph (b) or (c) of this section, stipends are to be set by the agency, subject to the maximum stipends prescribed in the following table:

MAXIMUM STIPENDS PRESCRIBED

Code symbol	Academic level of approved training program	Maximums by grade and step <sup>1</sup>
L-A .....	Below high school graduation .....	GS-1-1 (minus 3 steps).
L-1 .....	First year college undergraduate .....	GS-2-1 (minus 3 steps).
L-2 .....	Second year college undergraduate .....	GS-3-1 (minus 3 steps).
L-3 .....	Third year college undergraduate .....	GS-3-3 (minus 3 steps).
L-4 .....	Fourth year college undergraduate .....	GS-4-2 (minus 3 steps).
L-5 .....	First year postgraduate predoctoral .....	GS-5-1 (minus 3 steps).
L-6 .....	Second year postgraduate predoctoral .....	GS-7-1 (minus 3 steps).
L-6 .....	Third year medical school .....	GS-7-1 (minus 3 steps).
L-7 .....	Third year postgraduate predoctoral .....	GS-9-1 (minus 3 steps).
L-7 .....	Fourth year medical school .....	GS-9-1 (minus 3 steps).
L-8 .....	Fourth year postgraduate predoctoral .....	GS-10-1 (minus 3 steps).
L-8 .....	Medical or dental internship .....	GS-10-1 (minus 3 steps).
L-9 .....	Fifth year postgraduate w/o doctorate .....	GS-11-1 (minus 3 steps).
L-9 .....	First year postgraduate (Ph. D.) .....	GS-11-1 (minus 3 steps).
L-9 .....	First year medical or dental residency .....	GS-11-1 (minus 3 steps).
L-10 .....	Second year postdoctoral (Ph. D.) .....	GS-12-1 (minus 3 steps).
L-10 .....	Second year medical or dental residency .....	GS-12-1 (minus 3 steps).
L-11 .....	Third year medical or dental residency .....	GS-12-4 (minus 3 steps).
L-12 .....	Fourth year medical or dental residency .....	GS-13-1 (minus 3 steps).
L-13 .....	Fifth year medical residency .....	GS-14-1 (minus 3 steps).

<sup>1</sup>The maximum money amount in each case is derived by subtracting from the statutory salary for the appropriate grade a sum equivalent to three step increments of that grade. This amount includes overtime pay, maintenance allowances, and other payments in money or kind.

(b) An agency may pay a student-employee a stipend in excess of the amount prescribed under paragraph (a) of this section only if the Office of Personnel Management has determined that a higher maximum stipend is warranted for the student-employee.

(c) Maximum stipends for positions in the Public Health Service in which duty requires intimate contact with persons afflicted with leprosy are increased above the rates prescribed in paragraph (a) of this section to the same extent that additional pay is provided by Public Health Service Regulations (42 CFR 22.1) for employees subject to the General Schedule (part 531 of this chapter).

(d) Overtime pay, maintenance allowances, and other payments in money or kind for a student-employee must be considered as part of the student-employee's stipend for the purposes of this section, and therefore, may not be used to cause the stipend to exceed the maximum stipend established under this section.

(e) A trainee at a non-Federal hospital, clinic, or medical or dental laboratory who is assigned to a Federal hospital, clinic, or medical or dental laboratory as an affiliate for a part of his or her training may not receive a stipend from the Federal agency other than any maintenance allowance that is provided.

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### § 534.204 Previous authorizations.

The provisions of this subpart do not terminate any authorization approved by the Civil Service Commission or the Office of Personnel Management before February 15, 1979, and such authorizations remain in effect until modified or terminated by an agency or the Office of Personnel Management in accordance with the provisions of this subpart.

### Subpart C—Basic Pay for Employees of Temporary Organizations

SOURCE: 67 FR 3582, Jan. 25, 2002, unless otherwise noted.

#### § 534.301 Purpose.

This subpart provides rules for determining the rate of basic pay and locality-adjusted rate of basic pay for employees who are appointed to positions in temporary organizations and compensated under 5 U.S.C. 3161. Such temporary organizations are established by law or Executive order. This subpart does not provide authority to establish other forms of compensation and benefits not authorized by title 5, United States Code, or another specific statutory authority.

[67 FR 63049, Oct. 10, 2002]

#### § 534.302 Coverage.

This subpart applies to employees in executive level and staff positions in temporary organizations. Such employees are not subject to the provisions applicable to General Schedule employees covered by chapter 51 and subchapter III of chapter 53 of title 5, United States Code.

[67 FR 63049, Oct. 10, 2002]

#### § 534.303 Basic pay for executive level positions.

Rates of basic pay for executive level positions of temporary organizations may not exceed the rate for level III of the Executive Schedule.

[69 FR 70362, Dec. 6, 2004]

#### § 534.304 Basic pay for staff positions.

(a)(1) Rates of basic pay for staff or other non-executive level positions of

temporary organizations may not exceed the maximum rate of basic pay for grade GS-15 of the General Schedule under 5 U.S.C. 5332, excluding any locality-based comparability payment under 5 U.S.C. 5304.

(2) In establishing rates of basic pay for staff and other non-executive level positions of temporary organizations, the head of a temporary organization must give consideration to the significance, scope, and technical complexity of the position and the qualifications required for the work involved. The head of a temporary organization must also take into account the rates of pay applicable to Federal employees who have duties that are similar in terms of difficulty and responsibility.

(b) Employees in staff and other non-executive level positions of temporary organizations must be paid locality payments in addition to basic pay in the same manner as employees covered by 5 U.S.C. 5304. Locality-adjusted rates of basic pay may not exceed the locality-adjusted rate of basic pay for grade GS-15 of the General Schedule under 5 U.S.C. 5304, for the locality pay area involved (not to exceed the rate for level IV of the Executive Schedule).

(c) Notwithstanding the limitations in paragraphs (a) and (b) of this section, the rate of basic pay and locality-adjusted rate of basic pay for a senior staff position of a temporary organization may, in a case determined by the head of a temporary organization to be exceptional, exceed the maximum rates established under those paragraphs. However, the higher payable rates may not exceed the rate for level III of the Executive Schedule.

