



6325-39

U.S. Office of Personnel Management

5 CFR Parts 317, 430, and 534

U.S. Office of Management and Budget

5 CFR Part 1330

RIN: 3206-AL20

Performance Appraisal System Certification

AGENCY: Office of Personnel Management and Office of Management and Budget.

ACTION: Proposed rule with request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) and the U.S. Office of Management and Budget (OMB) jointly propose to implement certain requirements contained in the Senior Professional Performance Act of 2008, incorporate OPM policies and to reorganize information for ease of reading. OPM additionally proposes to make conforming changes and technical corrections, and to update and simplify the processes used based on over a decade of experience with the certification process and recommendations from an interagency workgroup.

DATES: OPM must receive comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by “RIN 3206-AL20,” using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

E-mail: sespolicy@opm.gov. Include "RIN 3206-AL20" in the subject line of the message.

Fax: (202) 606-4264.

Mail, Hand Deliver/Courier comments: Address comments to Mr. Stephen T. Shih, Deputy Associate Director for Senior Executive Services and Performance Management, Suite 7412, 1900 E Street, NW, Washington, DC 20415-9700.

FOR FURTHER INFORMATION CONTACT: Myriam Mayobre by telephone at (202) 606-8046, by FAX at (202) 606-4264, or by e-mail at myriam.mayobre@opm.gov.

SUPPLEMENTARY INFORMATION:

This proposal updates current regulations to account for changes in statute, policies, and processes that have occurred since the current regulation became effective in 2004. This proposal also streamlines the existing process to decrease burden on agencies while ensuring OPM and OMB have information needed for certification.

On October 8, 2008, the President signed into law the Senior Professional Performance Act of 2008 (the Act), Public Law 110-372. The Act made significant changes in the law governing certification of senior employee performance appraisal systems. This rulemaking would revise subpart D of parts 430 and 1330 of title 5, Code of Federal Regulations to reflect the changes resulting from the Act. Other changes to the regulations not related to the Act have been included in this revision to update and simplify the processes used based on over a decade of experience with the certification process and recommendations from an interagency workgroup. OPM convened the workgroup in December 2014 as a result of a President's Management Agenda recommendation made in 2011 by a separate workgroup, to follow up on recommendations made by a Chief Human Capital Officers workgroup held in February 2014,

and as part of the current Presidential Management Agenda initiatives to improve the Senior Executive Service (SES). The workgroup was comprised of agency subject matter experts who were tasked to review the certification process and provide recommendations regarding the certification criteria and streamlining the process.

While OPM and OMB jointly propose to amend parts 430 and 1330 of title 5, Code of Federal Regulations, OPM additionally proposes to make the following changes to parts 317, 430 Subpart C, and 534 of title 5, Code of Federal Regulations, for which OPM alone is responsible. OPM proposes changes in 5 CFR 317.501(b)(2) and 317.503(g)(3) to fix erroneous internal cross-references to certain regulations affecting those sections. OPM also proposes certain changes to final regulations on 5 CFR 430 subpart C—Managing Senior Executive Performance published September 25, 2015, 80 FR 57693 to update citations to the proposed regulation. Revisions to 5 CFR 430.309(e)(2) would further clarify higher level review.

OPM is proposing conforming changes to pay regulations at 5 CFR 534 subparts D and E. For the most part, these changes update citations from the current regulations with citations to the same or similar material in the proposed regulations or change the existing references in current regulation to “suspension” of an appraisal system certification with the term “termination” of certification. In 5 CFR 534 subpart D, OPM also proposes to revise 5 CFR 534.404(e)(1) to clarify that certification of an appraisal system does not provide an immediate opportunity to adjust the pay of current senior executives. Rather, pay adjustments for current senior executives must be based on an annual summary rating and, therefore, occur only after the completion of a rating cycle under the newly certified appraisal system. This should occur on the normal appraisal cycle and include a period of performance under the certified system that is at least equal to the agency's minimum appraisal period. OPM also proposes to add new

paragraph 534.404(c)(6) to address a technical issue associated with the 12-month rule and enable authorized agency officials to grant a pay adjustment up to 2 days before the expiration date of the 12-month restriction on pay adjustments that applies to a senior executive. This will allow agencies to make a pay adjustment consistent with an otherwise applicable annual performance and pay adjustment cycle. OPM finds this appropriate to support agencies in maintaining a cycle that provides for granting pay adjustments based upon performance on the first day of the same bi-weekly pay period each year (e.g., at the time of the statutory annual adjustment to General Schedule rates, which may occur 1 or 2 days short of a full 12-month period). OPM does not propose to require annual approval and documentation of the basis for this exception prior to its use. In 5 CFR 534 subpart E, OPM proposes to revise 5 CFR 534.505(a)(5) to add the review of proposed performance awards for senior professionals as a responsibility of the centralized review panel. This creates consistency with the duties of the performance review boards (PRB) for senior executives. OPM also proposes to revise 5 CFR 534.507(a)(2) to include a 14-day time period from the date specified in paragraph (a)(1) of that section in which an authorized agency official must provide notice to a senior professional concerning the reasons for a zero adjustment in pay, as required by paragraph (h) of that section. Specifying a 14-day time period will ensure that senior professionals receive such notices in a timely manner.

