



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 534

RIN: 3206-AL88

Pay for Senior-Level and Scientific or Professional Positions

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: This document amends rules for setting and adjusting pay of senior-level (SL) and scientific or professional (ST) employees. The Senior Professional Performance Act of 2008 changes pay for these employees by providing for rates of basic pay up to the rate payable for level III of the Executive Schedule (EX-III), or, if the employee is under a certified performance appraisal system, the rate payable for level II of the Executive Schedule (EX-II). Consistent with this statutory emphasis on performance-based pay, these regulations provide for agencies to set and adjust pay for SL and ST employees based on individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance appraisal system.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: William Collins, 202-606-1642.

SUPPLEMENTARY INFORMATION:

Section 2 of the Senior Professional Performance Act of 2008 (Public Law 110-372, October 8, 2008), hereafter referred to as the "Act," made significant changes

affecting pay of senior-level and scientific or professional employees. OPM published proposed regulations on December 23, 2011, (76 FR 80268) and solicited agency comments on the proposed implementation of these changes. We received comments from three agencies, an executive organization, and one individual. Comments are summarized below, along with any revisions that have been made in preparing the final regulation. These will be discussed according to their subject matter and affected sections of the regulation.

Definitions

An agency observed that OPM's definition of "performance management system" includes disciplines and activities by which an agency addresses the certification criteria in 5 CFR 430.404(a)(1) through (9) and asked what implications this has for an agency that does not pursue certification of an applicable performance appraisal system. OPM cites disciplines and activities associated with these criteria to give examples of included disciplines and activities. There is no intent to suggest these must be implemented in a way that results in certification for an agency's performance management system in order to satisfy the definition. This term is used in 5 CFR 534.510 to indicate sources and kinds of data an agency may use to document its basis for an off-cycle pay increase, but we provide that an agency may use other sources deemed useful. We see no adverse implications for an agency that chooses not to seek certification; however, we have removed a reference to certification from the definition.

We are concerned that this question may imply a view that an agency that does not seek certification need not design and implement its performance management system so as to support determining pay of covered senior professionals based upon

performance. If so, we disagree. In supplementary information at 76 FR 80269, December 23, 2011, we explained that changes made by section 2 of the Act demonstrate congressional intent for SL and ST pay to be based upon individual performance, contributions to the agency's performance, or both, whether or not an agency's performance appraisal system is certified by OPM and OMB. An agency that does not seek certification is still obligated to design its performance management system for SL and ST employees based upon this congressional intent.

An agency recommended defining the term "performance appraisal system" because applicable pay ranges are determined based upon whether or not an agency's performance appraisal system is certified. We agree and have added a definition of "performance appraisal system" to 5 CFR 534.503. With respect to a senior professional employee, this definition includes both appraisal systems and appraisal programs as defined at 5 CFR 430.203.

An agency recommended that OPM redefine the term "movement" to exclude transfer of a Senior Executive Service (SES) employee to a senior professional position or revise 5 CFR 534.509 to provide that an SES employee transferring to a senior professional position may not be paid above the maximum rate of basic pay for senior professional employees at the hiring agency. We have not redefined "movement" or "transfer" because those definitions already exclude such changes in position, but we agree with the agency's concern. We find that 5 U.S.C. 5382(c) protects an SES member's pay rate above EX-III only upon the employee's transfer to an agency with an applicable maximum rate of pay prescribed under 5 U.S.C. 5382(a), which applies only to an SES position. Similarly, 5 U.S.C. 5376(b)(4) protects a senior professional's pay

rate above EX-III only upon the employee's transfer to an agency with an applicable maximum rate of pay prescribed under 5 U.S.C. 5376(b)(1)(B), which applies only to a senior professional position. We therefore have added a new paragraph (h) to 5 CFR 534.509 to specify that provisions of that section do not apply upon appointment of an SES member to a senior professional position or upon appointment of a senior professional to an SES position.