[67 FR 3582, Jan. 25, 2002, as amended at 67 FR 63050, Oct. 10, 2002; 69 FR 70362, Dec. 6, 2004]

#### § 534.305 Pay periods and computation of pay.

(a) The requirements of 5 U.S.C. 5504, must be applied to employees of temporary organizations. This includes requirements for biweekly pay periods and requirements for converting an annual rate of basic pay to a basic hourly, daily, weekly, or biweekly rate.

(b) Employees of temporary organizations must receive basic pay on an hourly basis.

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

SOURCE: 54 FR 2987, Jan. 23, 1989, unless otherwise noted.

**§ 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 system(s) 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.

[69 FR 70362, Dec. 6, 2004]

**§ 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.

*Performance expectations* means the critical and other performance elements and performance requirements that constitute the senior executive

performance plans (as defined in § 430.303).

*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.

*Relative performance* means the performance of a senior executive with respect to the performance of other senior executives, including their contribution to agency performance, where appropriate, as determined by the application of a certified performance appraisal system under 5 CFR part 430, subpart D.

*Senior executive* means a member of the Senior Executive Service (SES) paid under 5 U.S.C. 5383.

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

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

[69 FR 70362, Dec. 6, 2004]

**§ 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). 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. 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). The applicable maximum rate of basic pay for the SES rate range will increase with any increase in the rate for levels II or III of the Executive Schedule under 5 U.S.C. 5318.

(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 rein-

stated 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 part 536, subpart C.

[69 FR 70362, Dec. 6, 2004, as amended at 70 FR 31305, May 31, 2005]

**§ 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). 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) 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).

(3) An agency may provide a pay increase to allow a senior executive to advance his or her relative position within the SES rate range 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 or pay adjustments.

(4)(i) On the effective date of an increase in the minimum or maximum rate of basic pay of the SES rate range under § 534.403(a)(1) or (2), an authorized agency official may increase the rate of basic pay of a senior executive who meets or exceeds his or her performance expectations by an amount that does not exceed the amount necessary to maintain the senior executive's relative position in the SES rate range, except as provided in paragraph (b)(4)(ii) and (b)(4)(iii) of this section. A pay increase made under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c).

(ii) A pay increase under paragraph (b)(4)(i) of this section may not be provided to a senior executive whose rate of basic pay is at or below the rate for level III of the Executive Schedule if such an increase would cause the senior executive's rate of basic pay to exceed the rate for level III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) has approved the increase in pay.

(iii) A pay increase under paragraph (b)(4)(i) of this section may not be provided to a senior executive whose rate of basic pay is above the rate for level

III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) has approved the increase in pay. However, in the case of a senior executive whose rate of basic pay is above the rate for level III of the Executive Schedule and who has been rated below outstanding, but above fully successful, for the most recently completed appraisal period, the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) may approve such a pay increase in limited circumstances, such as for an exceptionally meritorious accomplishment.

(5) 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.

(6) 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. However, an agency may make a determination to provide an additional pay increase under certain conditions as prescribed in paragraph (c)(3) and (4) of this section without regard to whether the senior executive has received a pay adjustment during the previous 12-month period.

(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, except as provided in paragraph (c)(3) 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;

(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;

(iv) A determination to provide an additional pay increase under paragraph (f) of this section when there is an increase in Executive Schedule rates of pay;

(v) [Reserved]

(vi) A determination to provide a pay increase under paragraph (b)(4) of this section to allow a senior executive to maintain his or her relative position in the SES rate range; and

(vii) An increase in pay equivalent to the minimum amount necessary to ensure that a senior executive's rate of basic pay does not fall below the minimum rate of the SES rate range.

(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) (including the Inspector General, where applicable) determines that—

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

(ii) A pay increase is necessary to reassign a senior executive to a position

with substantially greater scope and responsibility or to recruit a senior executive with superior leadership or other competencies from a position in another agency;

(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) An authorized agency official must provide written documentation approving an exception under paragraph (c)(4) of this section. Any pay adjustment made as a result of a determination under paragraph (c)(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 adjust 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 an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and the senior executive is otherwise eligible for such an 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.* (1) 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 limitations in § 534.403(a)(3). The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and if the senior executive is otherwise eligible for such an 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).

(2) [Reserved]

(f) *Effect of increase in Executive Schedule rates of pay.* (1) 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).

(2) If there is an increase in the rates of pay for the Executive Schedule under 5 U.S.C. 5318 after an agency has already granted pay increases to its senior executives following the applicable performance appraisal period, an agency may review any previous determination to increase the pay of a senior executive whose rate of basic pay is equivalent to the rate for level II (if covered under a performance appraisal system that is certified) or level III (if covered under a performance appraisal system that is not certified) when the applicable maximum rate is increased to determine whether, and to what extent, an additional pay increase may be

warranted for the senior executive based on the same criteria used for the previous determination. The determination to provide an additional pay increase must be approved and made effective as of the effective date of increases in the Executive Schedule under 5 U.S.C. 5318 (*i.e.*, the first day of the first pay period beginning on or after January 1). An additional pay increase under this paragraph 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. Agencies must provide for transparency in the processes for making pay decisions, while assuring confidentiality. In developing its plan for setting and adjusting SES rates, an agency may consider the senior executive's broad scope of authority and level of responsibility and his or her personal accountability for the success (or failure) of an agency's programs. 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 to ensure that individual pay rates or pay adjustments, as well as their overall distribution within the SES rate range, reflect meaningful distinctions within a single performance rating level (*e.g.*, the higher the employee's relative performance within a rating level, the higher the pay adjustment) and/or between performance rating levels (*e.g.*, the higher the rating level, the higher the pay adjustment);

(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) (including the Inspector General, where applicable) 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).

(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) 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 to an agency where the maximum rate of basic pay for the applicable SES rate range is 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 part 536, subpart C.