Key Changes to 5 CFR parts 430 and 1330

The proposed regulations implement the provision in the Act that authorizes agencies to apply higher maximum rates of basic pay for employees in senior-level (SL) and scientific or professional (ST) positions (*i.e.*, senior professionals) paid under 5 U.S.C. 5376. An agency without an applicable certified appraisal system must use a maximum rate of basic pay for senior

professionals that does not exceed the rate for level III of the Executive Schedule (EX-III). An agency with an applicable certified appraisal system may use a maximum rate of basic pay for senior professionals covered by the certified system that does not exceed the rate for level II of the Executive Schedule (EX-II).

The proposed regulation implements a section of the Act providing that certification may be granted beginning at any point in the year for a period not to exceed 24 months. Under rare and exceptional circumstances, the Director of OPM may extend certification for up to 6 additional months. Full certification will be granted for a period of 24 months. Provisional certification will be granted for a period of 12 months.

Since certification no longer expires at the end of a calendar year, there is no need for OPM to extend provisional certification into the following calendar year. That extension enabled agencies to maintain certification long enough to make pay adjustments using the higher maximum rate of the newly adjusted pay range and continued their access to the higher pay rate of EX-II.

OPM proposes to remove sections of the regulation that governed the renewal of an already fully certified system and described a process for automatic renewal based on an OPM/OMB review of the required agency annual report. OPM determined that this information alone is insufficient to assess whether an agency's system continues to meet the certification criteria. An agency that intends to maintain its certification must submit a request for certification in accordance with proposed sections 430.407 and 1330.407.

OPM proposes to change the requirement of current sections 430.404(a)(6) and 1330.404(a)(6) that only the agency head or the official designated under paragraph (a)(5) of those sections may provide oversight of the agency's appraisal system and its results. The

proposed regulations also add Communication of Results (*i.e.*, overall rating distributions, average adjustment in the rate of basic pay for each rating level, and average performance award for each rating level, as applicable) as a certification criterion. This change is consistent with OPM's current guidance that each agency must describe the communication of ratings and payouts to senior employees and other involved officials in its certification request. Additionally, the proposed regulations combine the criteria for *Alignment* and *Results* into a single criterion, Aligned Results.

OPM proposes to remove the references that distinguish requests for full certification from requests for provisional certification. As the certification process has evolved, OPM has found that submission of the same information is needed for all agency requests for certification. Based on review of an agency request, OPM, with OMB concurrence, may then grant full or provisional certification as appropriate. Reasons for which an agency would receive provisional rather than full certification are specified in the proposed regulations. OPM also proposes to remove the requirement for agencies to submit, as part of their certification requests, the process they use for ensuring ratings are not distributed arbitrarily or on a rotational basis. OPM believes this falls within the responsibilities of the oversight official to ensure the appraisal system is administered appropriately. OPM continues to require, as part of the oversight criterion, that an agency identify the official responsible for certifying that the senior employee appraisal process makes meaningful distinctions based on relative performance. OPM recognizes the ability to make meaningful distinctions in performance starts with the development of performance standards and requirements that clearly describe the different expectations at various performance levels. Agencies should consult their strategic plans and objectives when developing performance requirements to ensure alignment with mission outcomes and

organizational results. This first critical step falls to the rating official, in consultation with the senior employee, followed by the accurate application of these standards/requirements when assessing performance. The proper development of performance standards/requirements and the accurate assessment of performance compared to these standards/requirements should lead to meaningful distinctions in ratings. OPM has found that the role of the oversight official provides the appropriate level for ensuring ratings make meaningful distinctions on the basis of actual differences in levels of performance. Furthermore, OPM proposes to remove the requirement for an agency to submit, as part of its certification request, the process for reviewing performance standards, requirements, expectations, or ratings of employees supervised by senior employees, because OPM believes this too is a review that should be included in the responsibilities of the Oversight Official.