The executive association recommended that OPM include Inspectors General in the definition of "agency head" to give them the same authority for senior professional pay actions as other agency heads, rather than allowing an agency head to delegate authority for pay actions to an Inspector General (IG). The executive association considers the latter approach confusing and duplicative of the authority granted under the Inspector General Reform Act of 2008 (Public Law 110-409, October 14, 2008). In supplementary information at 76 FR 80272, December 23, 2011, we explained that the IG Reform Act of 2008 does not provide OPM a statutory basis to identify the IG as an agency head for purposes of 5 U.S.C. 5376, or to require an agency head to delegate authority for senior professional pay actions to an IG. We have not adopted the recommendation because the commenter has not identified a basis for it that we have not previously considered and found wanting.

Written Plan

The executive association agreed with requiring an agency to explain any system it uses to differentiate tiers for its senior professional positions, while expressing some doubt that tiers may be applied as readily to senior professional positions in most agencies as to senior executive positions. The executive association considers it

especially critical that agencies provide a full explanation of the tiers' applicability to senior professional positions and that copies of any written plan related to tiers be provided to affected senior professionals. We agree with these observations. Each agency must determine whether tiers will be applied to their positions and, if so, explain in the agency's written pay procedures for senior professionals how they apply. However, 5 CFR 534.505(a)(3), as proposed, required that any system of tiers be described in an agency's written procedures, and 5 CFR 534.505(d) requires an agency to keep its written procedures up to date, make them available to senior professionals, and provide training or supplemental guidance as needed to clarify their application. We have revised 5 CFR 534.505(d) to state first the agency's obligation to make its written pay procedures available to affected senior professionals and to clarify their application as needed. This is done to avoid any possible misreading that would seem to make it necessary for senior professionals to request this information.

Centralized Review

An agency and the executive association objected to the agency-level centralized review requirement as proposed in 5 CFR 534.505(a)(5). Both argued that review of proposed senior professional ratings and pay adjustments by a panel within an agency component is sufficient and more similar to SES provisions for Performance Review Board (PRB) review of proposed SES ratings and awards. The agency considers a component-level PRB responsible for both SES and SL or ST appraisals to be a more meaningful venue and notes that the law does not require centralized review by a single panel. The executive association considers centralized review of SL and ST ratings an unnecessary alternative to the discretion provided an agency at 5 CFR 430.403(d) to

include system features in its senior professional appraisal system that are the same as, or similar to, the features of its SES appraisal system, including procedures corresponding to PRB review for senior executives.

In supplementary information at 76 FR 80269, December 23, 2011, OPM explained its proposal to remove the 12-month restriction on senior professional pay adjustments and instead provide new rules that require the following: (1) determining SL and ST pay adjustments based upon performance, contributions to the agency's performance, or both; 2) for agencies with ten or more senior professionals, centralized review of proposed pay adjustments; and 3) approval of the highest level SL and ST pay adjustments and off-cycle pay adjustments under proposed 5 CFR 534.510 by the agency head or the designee who oversees the performance-based pay system. OPM proposed centralized review to provide for proposed ratings and pay adjustments to be considered within the larger context of ratings, pay adjustments, and pay rates for all agency senior professionals, so that an agency head and other authorized agency officials responsible for adjusting pay for senior professionals based upon individual performance, contributions to agency performance, or both, do so based upon advice that takes this larger context into account rather than relying solely upon the views, values and context of agency components. Our statement in supplementary information at 76 FR 80271, December 23, 2011, that an agency's use of an agency PRB within a senior professional performance appraisal system under 5 CFR 430.403(d) could meet the proposed centralized review requirement did not refer to component PRBs. The centralized review is intended to provide an agency-wide perspective and a check on proposed performance ratings and pay adjustments that would be significantly out of line. We have therefore

revised 5 CFR 534.505(a)(5) to clarify that the centralized review is to provide advice from an agency-wide perspective to authorized agency officials for their consideration prior to approving pay adjustments.