(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 may be set at any rate within the SES rate range (without regard to whether the employee received a pay adjustment during the previous 12-month period), but not higher than the senior executive's former SES rate of basic pay. Where there has been a break in service of 30 days or less, the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) (including the Inspector General, where applicable) may approve a higher rate than the senior executive's former rate of basic pay, if warranted. 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. If fewer than 12 months have elapsed since the employee's last SES pay adjustment, an authorized agency official may approve an additional pay increase under § 534.404(c)(4) if the 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.

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(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.

(4) Reductions in pay under paragraph (j) of this section are not appealable under 5 U.S.C. 7543.

[69 FR 70363, Dec. 6, 2004, as amended at 70 FR 31305, May 31, 2005; 71 FR 38754, July 10, 2006; 79 FR 12357, Mar. 5, 2014]

### § 534.405 Performance awards.

(a) This section covers the payment of performance awards to career appointees in the Senior Executive Service (SES).

(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 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.

(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) or this section.

(3) When making recommendations on performance awards, more than one-half of the membership of a Performance Review Board must be career SES appointees. The only exception is if OPM has determined under § 430.307(d) of this chapter that the Board does not have to have a majority of career members when making recommendations on performance appraisals of career appointees because there exists an insufficient number of career appointees.

(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.

(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 (Pub. L. 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.

(d) OPM shall issue guidance concerning the distribution of performance awards within an agency.

(e) Agencies shall submit their distribution of performance awards, the total amount of awards, and the aggregate payroll or average rate of basic pay as computed under paragraph (b) of this section to OPM no later than 14 days after the date the performance awards are approved by the agency. If OPM determines that an agency's payments do not meet the requirements of law or regulations, the agency shall take any corrective action directed by OPM.

(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.

[52 FR 2, Jan. 2, 1987, as amended at 55 FR 1353, Jan. 16, 1990; 57 FR 10125, Mar. 24, 1992; 60 FR 6389, Feb. 2, 1995; 64 FR 72889, Dec. 29, 1999; 69 FR 2051, Jan. 13, 2004. Redesignated and amended at 69 FR 70362, 70366, Dec. 6, 2004]

#### **§ 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

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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) An SES member who is assigned to a position 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 the senior executive's 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 the employee's initial 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 initial 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. 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 (Pub. L. 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).

[69 FR 70366, Dec. 6, 2004]

### § 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.

[69 FR 70367, Dec. 6, 2004]

### § 534.408 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, subpart J.

[60 FR 6390, Feb. 2, 1995. Redesignated and amended at 69 FR 70362, 70367, Dec. 6, 2004]

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

SOURCE: 79 FR 12357, Mar. 5, 2014, unless otherwise noted.

### § 534.501 Purpose.

This subpart provides rules for setting and adjusting rates of basic pay for senior-level (SL) and scientific or professional (ST) employees under 5 U.S.C. 5376, as amended by section 2 of the Senior Professional Performance Act of 2008 (Pub. L. 110-372, October 8, 2008), promotes performance-based pay by enabling an agency that attains certification of a performance appraisal system covering senior professionals to fix rates of basic pay for those employees up to the rate payable for level II of the Executive Schedule. Under 5 U.S.C. 5307(d) and subpart D of part 430 of this chapter, the Office of Personnel Management (OPM), with Office of Management and Budget (OMB) concurrence, grants certification only to a performance appraisal system that, in its design and application, makes meaningful distinctions based upon relative performance. This subpart implements the purpose of the law by providing for pay determinations for SL and ST employees to be based on individual performance, contributions to the agency's performance, or both, as determined through administration of the agency's performance management system(s) for SL and ST employees.

### § 534.502 Coverage.

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

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

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

(b) This subpart does not apply to—

(1) Senior Executive Service positions established under 5 U.S.C. 3132, unless the incumbent of the position declined to convert to the SES and, under § 317.303 of this chapter, remained at grade GS-16, 17, or 18 (now the SL pay system) or under the ST pay system;

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

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

### § 534.503 Definitions.

In this subpart—

*Agency* means—

(1) An Executive agency as defined in 5 U.S.C. 105;

(2) The Library of Congress; and

(3) Any other entity that is not part of an Executive agency, for which OPM has approved establishment of one or more scientific or professional positions under 5 U.S.C. 3104.

*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.

*Certified* means having the certification that OPM, with OMB concurrence, grants under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter only to a performance appraisal system that makes, in its design and application, meaningful distinctions based on relative performance. In this subpart, the term “certified” refers to a performance appraisal system that has this certification, including a performance appraisal system for which certification has been reinstated after suspension under § 430.405(h) of this chapter.

*Movement* means a change of an SL or ST employee from one SL or ST position to a different SL or ST position without a break in service under procedures that meet applicable requirements for staffing positions in the competitive service and excepted service. As used in this subpart, the term “movement” applies only to an appointment, not a detail, and is used without reference to the pay consequences of an action. Unless otherwise specified, the term refers to position changes both within and between agencies.

*Not certified* means lacking the certification that OPM, with OMB concurrence, grants under 5 U.S.C. 5307(d) and

part 430, subpart D of this chapter only to a performance appraisal system that makes, in its design and application, meaningful distinctions based on relative performance. In this subpart, the term “not certified” refers to a performance appraisal system that does not have this certification, or for which a previously granted certification has expired or is suspended under § 430.405(h) of this chapter.

*Off-cycle pay increase* means any increase in a senior professional’s rate of basic pay that becomes effective on a date other than the date specified in § 534.507(a)(1).

*OMB* means the Office of Management and Budget.

*OPM* means the Office of Personnel Management.

*Performance appraisal system* means the policies, practices, and procedures an agency establishes under 5 U.S.C. chapter 43 and 5 CFR part 430, subpart B, or other applicable legal authority, for planning, monitoring, developing, evaluating, and rewarding employee performance. For a senior professional employee, this term refers to appraisal programs or appraisal systems as defined in § 430.203 of this chapter.

*Performance management system* means the framework of policies and practices that an agency uses to implement performance management, as described in § 430.102 of this chapter. As used in this subpart, the term includes, but is not limited to, those disciplines and activities by which an agency addresses the criteria identified in § 430.404(a)(1) through (9) of this chapter.