The proposed regulations introduce a new procedural framework that provides for shared responsibilities in assessing certification criteria. Instead of OPM assessing all criteria, OPM will assess Aligned Results, Performance Distinctions, and Pay Differentiation. OPM will seek OMB concurrence on its findings. Agencies will verify Organizational Assessment and Guidelines, Oversight, and Communication. The criteria verified by the agency will, however, be subject to periodic spot checks by OPM to ensure continued compliance. Spot checks will not be announced in advance and when they occur, agencies will submit to OPM the documentation they used as the basis of their verification of the applicable criteria. In addition, the proposed regulations allow for an agency to demonstrate compliance with the Aligned Results criterion through a peer review process. This peer review process will provide the option for an agency with full certification to either have its performance plans reviewed by another agency with a fully certified appraisal system or submit the performance plans to OPM. Agencies that maintain

full certification may continuously use this peer review method to demonstrate compliance with the Aligned Results criterion subject to spot checks by OPM. To maintain the integrity of the peer review process, agencies will not be allowed to conduct reciprocal reviews.

OPM proposes to remove Consultation, Balance, and Accountability criteria from the Certification Criteria and move them to a new section, Additional Appraisal Program Requirements and add the Training requirement to this same section. Based on over a decade of experience and careful deliberation by a cross-agency working group of subject matter experts, we have determined these important aspects of a successful and effective performance management system no longer need to be reviewed by OPM for the purpose of supporting a certification determination. Since they are vital to the success of a performance management system, are included in the design and application of the Basic SES appraisal system, and agencies already have incorporated them into their performance cultures, each agency will now be responsible for ensuring they continue to be properly applied within their organizations.

OPM proposes to modify the definition of Relative Performance to clarify that a senior employee's performance is compared to the performance expectations established for his or her position, including their contribution to agency performance as appropriate. The definition of Relative Performance also specifies that it does not permit peer ranking or peer comparison for rating purposes. OPM also proposes to remove Outstanding Performance from the definitions to avoid confusion with the commonly used Level 5 rating label—Outstanding. As used in the certification regulations, Outstanding Performance originally was intended to allow for separately identifying the highest performers even within the highest performance level, usually Level 5, which often uses the label Outstanding. Some additional terms have been defined, as noted in the table of changes. OPM also proposes to revise the title of this subpart from

Performance Appraisal Certification for Pay Purposes to Performance Appraisal System Certification for accuracy.

Agencies will also be required to submit, as part of the certification request, the applicable agency SES or SL/ST pay setting and adjustment policy required under 5 CFR part 534 and the policy and procedures for granting performance awards under § 534.405 for SES or §§ 451.101(e) and 451.104(a)(3) for SL/ST. In order to assess whether an agency is meeting the pay differentiation criterion for certification, OPM often finds it necessary to examine the pay policy to understand the context within which the reported pay adjustments have been authorized and performance awards have been granted. OPM also proposes that agencies make pay adjustments and performance awards for senior employees in a timely manner. These pay adjustments and awards for SES must have an effective date no later than 5 months after the end of the applicable appraisal period. For senior professionals, agencies must make pay adjustments, in compliance with requirements in § 534.505(b), at the same time as the adjustment to the General Schedule. This is the only time during the year annual increases in basic pay for senior professionals are permissible. Performance awards must be paid as soon as practicable after the end of the appraisal period. These timeliness requirements support the principles of performance-based compensation by ensuring the pay and awards are as close as practicable to the ratings upon which they are based.

OPM proposes to remove paragraphs addressing the limits on basic pay and aggregate total compensation because they are contained in 5 CFR part 534, subparts D and E and § 530.203(b) respectively.

Summary of Major Changes

These proposed regulations make the following major changes:

1. Proposed revisions make conforming changes as a result of Public Law 110-372, Senior Professional Performance Act of 2008.

- Adds that an agency with an applicable certified appraisal system may apply the higher maximum rate of basic pay for senior professionals covered by the certified system.
- Implements the provision of the Act where certification may be granted beginning at any point in the year for a period not to exceed 24 months as opposed to a calendar-year basis.

2. Proposed revisions address recommendations stemming from over a decade of experience with certification as well as from an interagency work group tasked to design an improved certification process to support the President's Management Agenda recommendation to improve the SES.

- Provides for shared responsibilities in assessing certification criteria in which OPM assesses Aligned Results, Performance Distinctions, and Pay Differentiation and agencies will verify all other criteria.
- Adds new option for Peer Review – this would allow fully certified agencies to engage in a review of other fully certified agencies' performance plans to determine whether they meet the criterion for "Aligned Results," while prohibiting concurrent reciprocal reviews.
- Requires timely pay adjustments and performance awards for senior employees; for SES, not later than 5 months after the end of the appraisal period.