An agency recommended deleting paragraphs (i) and (ii) of 5 CFR 534.505(a)(5) because the agency says it is not clear why an agency that does not seek certification should be required to consider whether proposed ratings and rates of basic pay are consistent with performance and pay differentiation criteria for certification. We disagree. We explained in supplementary information at 76 FR 80271, December 23, 2011, that OPM considers the Act to call for agency heads to use their discretion to set and adjust pay for senior professionals based upon performance whether or not an applicable performance appraisal system is certified. Upon consideration, however, we agree that the descriptions of performance differentiation and pay differentiation in 5 CFR 430.404(a)(8) and (9) include certain problematic elements. The description of performance differentiation within the certification context requires use of at least one summary performance level above Fully Successful, including a summary level that reflects outstanding performance, but an agency with an appraisal system that is not certified could use a summary rating pattern under 5 CFR 430.208(d) that does not meet this requirement. In the certification context, both performance and pay differentiation refer to review of ratings and pay adjustments that have been finalized rather than review of proposed ratings and pay adjustments. We are therefore revising paragraphs (i) and (ii) of 5 CFR 534.505(a)(5) to replace references to performance differentiation and pay differentiation as described in 5 CFR 430.404(a)(8) and (9) with language describing the centralized review panel's responsibility to advise on whether

proposed ratings accurately reflect performance, and proposed pay adjustments and pay actions appropriately correspond to performance ratings.

The executive association recommends that OPM provide for PRBs to include senior professionals when senior professional ratings and awards are being considered and revise 5 CFR 430.310(a)(3) to provide that when a career senior professional's proposed ratings and awards are being considered in an agency that does not employ SES members, more than one-half of the PRB's members must be career senior professionals. Although we agree with the suggested career majority requirement, an agency that does not employ SES members normally would not be subject to 5 CFR 430.310(a)(3). Also, 5 CFR 430.403(d) gives agencies discretion to include system features in their senior professional appraisal systems that are the same as, or similar to, features of SES appraisal system(s), including procedures corresponding to PRB reviews, but a decision to include such a feature in a senior professional appraisal system would not alter the statutory basis of a PRB established under 5 CFR 430.310, which pertains only to senior executives, or make a non-SES agency subject to requirements of that section.

We are therefore adding new paragraph (f) to 5 CFR 534.505 to require centralized review panels to have a majority of career appointees, including career SES and/or career or career-type senior professionals when reviewing proposed pay adjustments for a career or career-type senior professional. We are not requiring that a centralized review panel include a senior professional because career SES members normally have experience with performance appraisal, and there are enough of them to keep most agencies from having to go outside their own employee population to achieve a majority. We are adding that an agency head may include employees from outside the

agency on a central review panel and revising 5 CFR 534.505(e)(3) to assure that it is not read as precluding use of Federal employees who are within a different OIG in the same agency on a review panel. We are also providing that an agency using the discretion provided at 5 CFR 430.403(d) must do so in accordance with the centralized review requirement.

The executive association recommends that OPM encourage Government corporations which are not covered by SES statutes or chapter 43 of title 5 to closely follow these regulations and use them in managing their SL employees. Although Government corporations are excluded from performance appraisal requirements of 5 U.S.C. 4301-4305, they are covered by 5 U.S.C. 5108, regarding allocation and establishment of SL positions, and 5 U.S.C. 5376, regarding compensation for SL positions. Since these regulations apply to Executive agencies, including Government corporations (5 CFR 534.503), we consider 5 CFR 534.505(a)(5) and (f) to apply to a Government corporation that obtains SL slots and establishes SL positions under 5 U.S.C. 5108 and compensates its SL employees under 5 U.S.C. 5376, if the Government corporation uses its discretion to implement a performance appraisal system for those employees despite being exempt from 5 U.S.C. 4301-4305. The exemption in 5 CFR 534.511(a) applies with respect to SL or ST positions and employees actually excluded from performance appraisal.