*Performance rating* means the written, or otherwise recorded, appraisal of performance compared to the SL or ST employee’s performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for a minimum of 90 days. A performance rating may include the assignment of a summary level within a pattern as specified in § 430.208(d) of this chapter.

*Rate of basic pay* means the rate of pay fixed by law or administrative action for an SL or ST employee under the provisions of 5 U.S.C. 5376 and this subpart before any deductions and exclusive of additional pay of any other kind.

*Rating of record* means the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level within a pattern as specified in § 430.208(d) of this chapter that has been reviewed and approved in accordance with § 534.505(a).

*Scientific or professional (ST) employee* means an individual appointed to a position described in § 319.103 and authorized by OPM under § 319.202 of this chapter or otherwise established under 5 U.S.C. 3104.

*Senior-level (SL) employee* means an individual appointed to a position described in § 319.102 and authorized by OPM under § 319.202 of this chapter.

*Senior professional* means an SL or ST employee.

*Transfer* means any movement, as defined in this section, that is a change of a senior professional from an SL or ST position in one agency to an SL or ST position in another agency without a break in service of at least 1 full workday.

#### § 534.504 Pay range.

(a) A rate of basic pay under this subpart must be—

(1) Not less than 120 percent of the minimum rate of basic pay payable for GS–15 of the General Schedule, and

(2) Not greater than—

(i) The rate of basic pay payable for level III of the Executive Schedule (EX–III), or

(ii) In the case of an SL or ST employee who is covered by a certified performance appraisal system or whose established rate of basic pay is preserved under § 534.509, the rate of basic pay payable for level II of the Executive Schedule (EX–II).

(b) An agency may not set or adjust the rate of basic pay for an SL or ST employee higher than the maximum in—

(1) Paragraph (a)(2)(i) of this section (i.e., EX–III) when the SL or ST employee is covered by a performance appraisal system that is not certified or when the SL or ST employee is not subject to a performance appraisal system, except as provided in § 534.509; or

(2) Paragraph (a)(2)(ii) of this section (*i.e.*, EX-II) when the SL or ST employee is covered by a certified performance appraisal system.

**§ 534.505 Written procedures.**

(a) Each agency with positions subject to this subpart must establish written procedures for setting the rate of basic pay and increasing the rate of basic pay of incumbents of the positions in accordance with law and this subpart. Agencies must provide for transparency in the processes for making pay decisions, while assuring confidentiality. The agency's plan for setting and increasing rates of basic pay must reflect meaningful distinctions among SL and ST employees based on individual performance, contribution to agency performance, or both, and must include—

(1) The criteria that will be used to set and increase a senior professional's rate of basic pay to ensure that individual pay rates or pay increases, as well as their overall distribution within the senior professional pay range, reflect meaningful distinctions within a single performance level (*e.g.*, the higher the employee's relative performance within a rating level, the higher the pay increase), between performance rating levels (*e.g.*, the higher the rating level, the higher the pay increase), or both;

(2) The criteria that will be used to set and increase a senior professional'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 part 430, subpart D of this chapter;

(3) Any system, methods, or criteria the agency uses to establish pay ranges applicable to various SL or ST positions within the pay range that applies under § 534.504(a), consistent with the requirement that pay be determined based upon individual performance, contributions to the agency's performance, or both;

(4) The designation of the authorized agency official(s) who will have the authority to set and adjust rates of basic pay for SL and ST employees, subject to the requirements of paragraph (c) of this section; and

(5) The administrative and management controls that will be applied to assure compliance with applicable statutes, OPM regulations, the agency's written procedures established under this section, the applicable maximum rate of basic pay in § 534.504(a), and, where applicable, the certification requirements set forth in part 430, subpart D of this chapter. In an agency that employs ten or more senior professionals, these controls must include centralized review of ratings proposed under § 430.208 of this chapter and pay actions proposed under § 534.507 by a panel of individuals designated by the agency head to provide advice from an agency-wide perspective for authorized agency officials to consider before approving pay adjustments on whether—

(i) Ratings of record and performance ratings proposed for senior professionals accurately reflect their individual performance, contributions to agency performance, or both, and take into account, as appropriate, assessment of the agency's performance against program performance measures and other relevant considerations; and

(ii) Proposed pay adjustments for senior professionals conform to the requirements of § 534.507 and appropriately correspond to proposed ratings of record and performance ratings.

(b) Each agency's written procedure must provide that, effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay under the General Schedule, the head of an agency will adjust a senior professional's rate of basic pay under the provisions of § 534.507.

(c) The following actions must be approved by the agency head or by a designee who provides the certifications described in § 430.404(a)(6)(i), (ii) and (iii) of this chapter for all senior professionals in the agency, and this approval authority may not be further delegated:

(1) Any pay-setting action under § 534.506 or any pay increase under § 534.507 that results in a rate of basic pay that is within the highest 10 percent of the applicable rate range under § 534.504. A rate of basic pay equal to or

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above the amount derived using the following rules is considered to be within the highest 10 percent of the applicable pay range (in 2015, \$177,166 or above if the applicable system is certified, or \$164,026 or above if the applicable system is not certified or performance appraisal does not apply):

(i) Subtract the minimum rate of basic pay from the maximum rate of basic pay for the applicable rate range under § 534.504 (in 2015, \$183,300 – \$121,956 = \$61,344 if the applicable system is certified, or \$168,700 – \$121,956 = \$46,744 if the applicable system is not certified or performance appraisal does not apply);

(ii) Multiply the amount derived in paragraph (c)(1)(i) of this section by 0.10 (in 2015, \$61,344 × 0.10 = \$6,134 if the applicable system is certified, or \$46,744 × 0.10 = \$4,674 if the applicable system is not certified or performance appraisal does not apply); and

(iii) Subtract the amount derived in paragraph (c)(1)(ii) of this section from the maximum rate of basic pay applicable under § 534.504 (in 2015, \$183,300 – \$6,134 = \$177,166 if the applicable system is certified, or \$168,700 – \$4,674 = \$164,026 if the applicable system is not certified or performance appraisal does not apply);

(2) Any pay increase under § 534.507 that results in a rate of basic pay more than 10 percent above the SL or ST employee's rate of basic pay as in effect on the last day of the preceding fiscal year or, if the individual was first appointed as an SL or ST employee in the agency after the last day of the preceding fiscal year, more than 10 percent above the rate of basic pay set at the time of that appointment. A rate of basic pay more than 10 percent above the applicable rate of basic pay is considered to be any rate of basic pay that exceeds the amount derived by multiplying the applicable rate of basic pay by a factor of 1.1;

(3) Any pay-setting action under § 534.506(c)(2) that results in a higher rate of basic pay than the senior professional had upon leaving the agency; and

(4) Any off-cycle pay increase under § 534.510.