Request for Comments

In addition to the general request for comments on the proposed regulation, we would appreciate feedback focused specifically on the following questions:

- How could agencies best assess and highlight their organizational performance – strengthening alignment to individual SES performance requirements – to distinguish between SES performance levels and/or to objectively set high performance expectations for individual SES?
- Are there additional ways, or alternatives, OMB and OPM should consider to make the SES and SL/ST performance appraisal system certification process less resource-intensive, while still achieving the goal of tying performance to agency outcomes, and making meaningful distinctions amongst individuals’ performance levels?

Complete Table of Changes

The following table lists all the proposed changes to the current regulations. The "current rule" column lists the regulations in the current subpart D. The "proposed rule" column indicates where matters addressed in the current regulation are addressed in the proposed regulation and where new material is being added. The third column explains each change.

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
430.401(a)	430.401(a) and (b)	Divides paragraph into multiple sections to increase clarity.
430.401(b)	Removed	Removes paragraphs addressing the limits on basic pay and aggregate compensation because they are contained in 5 CFR part 534, subparts D and E and § 530.203(b) respectively.
430.402	430.402	Adds definitions for <i>Agency, Agency Head, Annual Summary Rating, Appraisal, Certification Criteria, Peer Review, Rating of Record, Senior Professional Review Panel (SPRP)</i> , updates <i>GPRA</i> to <i>GPRAMA</i> , clarifies the definitions of <i>Performance Expectations, Relative</i>

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
		<i>Performance</i> , and <i>Senior Executive</i> . Removes the definition for <i>Outstanding Performance</i> .
430.403(a)	430.403(a)	Edits made to increase clarity.
-----	430.403(b)	Adds provision that certifications are not renewable.
430.403(b)	430.403(c)	Moves requirement that agencies seeking certification must submit systems that have been approved by OPM.
430.403(c)	Removed	Removes option for agencies to submit a new appraisal system(s) for certification that has not yet been approved by OPM.
430.403(d)	430.403(e)	Moves requirement that agencies submit for certification, separate systems for their senior professionals and SES members. Adds new requirement for a centralized review panel for agencies with 10 or more senior professionals. Also moves the option to include features in the senior professional appraisal system that are similar to the SES system.
430.403(e)	430.403(c) and (d)	Splits paragraph into two sections.
430.404(a)	430.404	Edits made to increase clarity.
430.404(a)(1)	430.404(a)(1)	Moves certification criterion and changes name from Alignment to Aligned Results.
430.404(a)(2)	430.406(a)	Moves to Additional Appraisal System Requirements and clarifies.
430.404(a)(3)	430.404(a)(2)	Moves certification criterion and changes name from Results to Aligned Results.
-----	430.404(a)(3)	New provision allowing for peer review of aligned results.
430.404(a)(4)	430.406(b)	Moves to Additional Appraisal System Requirements and clarifies.
430.404(a)(5)	430.405(a)	Moves certification criterion and

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
		simplifies.
430.404(a)(6)	430.405(b)	Moves certification criterion and clarifies.
430.404(a)(7)	430.406(c)	Moves to Additional Appraisal System Requirements, changes name from Accountability to Accountability for the Performance Management of Subordinates, and clarifies.
430.404(a)(8)	430.404(b)(2)	Moves the certification criterion, changes the name from Performance Differentiation to Performance Distinctions, and simplifies.
430.404(a)(9)	430.404(c)(1) and (2)	Moves certification criterion and clarifies.
-----	430.404(c)(3)	Adds specific timeframe for making pay adjustments and awards in a timely manner.
430.404(a)(9)	430.404(c)(4)	Moves certification criterion and clarifies transparency in the process for making pay and awards decisions.
430.404(b)	Removed	Addressed by defining agency head to mean an Inspector General when applying these provisions to Offices of the Inspector General.
-----	430.405(c)	Adds Communication of Results as a certification criterion.
-----	430.406(d)	Adds Training to Additional Appraisal System Requirements.
-----	430.405	Adds new section titled Certification Criteria Verified by the Agency.
430.405(a)	430.407	Moves and clarifies.
430.405(b)	430.407(a)	Moves and removes the requirement to identify whether the request is for full or provisional certification. Removes requests covering an agencywide system or a system that applies to one or more agency organizations or