Delegation of Authority for Certain Pay Actions

One agency commented that permitting delegation of pay actions identified in 5 CFR 534.505(c) to the designee who performs the functions in 5 CFR 430.404(a)(6) is not sufficient to provide for delegating authority for these pay actions if the applicable

performance appraisal system is not certified. We disagree. This requirement is intended to focus on the certifications described in 5 CFR 430.404(a)(6)(i), (ii) and (iii), which relate to the obligation of an agency, including an agency with a performance appraisal system that is not certified, to determine the pay of a senior professional based upon performance. However, the proposed language could be misunderstood as indicating that the official performing these certifications must be selected in accordance with the criteria in 5 CFR 430.404(a)(6). In an agency with a certified appraisal system, the designee who performs the functions in 5 CFR 430.404(a)(6) is also the one who performs the functions in 5 CFR 430.404(a)(5). In an agency with an appraisal system that is not certified, this need not be the case. Accordingly, we have revised 5 CFR 534.505(c) to authorize delegation to a designee who performs the certifications described in 5 CFR 430.404(a)(6)(i), (ii) and (iii) for all senior professionals in the agency and made corresponding adjustments in 5 CFR 534.506(c)(2), 5 CFR 534.510(a), and 5 CFR 534.510(d). An agency head who does not designate a single official to do this for all agency senior professionals is responsible for approving pay actions described in 5 CFR 534.505(c).

The agency also commented that a restriction on delegation of authority to approve pay actions falling within the top 10 percent of the applicable pay range differs substantially from SES regulations and creates confusing discrepancies about points at which higher-level approval is required depending upon whether an appraisal system is certified or not certified or whether the employee is SES or a senior professional. The agency says the 10 percent criterion is counterintuitive and is not required by statute; the

agency recommends that OPM change the threshold amount in § 534.505(c)(1) to EX-III, the same as for SES pay actions under 5 CFR 534.404(g)(3).

We do not consider the top 10 percent rule to be counterintuitive. OPM finds that amendments in section 2 of the Act demonstrate Congress intends senior professional pay to be based upon performance. An agency cannot simply opt out by choosing not to seek certification. The 10 percent criterion provides a proportional rule that leaves most pay actions subject to approval by lower-level officials but requires top level scrutiny for certain pay actions, including the largest pay adjustments and those resulting in the highest rates of basic pay. For both certified and non-certified systems, the rules are the same, the pay actions affected are the same, the portion of the pay range subject to higher level scrutiny is the same, and the officials designated to provide that scrutiny are the same. Thus, the rule is consistent and related to its purpose. Accordingly, we have made no changes with respect to the 10 percent rule. If we were revising the SES pay rules at this time, we would consider imposing the same discipline for SES positions under appraisal systems that are not certified. Note that the final regulations still distinguish rates above EX-III as reserved for new senior professional appointees who meet criteria described in 5 CFR 534.506(a) and current senior professional appointees who meet criteria described in 5 CFR 534.507(b)(2) and require an agency's written plan to address criteria that will be used in setting or increasing pay at those rates.

Annual Pay Adjustment

One agency stated that, because the statute does not require an agency to communicate in writing the reasons for a decision not to adjust a senior professional's pay, this should be left to agency discretion. OPM explained in supplementary

information at 76 FR 80271, December 23, 2011, its view that an SL or ST employee rated Fully Successful and properly positioned within the pay range should at least receive a pay increase that preserves the economic value of his or her salary. The statute also requires an agency head to adjust each rate of pay established under 5 U.S.C. 5376 annually by an amount the agency head considers appropriate. We consider written explanation appropriate to: 1) establish pay adjustment as a normal expectation for a senior professional rated Fully Successful; 2) verify the agency's consideration when pay has not been adjusted; and 3) explain why pay was not adjusted in a specific case. Accordingly, we are retaining this requirement.

Another agency recommended deleting the requirement for an annual adjustment in 5 CFR 534.507(a). The agency said pay for senior professionals, like SES pay, should be based upon performance and should not be linked to GS increases or include a guaranteed adjustment. As written, the agency said this adds a cost-of-living adjustment to any performance increase. If done for senior professionals, it should be done for the SES also. OPM cannot delete the requirement for an agency head to adjust pay for senior professional positions annually because it is a statutory requirement under 5 U.S.C. 5376(b)(2). Although we think a senior professional rated Fully Successful and properly positioned within the pay range should receive a pay increase that preserves the economic value of his or her salary, we do not agree with construing this as a cost-of-living adjustment supplementing performance based adjustments. Rather, we consider the amount needed to preserve the economic value of existing salary to be a good reference point for determining the appropriate performance-based pay adjustment for a senior professional rated Fully Successful. Since Congress does not provide a system-wide

adjustment for senior professionals and has eliminated locality pay, this should not be treated as a cost-of-living adjustment to supplement performance-based pay.