(d) An agency must keep its written procedures for setting and increasing

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rates of basic pay up to date, make them available to affected SL and ST employees, periodically provide training or supplemental guidance to clarify how they are applied, and provide a copy to OPM upon request.

(e)(1) The head of an agency may delegate to an Inspector General the authority to set and adjust pay for senior professionals in the Office of the Inspector General, including authority for pay actions described in paragraph (c) of this section.

(2) An agency head who delegates to an Inspector General the authority to set and adjust pay for all senior professionals in the Office of the Inspector General, including all pay actions described in paragraph (c) of this section, may exclude those senior professionals from the count of agency senior professionals for the purpose of determining whether centralized review under paragraph (a)(5) of this section is required.

(3) An Inspector General to whom an agency head delegates authority to set and adjust pay for 10 or more senior professionals in the Office of the Inspector General must provide the centralized review required by paragraph (a)(5) of this section and may use Federal employees from outside the agency for that purpose or from the Inspector General community, whether or not in the same agency.

(f)(1) A panel performing centralized review under paragraphs (a)(5) or (e)(3) of this section for a senior professional who holds a career or career-conditional appointment or an appointment of equivalent tenure in the excepted service must have a majority of career appointees.

(2) For the purpose of paragraph (f)(1) of this section, a career appointee is considered to be a career SES member or a senior professional who holds a career or career-conditional appointment or an appointment of equivalent tenure in the excepted service.

(3) An agency head may include Federal employees from outside the agency on a panel performing centralized review.

(4) An agency using the discretion provided in § 430.403(d) of this chapter



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must do so in accordance with paragraphs (a)(5), (e) and (f) of this section, as applicable.

[79 FR 12357, Mar. 5, 2014, as amended at 80 FR 57698, Sept. 25, 2015]

### § 534.506 Setting a rate of basic pay upon appointment.

(a) An authorized agency official may set the rate of basic pay of an individual who is not currently an SL or ST appointee of the agency at any rate within the applicable rate range under § 534.504(a) upon appointment to an SL or ST position in the agency, subject to the requirements of this section. In setting a new senior professional's rate of basic pay, an agency must consider the nature and quality of the individual's experience, accomplishments, and any unique skills, qualifications, or competencies the individual possesses as they relate to requirements of the senior professional position and its impact on the agency's performance. 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 professionals who possess superior leadership, scientific, professional or other competencies necessary to address key program and mission requirements, as determined by the agency through its strategic human capital planning process.

(b) Consistent with the agency's written procedures and paragraph (a) of this section, an authorized agency official may set the rate of basic pay for an SL or ST employee upon transfer from another agency at any rate of basic pay within the pay range that applies to the SL or ST position under § 534.504(a), except as provided in § 534.509(a).

(c)(1) Consistent with the agency's written procedures and paragraph (a) of this section, except as provided in paragraph (c)(2) of this section, an authorized agency official may set pay upon reappointment of a former SL or ST employee at any rate of basic pay within the pay range that applies to the SL or ST position under § 534.504(a).

(2) If a former agency SL or ST employee is reappointed within 30 days to the same position or a successor posi-

tion in the same agency, the agency may not give the individual a higher rate of basic pay upon reappointment unless the agency head or a designee who provides the certifications described in § 430.404(a)(6)(i), (ii) and (iii) of this chapter for all senior professionals in the agency determines that a higher rate of basic pay is warranted.

### § 534.507 Annual increases in basic pay.

(a)(1) Effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under 5 U.S.C. 5303 in the rates of basic pay under the General Schedule, the head of an agency must adjust a senior professional's rate of basic pay under paragraph (b) of this section by an amount he or she considers appropriate, subject to the applicable maximum rate under § 534.504(a), the agency's written procedures under § 534.505, and the provisions of this section.

(2) A determination by an authorized agency official to make a zero adjustment in pay after reviewing a senior professional's current rating of record or performance rating meets the requirement of paragraph (a)(1) of this section only if the notice required by paragraph (h) of this section is provided to the senior professional.

(3) A pay adjustment under paragraph (a)(1) or a determination under paragraph (a)(2) of this section does not restrict the authority of an agency head to increase pay at other times under § 534.510, if warranted.

(b)(1) An agency may provide a pay increase to a senior professional only upon a determination by the authorized agency official that the senior professional's performance and/or contributions to agency performance so warrant.

(2) Increases resulting in a rate of basic pay that exceeds the rate for level III of the Executive Schedule, but is less than or equal to the rate for level II of the Executive Schedule, are reserved for those senior professionals who demonstrate the highest levels of individual performance, make the greatest contributions to the agency's performance, or both, as determined by the agency through the administration

of its performance management system.

(3) A pay increase must reflect the agency's judgment concerning the value of the employee's characteristic and continuing service to the agency in the SL or ST position. A single noteworthy contribution that is not characteristic of the employee's continuing performance requirements, individual performance or contributions to the agency's performance should be recognized by an appropriate award under part 451, subpart A of this chapter or other appropriate authority, rather than by a permanent increase in the rate of basic pay.

(c) An agency must document the basis for each pay increase granted under paragraph (b) by means of—

(1) A current rating of record; or

(2) A performance rating that covers a period of at least 90 days and is assigned in accordance with subpart B of part 430 of this chapter and the centralized review required by § 534.505(a)(5), but only if a rating of record is not available or does not reflect current performance.