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
		components. Specifies who must submit certification requests.
430.405(b)(1)	430.407(a)(1)	Moves and remains unchanged.
-----	430.407(a)(2)	Adds new paragraph explicitly requiring separate certification requests for Offices of Inspectors General.
430.405(b)(1)(i)	430.407(a)(3)(i)	Moves and remains unchanged.
430.405(b)(1)(ii)	Removed	Removes applicable administrative instructions and implementing guidance from written requests for certification.
430.405(b)(1)(iii)	430.407(a)(3)(ii)	Moves and edits made to increase clarity.
430.405(b)(1)(iii)(A) and (B)	430.404(b)(1)	Moves and clarifies.
-----	430.404(b)(3)	Adds provision requiring agencies to appropriately assign the highest ratings to the best performers.
430.405(b)(1)(iii)(C)	430.404(b)(4)	Moves and replaces Outstanding Performance with the highest level of performance.
430.405(b)(2)	Removed	Removes requirement to submit a clearly defined process for reviewing initial ratings as well as the requirement to submit a review of supervised employees' performance standards, requirements, and ratings.
430.405(b)(3)	430.407	Moves and simplifies.
430.405(b)(3)(i) and (ii)	Removed	Removes distinction between requirements associated with full and provisional certification requests.
-----	430.407(a)(4)	New requirement to include a sample of performance plans.
-----	430.407(a)(5)	New requirement to include documentation of organizational performance results and relationship with ratings distribution.
430.405(b)(4)	430.407(a)(6) and (7)	Moves and references the annual reporting requirement. Moves

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
		references to full certification and the two appraisal periods, by requiring data reported in the annual data call.
-----	430.407(a)(7)	New requirement to submit documentation of the pay policy and procedures as well as policies established for awards programs.
430.405(b)(5)	430.407(a)(8)	Moves and remains unchanged.
-----	430.407(b)	Requires agencies participating in peer review to submit such documentation as OPM requires.
430.405(c)	430.408(a)	Moves and simplifies.
430.405(c)(1)	430.408(a)(1)	Moves, redefines the certification period from 2 calendar years to 24 months, and clarifies the requirements for full certification.
430.405(c)(2)	430.408(a)(2)	Moves, deletes the option for OPM to extend provisional certification into the following calendar year, redefines the certification period from 1 calendar year to 12 months, and specifies reasons an agency would receive provisional rather than full certification.
430.405(c)(3)	430.410(a)	Moves and changes the word suspend to terminate.
-----	430.408(b)(1)	Implements statutory authority of OPM Director to provide certification extensions.
-----	430.408(b)(2)	New provision providing requirements for requesting a certification extension.
430.405(d) 430.405(e)(2) 430.405(f)(2)	Removed	Removes paragraphs addressing the limits on basic pay and aggregate compensation because they are contained in 5 CFR part 534, subparts D and E and § 530.203(b), respectively.
430.405(e)(1)	430.408(a)(1)(i) - (iii)	Moves and restructures for clarity. Adds as a requirement for full certification, demonstration of appropriate system application

Part 430, subpart D		
Current rule	Proposed rule	Explanation of change
		based on data reports for the two most recent completed performance cycles.
430.405(e)(3)	Removed	Removes automatic renewal of full certification.
430.405(f)(1)	430.408(a)(2)(i) and (ii)	Moves and restructures for clarity.
-----	430.408(a)(2)(iii)	Adds as a reason for receiving provisional rather than full certification, the demonstration of appropriate system application based on data reports for only the most recent completed performance cycle.
430.405(f)(3)	Removed	Removes requirement to resubmit application requesting provisional certification.
430.405(g)	430.409	Moves and edits for increased clarity. Also removes the requirement to report aggregate total compensation.
430.405(h)(1)	430.410(a)	Combines redundant provisions previously at 430.405(c)(3) and 430.405(h)(1).
430.405(h)(2)	430.410(b)	Moves and changes the word suspension to termination.
430.405(h)(3)	430.410(c) - (e)	Moves and restructures for increased clarity. Changes the word suspension to termination.
430.405(h)(4)	430.410(f)	Moves, changes the word suspension to termination, and clarifies that a restored certification will terminate on the same date as the original certification.
430.405(h)(5)	430.410(g)	Moves and changes the word suspension to termination.

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 U.S. Office of Management and Budget in accordance with E.O. 12866.

List of Subjects in 5 CFR Parts 317 and 1330

Government employees.

List of Subjects in 5 CFR Parts 430

Decorations, Government employees.

List of Subjects in 5 CFR Part 534

Government employees, Hospitals, Students, and Wages.

U.S. Office of Management and Budget.

Shaun Donovan,
Director.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

Accordingly, OPM and OMB are proposing jointly to amend parts 430 and 1330 of title 5 of the Code of Federal Regulations, and OPM proposes to amend parts 317, 430, and 534 of title 5, Code of Federal Regulations as follows:

5 CFR Chapter I -- Office of Personnel Management

PART 317 – EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

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

Authority: 5 U.S.C. 3392, 3393, 3395, 3397, 3592, 3593, 3595, 3596, 8414, and 8421.

Subpart E — Career Appointments

2. In § 317.501, revise paragraph (b)(2) to read as follows:

§ 317.501 Recruitment and selection for initial SES career appointment be achieved from the brightest and most diverse pool possible.