The executive association considered proposed 5 CFR 534.507(a)(1) confusing in that it provided for a zero adjustment determined after review of a senior professional's performance to be considered a pay adjustment for purposes of that paragraph, unlike the SES regulations (5 CFR 534.404(c)(3)(ii)), under which a zero adjustment is not considered a pay adjustment. We find that the SES pay and senior professional pay contexts differ in a way that supports treating zero adjustments differently. The intent of the proposed language was to assure that a zero adjustment considered appropriate by the agency head is deemed to meet the statutory requirement to adjust senior professional pay rates annually. We are revising 5 CFR 534.507(a) by providing a new paragraph (a)(2) stating that a zero adjustment satisfies paragraph (a)(1) (i.e., the requirement to adjust a senior professional's rate of basic pay at the time of the General Schedule pay adjustment under 5 U.S.C. 5303) only if the notice required by paragraph (h) (i.e., giving the reasons for a zero adjustment) is provided. However, any pay adjustment authorized at any time other than that specified in 5 CFR 534.507(a) must meet the conditions specified in 5 CFR 534.510.

The executive association strongly agrees with requiring an agency to explain why a senior professional received a zero adjustment but sees no reason for the exception proposed at 5 CFR 534.507(h), i.e., for senior professionals paid within the top 10 percent of the pay range, no written explanation is required unless the employee is rated outstanding and there is an increase in the Executive Schedule pay range. The executive association recommends an agency be required to explain all zero adjustments. Our view

that fully successful performance generally deserves a pay adjustment that helps preserve the economic value of a senior professional's salary is tempered when the individual is already highly compensated for his or her position. Such a senior professional should not expect increases, either to maintain or advance relative position within the pay range, apart from maintaining or exceeding the levels of performance that justified elevation to his or her existing pay rate. In effect, the bar is raised for these employees. The requirement for a written explanation if there is no increase in pay despite an outstanding rating is consistent with SES rules in that 1) an executive rated outstanding must be considered for a pay increase (5 CFR 534.404(b)(2)); and 2) an executive paid above EX-III must normally be rated outstanding to receive an increase under 5 CFR 534.404(b)(4) to maintain his or her relative position within the pay range. We have revised 5 CFR 534.507(h)(2)(ii) to clarify that if the Executive Schedule pay rates are increased, the written communication requirement applies to a senior professional paid within the top 10% of the pay range if he or she receives the highest available rating (except a fully successful rating) under the applicable summary level pattern, i.e., receives a level 4 rating in an appraisal program that uses summary level pattern C or G, or a level 5 rating in an appraisal program that uses summary level patterns B, E, F, or H. This is consistent with proposed 5 CFR 534.507(h)(2)(ii) and with the executive association's stated concern that the written communication requirement be broadly applied.

Pay Increase upon a Temporary Movement

An agency recommended deletion of proposed § 534.508(d) under which an SL could receive a temporary pay increase upon movement to another SL position, because it

could be subject to abuse. For example, an agency could break out seasonal or especially challenging aspects of work into multiple positions and reassign SL employees among them in such a manner as to either minimize or maximize the amount of time the SL employees are paid at a higher rate. In response to this concern we are revising § 534.508(d) by restricting its use to a circumstance justified under § 534.510 for movement to a position that has a substantially greater impact upon agency performance. It is written and intended to apply only upon movement to a different position. It does not apply upon a detail or temporary change in duties of an SL or ST employee's current position.