(d) Any increase under this section that results in a rate of basic pay above the rate for level III of the Executive Schedule may not be made effective unless—

(1) The rating of record or performance rating used to justify the increase covers a period of at least 90 days of performance during which the applicable performance appraisal system has continuously been certified under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter;

(2) The rating of record or performance rating used to justify the increase becomes final while the applicable performance appraisal system is certified;

(3) The rating and pay increase are reviewed and approved in accordance with § 534.505(a);

(4) The pay increase is approved in accordance with § 534.505(c), as applicable, and the agency's written procedures; and

(5) The pay increase becomes effective while the applicable performance appraisal system is certified.

(e) Upon the initial certification under 5 U.S.C. 5307(d) and part 430, subpart D of this chapter by OPM, with

OMB concurrence, of an agency performance appraisal system covering SL or ST employees, OPM may waive the requirement of paragraph (d)(1) of this section. The requirement may be waived only if OPM determines that the agency has, for a period of no less than 90 days prior to certification, consistently applied the same performance appraisal system to covered SL or ST employees in a manner consistent with certification. If OPM waives this requirement, OPM will notify the agency in writing.

(f) Except as required by paragraph (g) of this section, a pay increase under this section may not be provided to an employee—

(1) Who has a current rating of record below Level 3 (Fully Successful or equivalent), as described in § 430.208 of this chapter; or

(2) Who, after receiving a rating of record at Level 3 or above, receives a more recent performance rating that rates performance in a critical element at a level below Fully Successful, as described in § 430.206(b)(8)(i) of this chapter.

(g) An SL or ST employee whose rate of basic pay would otherwise fall below the minimum rate of the SL and ST pay range under § 534.504(a)(1) must be provided a pay adjustment sufficient to maintain the minimum rate of basic pay.

(h)(1) If the rates of basic pay under the General Schedule are increased under 5 U.S.C. 5303 on the date specified in paragraph (a)(1) of this section and the agency head decides upon a zero adjustment for an SL or ST employee who has a current rating of record or applicable performance rating at Level 3 or above, as described in § 430.208 of this chapter, the agency must communicate the reasons for that decision to the employee in writing.

(2) Paragraph (h)(1) of this section does not apply to a senior professional with a rate of basic pay described in § 534.505(c)(1) unless—

(i) The rates of basic pay for the Executive Schedule are also increased on the date specified in paragraph (a)(1) of this section; and

(ii) The senior professional has a current rating of record or applicable performance rating at Level 4 in an appraisal program that uses summary level pattern C or G, or at Level 5 in an appraisal program that uses summary level pattern B, E, F, or H, as described in § 430.208 of this chapter.

(3) Paragraphs (h)(1) and (h)(2) of this section may not be construed to require a pay increase for any senior professional employee.

**§ 534.508 Reductions in a rate of basic pay.**

(a) Any reduction in a rate of basic pay for an SL or ST employee is subject to part 752, subpart D of this chapter except as otherwise provided in this section.

(b) If an employee is removed from an SL or ST position and placed in a General Schedule position under procedures in part 752, subpart D of this chapter or part 432 of this chapter providing for reduction in grade, or otherwise moves voluntarily or involuntarily to a General Schedule position, the employee is entitled to the minimum rate of basic pay, as defined in § 531.203 of this chapter, for the General Schedule grade unless the agency sets the employee's pay at a higher rate under—

(1) The maximum payable rate rule in § 531.221 of this chapter, if applicable;

(2) The superior qualifications and special needs pay-setting authority in § 531.212 of this chapter, if applicable; or

(3) The pay retention rules in part 536, subpart C of this chapter, if applicable.

(c) An agency may reduce an SL or ST employee's rate of basic pay, subject to part 752, subpart D of this chapter, upon movement to a different SL or ST position within the agency. If an SL or ST employee elects to accept a reduction in pay to facilitate a reassignment and the agency documents the voluntary nature of the action, the resulting pay reduction is not subject to part 752, subpart D of this chapter.

(d) If an agency justifies an increase in an SL or ST employee's rate of basic pay under § 534.510 upon the employee's movement to another SL or ST position having a substantially greater impact on agency performance with the

understanding that the employee will be reduced to his or her former rate of basic pay upon movement out of the position, and the agency documents the voluntary nature of the action, the resulting reduction to the former rate of basic pay (or to a higher rate of basic pay determined under this subpart that is within the pay range applicable to the SL or ST position under § 534.504(a)) is not subject to part 752, subpart D of this chapter.

(e) A reduction in the rate of basic pay of an SL or ST employee under § 534.506(b) upon transfer is considered voluntary upon the employee's acceptance of the appointment and is not subject to part 752, subpart D of this chapter, except that an SL or ST employee's rate of basic pay may not be reduced upon transfer under circumstances described in § 534.509(a). A reduction in the rate of basic pay of an SL or ST employee upon a transfer of function under part 351, subpart C of this chapter from another agency is subject to part 752, subpart D of this chapter unless otherwise provided by statute.

**§ 534.509 Preservation of an established rate of basic pay.**

(a) An SL or ST employee 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 to an SL or ST position in another agency where the maximum rate of basic pay for the applicable SL or ST rate range is equal to the rate for level III of the Executive Schedule.

(b) An SL or ST employee 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 expires or is suspended under § 430.405(h) of this chapter. See § 530.203(g) and (h) of this chapter for treatment of the aggregate pay limit when certification status changes during the calendar year.

(c) An agency may continue an SL or ST employee's rate of basic pay above the rate for level III of the Executive Schedule upon that employee's movement within the agency to an SL or ST position that is not under a certified

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performance appraisal system. Pay may be reduced upon the movement only as provided in § 534.508.

(d) If an agency grants a temporary pay increase under conditions described in § 534.508(d) to an SL or ST employee subject to a certified performance appraisal system who, prior to the temporary pay increase, has a rate of basic pay above the rate for level III of the Executive Schedule, the agency may return the employee to an SL or ST position that is not subject to a certified performance appraisal system when the temporary assignment ends and set the SL or ST employee's rate of basic pay at the rate in effect immediately before the temporary pay increase.