* * * * *

(b) * * *

(2) Before an agency may fill an SES vacancy by an initial career appointment, it must post a vacancy announcement in USAJOBS for at least 14 calendar days, including the date of publication. Each agency’s SES vacancy announcement must comply with criteria in § 330.104 of subpart A of this chapter, except for criteria pertaining to veterans’ preference, the Career Transition Assistance Program, and the Interagency Career Transition Assistance Program.

* * * * *

3. In § 317.503, revise paragraph (g)(3) to read as follows:

§ 317.503 Probationary period.

* * * * *

(g) * * *

(3) The break in SES service was the result of military duty or compensable injury, and the time credited under paragraph (d)(3) of this section was not sufficient to complete the probationary period.

PART 430 – MANAGING SENIOR EXECUTIVE PERFORMANCE

4. The authority citation for Part 430 continues to read as follows:

Authority: 5 U.S.C. chapter 43 and 5307(d).

5. In § 430.309, revise the last sentence of the introductory text in paragraph (e)(2), paragraph (e)(2)(ii), and the first sentence in paragraph (e)(2)(iii) to read as follows:

§ 430.309. Rating Performance

* * * * *

(e) * * *

(2) * * * The agency must provide each senior executive an opportunity for review of the initial summary rating by an employee, or (with the consent of the senior executive) a commissioned officer in the uniformed services on active duty in the agency, in a higher level in the agency than the official who prepared the initial rating.

* * * * *

(ii) When an agency cannot provide review by a higher-level official for a senior executive who receives an initial summary rating from the agency head because no such official exists in the agency, the agency must offer an alternative review as it determines appropriate; however, neither HLR nor alternative review may be provided by a member of the PRB that will make a recommendation under § 430.311(b)(2) concerning the senior executive or by an official who participated in determining the initial summary rating.

(iii) If a senior executive declines review by agency-designated higher-level officials, the agency may offer an alternative review but is not obligated to do so unless the only official in a higher level than the initial rater is the head of the agency.* * *

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PART 430 – PERFORMANCE MANAGEMENT

6. The authority citation for part 430 continues to read as follows:

Authority: 5 U.S.C. chapter 43 and 5307(d).

7. Revise subpart D to read as follows.

Subpart D – Performance Appraisal System Certification

Sec.

430.401 Purpose.

430.402 Definitions.

430.403 System certification.

430.404 Certification criteria verified by OPM/OMB.

430.405 Certification criteria verified by the agency.

430.406 Additional appraisal system requirements.

430.407 Agency certification requests.

430.408 OPM certification actions.

430.409 Annual reporting requirement.

430.410 Termination of certification.

Subpart D – Performance Appraisal System Certification

§ 403.401 Purpose.

(a) This subpart implements 5 U.S.C. 5307(d), which provides for certification of performance appraisal systems that as designed and applied make meaningful distinctions based on relative performance with respect to—

(1) Members of the Senior Executive Service (SES) paid under 5 U.S.C. 5382 and 5383;
and

(2) Employees in senior-level (SL) and scientific or professional (ST) positions paid under 5 U.S.C. 5376.

(b) The regulations in this subpart strengthen the application of performance-based-pay principles to senior employees. Specifically, the statutory provisions that these regulations implement authorize an agency to apply a higher maximum rate of basic pay in setting and adjusting rates of basic pay for senior employees (consistent with 5 CFR part 534, subparts D and E) and apply a higher annual aggregate limitation on pay (consistent with 5 CFR part 530, subpart B) to its senior employees, when OPM, with OMB concurrence, has certified that the design and application of the agency's appraisal systems for these employees make meaningful distinctions based on relative performance. This subpart establishes the certification criteria and procedures that OPM will apply in considering agency requests for such certification.

§ 403.402 Definitions.

In this subpart—

Agency means an agency as that term is defined in 5 U.S.C. 105 and an Office of Inspector General, which is considered a separate agency for purposes of applying all provisions relating to the Senior Executive Service under the Inspector General Act of 1978 (5 U.S.C. App 6(d)).

Agency head means the head of an agency and includes the Inspector General when applying the provisions of this subpart to Offices of the Inspector General.

Annual summary rating means the overall rating level that an appointing authority assigns at the end of the appraisal period as defined in § 430.303.

Appraisal system means the policies, practices, and procedures an agency establishes under 5 U.S.C. chapter 43 and 5 CFR part 430, subparts B and C, or other applicable legal

authority, for planning, monitoring, developing, evaluating, and rewarding employee performance. This includes appraisal systems and appraisal programs as defined in § 430.203 and performance management systems as defined in § 430.303.

Certification criteria means the factors used to determine whether an agency appraisal system as designed and applied makes meaningful distinctions based on relative performance.

GPRAMA means the Government Performance and Results Modernization Act of 2010.