Miscellaneous

The executive association asked for examples of positions or employees that would be covered by the exception to certain regulatory requirements provided at 5 CFR 534.511. We principally have in view agencies that are excluded from performance appraisal requirements under 5 U.S.C. 4301 but still employ senior professionals covered by these regulations, such as a Government corporation. When such an agency has discretion to implement performance appraisal for its senior professionals despite being exempt and does so, we consider the Act to call for that agency to use the results of performance appraisal to set pay for those employees, so that the exception in 5 CFR 534.511 would not apply. In addition, 5 U.S.C. 4301 excludes certain employees from performance appraisal who could be senior professionals. For example, 5 U.S.C. 4301(2)(F) excludes Presidential appointees. Certain U.S. Marshal positions filled by Presidential appointment with Senate confirmation are senior professional

positions. An agency's enabling legislation might also exclude specific positions or employees from performance appraisal that are not already excluded by 5 U.S.C. 4301.

An agency recommended that OPM establish a Governmentwide standardized performance plan and a standardized performance management system for senior professionals to streamline certification procedures before finalizing these regulations. OPM does not consider these proposals an appropriate basis to delay regulations implementing pay provisions of the Act.

An agency recommended that an SL/ST performance management system be certified for 4 years with no distinction of provisional or full certification. Section 3 of the Act provides that certification is for not more than 24 months, unless extended by the Director of OPM for up to 6 additional months. This change would therefore require new legislation.

An agency recommended that OPM establish a separate bonus pool for senior professionals and that there be no minimum bonus for a senior professional. This is beyond the scope of the current regulations. The SES bonus pool and minimum bonus are established by law. OPM provides associated regulations and guidance under 5 U.S.C. 5384(d) and 5385. The statute governing senior professional performance awards, 5 U.S.C. 4503 and 5 U.S.C. 4505a as extended by regulation at 5 CFR 451.101(e), does not define a bonus pool or establish a minimum award amount for senior professionals or specifically authorize OPM to do so.

OPM received six comments from an individual, some with multiple attachments including final decision notices on certain classification appeals relating to General Schedule positions, certain OPM publications related to classification of General

Schedule positions, and several publications related to agriculture and economic issues in certain nations. We reviewed these comments but did not identify any specific comments concerning provisions of the proposed regulations that we could address.

Regulatory Flexibility Act

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

E.O. 12866, Regulatory Review

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

List of Subjects in 5 CFR Part 534

Government employees, Hospitals, Students, and Wages.

U.S. Office of Personnel Management

Katherine Archuleta,
Director.

For the reasons stated in the preamble, the U.S. Office of Personnel Management amends 5 CFR part 534 as follows:

PART 534 – PAY UNDER OTHER SYSTEMS

1. Revise the authority citation for part 534 to read as follows:

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).

§ 534.404 [Amended]

2. Amend § 534.404 by removing and reserving paragraphs (c)(3)(v) and (e)(2).

3. Revise subpart E to read as follows:

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

534.501 Purpose.

534.502 Coverage.

534.503 Definitions.

534.504 Pay range.

534.505 Written procedures.

534.506 Setting a rate of basic pay upon appointment.

534.507 Annual increases in basic pay.

534.508 Reductions in a rate of basic pay.

534.509 Preservation of an established rate of basic pay.

534.510 Off-cycle pay increases.

534.511 Exemption from performance appraisal requirements.

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

§ 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. Section 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 above the amount derived using the following rules is considered to be within the highest 10 percent of the applicable pay range (in 2013, \$173,685 or above if the applicable system is certified, or \$160,725 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 2013, $\$179,700 - \$119,554 = \$60,146$ if the applicable system is certified, or $\$165,300 - \$119,554 = \$45,746$ if the applicable system is not certified or performance appraisal does not apply);

(ii) Multiply the amount derived in paragraph (b)(1)(i) of this section by 0.10 (in 2013, $\$60,146 \times 0.10 = \$6,015$ if the applicable system is certified, or $\$45,746 \times 0.10 = \$4,575$ if the applicable system is not certified or performance appraisal does not apply); and

(iii) Subtract the amount derived in paragraph (b)(1)(ii) of this section from the maximum rate of basic pay applicable under § 534.504 (in 2013, $\$179,700 - \$6,015 = \$173,685$ if the applicable system is certified, or $\$165,300 - \$4,575 = \$160,725$ 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 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 must do so in accordance with paragraphs (a)(5), (e) and (f) of this section, as applicable.

§ 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 position 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 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.

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