(e) When a rate of basic pay that is higher than the rate for level III of the Executive Schedule is preserved under a provision of this section, the SL or ST employee will continue to receive his or her current rate of basic pay and is not eligible for a pay increase until he or she is assigned to an SL or ST position covered by a certified performance appraisal system or his or her rate of basic pay is less than the rate for level III of the Executive Schedule.

(f) An agency that is otherwise subject to the limitation in § 534.504(a)(2)(i) with respect to an SL or ST position occupied by an SL or ST employee whose rate of basic pay is authorized to be preserved under paragraph (a), (b), (c), or (d) of this section may set that employee's rate of basic pay above EX-III only at the level required to preserve the applicable rate.

(g) Preservation of a rate of basic pay under this section does not preclude a subsequent reduction in pay as provided in § 534.508.

(h) The provisions of this section do not apply upon the appointment of a senior professional employee to a position in the Senior Executive Service or upon the appointment of a member of the Senior Executive Service to a senior professional position.

### § 534.510 Off-cycle pay increases.

(a) An authorized agency official may provide an off-cycle pay increase to a senior professional if, and only if, the agency head or a designee who provides the certifications described in

§ 430.404(a)(6)(i), (ii) and (iii) of this chapter for all senior professionals in the agency determines an off-cycle pay increase is warranted and approves the amount of the increase, subject to the requirements of this section and the agency's written procedures established under § 534.505. The authority to approve an off-cycle pay increase under this section may not be further delegated.

(b) Except as provided in paragraph (d) of this section, an off-cycle pay increase must be supported by factors that distinguish the level of the senior professional's performance and/or contributions to agency performance from that of his or her peers, as applicable, and from that sufficiently rewarded through the annual pay adjustment. In assessing the warrant for an off-cycle pay increase, the approving official may consider such factors as—

(1) A senior professional's exceptionally meritorious accomplishments that contribute significantly to the agency's performance;

(2) The need to offer a pay increase to reassign a senior professional to a position that has a substantially greater impact on agency performance; and

(3) The need to retain a senior professional whose contributions are critical to the agency and who is likely to leave the agency in the absence of a pay increase.

(c) Each off-cycle pay increase that is based upon such factors as are described in paragraphs (b)(1) through (3) of this section must be documented in accordance with § 534.507(b) through (e), except that the agency must also provide information to explain how each applicable factor was considered in determining the pay increase. This information may be derived from the agency's written pay procedures established under § 534.505, agency performance management system activities, or other sources the agency deems useful for this purpose.

(d) If the maximum rate of basic pay applicable to an agency's senior professionals increases during the 1 year period following the annual pay adjustment under § 534.507(a)(1) for reasons other than a change in the certification status of an applicable performance appraisal system, the agency head

or a designee who provides the certifications described in §430.404(a)(6)(i), (ii) and (iii) of this chapter for all senior professionals in the agency may consider whether, and to what extent, an additional pay increase may be warranted for a senior professional based on the same criteria used in determining his or her annual pay increase. However, if the increase in maximum rate of basic pay is due to a change in the certification status of an applicable performance appraisal system, the requirements of paragraphs (a), (b), and (c) of this section apply.

(e) An off-cycle pay increase granted under this section will be effective prospectively, not retroactively.

**§534.511 Exemption from performance appraisal requirements.**

(a) An agency responsible for setting and adjusting rates of basic pay for SL or ST employees or positions excluded from performance appraisal by or under statute is, with respect to those employees or positions, exempt from any provision of this subpart to the extent that it makes a pay determination contingent upon performance appraisal, including—

(1) Section 534.505(a)(1), (2) and (3) to the extent these paragraphs require that an agency's plan for setting and increasing rates of basic pay reflect meaningful distinctions among SL and ST employees based upon individual performance and include criteria that ensure individuals with the highest levels of individual performance, or the greatest contributions to agency performance, or both, receive the highest pay increases. The agency must still provide written procedures for setting and adjusting rates of pay for covered SL and ST employees that specify criteria that will be applied consistent with applicable law. The remaining provisions of §534.505 apply, except for references in §534.505(a)(5) to compliance with certification requirements and centralized review of ratings and pay actions;

(2) Section 534.507(b), (c), (d), (e), and (f). The agency must still document in writing the basis for each pay increase under §534.507 in accordance with criteria specified in the agency's written procedures under §534.505(a); and

(3) Section 534.510(b) and (c). The agency must still document in writing the basis for each off-cycle pay increase under §534.510 in accordance with criteria specified in the agency's written procedures under §534.505(a).

(b) Except as specified in paragraph (a) of this section, an agency responsible for setting and adjusting rates of basic pay for SL or ST employees excluded from performance appraisal by or under statute is subject to the requirements of this subpart with respect to those employees.

(c) The maximum rate of basic pay for an SL or ST employee or position not subject to performance appraisal is the maximum rate described in §534.504(a)(2)(i). An agency head who uses the exemption in paragraph (a) of this section to set the rate of basic pay for SL or ST employees who are not subject to performance appraisal may not certify that those employees are covered by a performance appraisal system meeting the certification criteria established in part 430, subpart D of this chapter for purposes of authorizing rates of basic pay above the rate for level III of the Executive Schedule.

(d) Notwithstanding paragraph (c) of this section, an agency responsible for setting and adjusting rates of basic pay for SL or ST employees or positions excluded from performance appraisal by or under statute is subject to §534.509(a) when setting a rate of basic pay for an SL or ST employee upon transfer to such a position. The agency may also apply §534.509(c) upon movement of an SL or ST employee whose rate of basic pay was initially set under §534.509(a) or (c) to another SL or ST position that is excluded from performance appraisal. Pay may be reduced upon the movement only as provided in §534.508. In either case, the employee will not be eligible for a pay increase until he or she is appointed to an SL or ST position that is subject to a certified performance appraisal system or until his or her rate of basic pay is less than the rate for level III of the Executive Schedule.

## Subpart F—Pay for Administrative Appeals Judge Positions

SOURCE: 66 FR 63908, Dec. 11, 2001, unless otherwise noted.