OMB means the Office of Management and Budget.

OPM means the Office of Personnel Management.

Peer review means the review under §430.404(a) of performance plans by one agency for another agency, both having fully certified performance appraisal systems, to determine whether they meet the certification criterion for Aligned Results.

Performance expectations means—

(1) the critical elements, performance requirements, and performance standards that constitute the senior executive performance plans, as defined in § 430.303, established for senior executives;

(2) the performance elements and standards that constitute the performance plans, as defined in § 430.203, established for senior professionals; or

(3) other appropriate means authorized under performance appraisal systems not covered by 5 U.S.C. chapter 43 for communicating what a senior employee is expected to do and the measures that demonstrate success, including contribution to agency performance where appropriate.

Program performance measures means results-oriented measures of performance, whether at the agency, component, or function level, which include, for example, measures under GPRAMA.

PRB means Performance Review Board, as described in § 430.311.

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 as defined in § 430.203.

Relative performance means the performance of a senior employee compared to the performance expectations established for his or her position (including contribution to agency performance) and those expectations must be set at a level that is sufficiently high to be commensurate with the authorities and responsibilities of a senior employee in the Federal Government. This does not permit peer ranking or peer comparison for rating purposes.

Senior employee means a senior executive or a senior professional.

Senior executive means a member of the Senior Executive Service (SES) paid under 5 U.S.C. 5382 and 5383.

Senior professional means an employee in a senior-level (SL) or scientific or professional position (ST) paid under 5 U.S.C. 5376.

SPRP means Senior Professional Review Panel as described in § 534.505(a)(5).

§ 430.403 System certification.

(a) OPM, with OMB concurrence, will certify an agency appraisal system under §430.408 when a review of that system's design (*i.e.*, system documentation), implementation (*i.e.*, performance plans), and application (*i.e.*, pay, performance awards, and ratings upon which they are based) reveals that the agency meets the certification criteria established in §§ 430.404 and 430.405 and has followed the procedural requirements set forth in § 430.407, and results in a

finding that the system as designed and applied makes meaningful distinctions based on relative performance and otherwise conforms to statutory and regulatory requirements relating to performance appraisal, pay, and awards.

(b) Each certification granted shall cover a specific period of time and is not renewable.

(c) Agencies subject to 5 U.S.C. chapter 43 and 5 CFR part 430 seeking certification of their appraisal systems must submit systems that have been approved by OPM under § 430.210 or § 430.314, as applicable.

(d) Agencies not subject to the appraisal provisions of 5 U.S.C. chapter 43 and 5 CFR part 430 seeking certification of their appraisal system(s) under this subpart must submit appropriate documentation to demonstrate that each system complies with the appropriate legal authority that governs the establishment, implementation, and application of that system.

(e) For senior professionals, an agency must establish an appraisal system(s), as defined in § 430.402, that meets the requirements of 5 CFR part 430, subpart B, and is separate from the system(s) established to cover its SES members under 5 CFR part 430, subpart C. At its discretion, an agency may include system features in its senior professional appraisal system(s) that are the same as, or similar to, the features of its SES appraisal system(s), as appropriate. For the purpose of certification under this subpart, such senior professional appraisal system(s) with 10 or more senior professionals covered by the system(s), must include a requirement for centralized review of senior professionals' ratings of record and proposed pay and performance awards actions.

§ 430.404 Certification criteria verified by OPM/OMB.

To be certified, an agency's applicable appraisal system(s) for senior executives or senior professionals must meet the following certification criteria, as verified by OPM, with OMB concurrence:

(a) Aligned results. (1) Performance expectations for individual senior employees must derive from, and clearly align with, the agency's mission and organizational goals, such as those communicated through GPRAMA strategic goals, program and policy objectives, and/or annual performance plans and budget priorities.

(2) Performance plans must contain performance expectations, including at least one critical element focusing on business results, that—

(i) Apply to their respective areas of responsibility and control;

(ii) Reflect expected agency and/or organizational outcomes and outputs, performance targets or metrics, policy/program objectives, and/or milestones;

(iii) Identify specific programmatic crosscutting, external, and partnership-oriented goals or objectives, as applicable; and

(iv) Are stated in terms of observable, measurable, and/or demonstrable performance (e.g., quality, quantity, timeliness, or cost effectiveness, as applicable).

(3) OPM may establish additional procedures to allow agencies to conduct peer reviews of the performance plans to determine whether the plans meet this criterion. When conducting peer review, agencies may not conduct concurrent reciprocal reviews.

(b) Performance distinctions. (1) Appraisal systems must include summary levels of performance as described in 5 CFR 430.305(a)(6) for senior executives, and for senior professionals at least one summary level of performance above fully successful.