### § 534.601 Coverage.

(a) This subpart implements 5 U.S.C. 5372b and applies to administrative appeals judge positions, the duties of which are not classifiable above GS–15 under 5 U.S.C. 5108 and which primarily involve reviewing decisions of administrative law judges appointed under 5 U.S.C. 3105 and rendering final administrative decisions.

(b) This subpart does not apply to—

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

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

(3) Senior Executive Service positions established under 5 U.S.C. 3132 or 3151;

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

(5) Administrative law judge positions appointed under 5 U.S.C. 3105; or

(6) Positions in agencies that are excluded from chapter 51 of title 5, United States Code, by section 5102(a) or 5102(c) or other provision of law.

### § 534.602 Definitions.

*Administrative appeals judge position* means a position not classified above GS–15 under 5 U.S.C. 5108 and for which the duties primarily involve reviewing decisions of administrative law judges appointed under 5 U.S.C. 3105 and rendering final administrative decisions.

*Administrative law judge* means an individual in an *administrative law judge* position as that term is defined in section 930.202 of this chapter.

*Agency* means an *Executive agency*, as defined in 5 U.S.C. 105, excluding the U.S. General Accounting Office.

*Head of an agency* means the head of an Executive agency or an official who has been delegated the authority to act for the head of the agency in the matter concerned.

### § 534.603 Rates of basic pay.

(a) The administrative appeals judge pay system (AA) has six rates of basic

pay—AA–1, 2, 3, 4, 5, and 6. These rates correspond to the rates of basic pay for AL–3/A, B, C, D, E, and F, respectively, of the administrative law judge pay system established under 5 U.S.C. 5372 and part 930, subpart B, of this chapter.

(b) The rates of basic pay of the administrative appeals judge pay system will be adjusted at the same time and in the same manner as adjustments are made in the corresponding rates of basic pay for the administrative law judge pay system under 5 U.S.C. 5372.

### § 534.604 Pay administration.

(a) The head of each agency must fix the rate of basic pay for each administrative appeals judge position within the agency.

(b) Upon initial appointment, an agency must set the rate of basic pay of an administrative appeals judge at the minimum rate AA–1 of the administrative appeals judge pay system, except as provided in paragraphs (b)(1), (b)(2), and (b)(3) of this section.

(1) An agency must set the pay of an employee under the General Schedule pay system who is appointed to an administrative appeals judge position without a break in service at the lowest rate of basic pay of the administrative appeals judge pay system that equals or exceeds the rate of basic pay the employee received immediately prior to such appointment, not to exceed the rate of basic pay for AA–6. If the resulting basic pay increase is less than one-half of the dollar value of the employee's next within-grade increase, the agency must set the employee's rate of basic pay at the next higher rate of basic pay in the basic rate range of the administrative appeals judge pay system.

(2) An agency may offer an administrative appeals judge applicant with prior Federal service a rate up to the lowest rate of basic pay of the administrative appeals judge pay system that equals or exceeds the employee's highest previous rate of basic pay in a Federal civil service position, not to exceed the rate of basic pay for AA–6.

(3) An agency may offer an administrative appeals judge applicant with superior qualifications who is not a current Federal employee a higher than minimum rate when such a rate is

clearly necessary to meet the needs of the Government. An agency may pay a higher than minimum rate of pay that is next above the applicant's existing pay or earnings, up to the maximum rate AA-6. Superior qualifications for applicants include, but are not limited to, having legal practice before the hiring agency, having practice in another forum with legal issues of concern to the hiring agency, or having an outstanding reputation among others in the field.

(c) Administrative appeals judges will advance successively to rates AA-2, 3, and 4 upon completion of 52 weeks of service in the next lower rate, and to rates 5 and 6 upon completion of 104 weeks of service in the next lower rate. Advancement to a higher rate takes effect on the first day of the first pay period beginning on or after completion of the required period of service. Time in a nonpay status is creditable service in the computation of a waiting period in so far as it does not exceed 2 weeks for each 52 weeks of service. Time in a nonpay status is fully creditable if the absence is due to military service, as defined in 5 U.S.C. 8331(13), or receipt of injury compensation under chapter 81 of title 5, United States Code. Time under pay systems outside the administrative appeals judge pay system is not creditable service in computing the required waiting period, except that time under the administrative law judge pay system established under 5 U.S.C. 5372 is creditable when an individual moves from that system to the administrative appeals judge pay system without a break in service.

(d) An agency must use the following procedures to convert an administrative appeals judge's annual rate of basic pay to an hourly, daily, weekly, or biweekly rate:

(1) To derive an hourly rate, divide the annual rate of pay by 2,087 and round to the nearest cent, counting one-half cent and over as the next higher cent.

(2) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the administrative appeals judge's basic daily tour of duty.

(3) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

#### § 534.605 Conversion.

On the first day of the first pay period beginning on or after December 11, 2001, agencies must convert the rate of basic pay of an administrative appeals judge to the lowest rate of basic pay provided by § 534.603(a) of this subpart that equals or exceeds the rate of basic pay the administrative appeals judge received immediately before that date.

### PART 535—CRITICAL POSITION PAY AUTHORITY

Sec.

535.101 Purpose.

535.102 Definitions.

535.103 Authority.

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535.106 Treatment as rate of basic pay.

535.107 Annual reporting requirements.

AUTHORITY: 5 U.S.C. 5377; E.O. 13415, 71 FR 70641.

SOURCE: 73 FR 50181, Aug. 26, 2008, unless otherwise noted.

#### § 535.101 Purpose.

The purpose of this part is to provide a regulatory framework for the critical position pay authority authorized by 5 U.S.C. 5377. The Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions under this part.

#### § 535.102 Definitions.

*Agency* has the meaning given that term in 5 U.S.C. 5102.

*Critical position* means a position for which OPM has granted authority to the head of an agency to exercise the pay-setting authority provided in 5 U.S.C. 5377.

*Critical position pay authority* means the authority that may be granted to the head of an agency by OPM under 5 U.S.C. 5377 to set the rate of basic pay for a given critical position under the provisions of that section.