(2) Agency application of performance appraisal systems must—

(i) Result in meaningful distinctions based on relative performance; and

(ii) Take into account the assessment of the agency's performance against relevant program performance measures, as described in § 430.405(a), employee performance expectations, and such other relevant factors as may be appropriate.

(3) Authorized agency officials, as designated through agency delegated authority, must appraise senior employee performance accurately and realistically so that senior employees who have demonstrated the highest performance and/or exceptional contribution to the agency's performance receive the highest annual summary ratings or ratings of record, as applicable.

(4) Agencies with equivalent appraisal systems not otherwise subject to this part must provide for clearly distinguishing and identifying the rating that reflects the highest level of performance.

(5) Agencies may not equate the requirement to make distinctions based on relative performance to permitting a forced distribution of annual summary ratings or ratings of record, which is prohibited under §§ 430.208(c) and 430.305(a)(5). However, methods used to make distinctions among employees or groups of employees such as comparing, categorizing, and ranking employees or groups on the basis of their performance may be used for purposes other than assigning a summary level including, but not limited to, award determinations.

(c) Pay differentiation. (1) Agencies must ensure senior employees who have demonstrated the highest performance receive the highest annual summary ratings or ratings of record, as applicable, and the largest corresponding performance awards, pay adjustments, and rates of pay, in accordance with applicable limitations;

(2) Agencies must ensure differentiation is evident separately in the pay adjustments, performance awards, and rates of pay;

(3) Agencies must ensure they make pay adjustments and performance awards for senior employees in a timely manner.

(i) For senior executives, the pay adjustments authorized under 5 CFR 534.404(b)(3) and the performance awards authorized under 5 U.S.C. 5384 must have effective dates not later than 5 months after the end of the applicable appraisal period;

(ii) For senior professionals, agencies must make pay adjustments in accordance with the requirements in § 534.505(b) and pay performance awards as soon as practicable after the end of the appraisal period; and

(4) Agencies must develop processes for making pay decisions and granting awards affecting senior employees that comply with Governmentwide law, regulation, and guidance. To make these processes transparent agencies must provide access to the appraisal and pay policies that govern the decisions and communicate the results as required in § 430.405(c).

§ 430.405 Certification criteria verified by the agency.

To be certified, an agency's applicable appraisal system(s) for senior executives or senior professionals must meet the following certification criteria, as verified by the agency in accordance with instructions provided by OPM:

(a) *Organizational assessment and guidelines.* Agencies must comply with all applicable OMB requirements for assessing organizational performance and may use those assessments to inform the individual ratings of its senior employees. The results of these assessments are shared with individuals involved in the rating process through the issuance of guidelines based at least in part upon those assessments. The guidelines must—

(1) Address agency performance overall and with respect to each of its particular missions, components, programs, policy areas, and support functions—such as reports of the

agency's GPRAMA goals, annual performance plans and targets, program performance measures, and other appropriate indicators;

(2) Be communicated by the agency head, or an individual specifically designated by the agency head for such purpose, to affected senior employees, their rating and reviewing officials, and PRB and SPRP members;

(3) Be provided at the conclusion of the appraisal period but before individual senior employee performance ratings are recommended, so that they inform individual performance appraisals; and

(4) Not take the form of quantitative limitations on the number of ratings at any given rating level.

(b) *Oversight*. The agency head or the individual specifically designated under paragraph (a)(2) of this section must certify for a particular senior employee appraisal system that—

(1) The senior employee rating process makes meaningful distinctions based on relative performance;

(2) The results of the senior employee appraisal process take into account the agency's assessment of its performance against program performance measures, as well as other relevant considerations, as appropriate;

(3) Performance awards, pay adjustments, and levels of pay based on the results of the rating process accurately reflect and recognize distinctions in individual performance and/or contribution to the agency's performance; and

(4) Final decisions include PRB or SPRP recommendations regarding senior employee ratings and must—

(i) Be consistent with 5 CFR part 430, subparts B and C; and

(ii) Appropriately reflect the employee's performance expectations, relevant program performance measures, and such other relevant factors as the PRB or SPRP may find appropriate.

(c) Communication of results. Agencies must communicate annually to senior employees, rating and reviewing officials, and PRB or SPRP members the results of the application of the appraisal process (*i.e.*, overall ratings distributions, average adjustment in the rate of basic pay for each rating level, and average performance award for each rating level, as applicable) while assuring confidentiality of protected information.

§ 430.406 Additional appraisal system requirements.

To be certified, an agency's appraisal system must meet the requirements of 5 CFR part 430, subparts B or C, as applicable, or other applicable legal authority. Agencies are responsible for ensuring their senior employee appraisal systems provide for—

(a) Consultation. Performance expectations for senior employees must be developed with the input and involvement of the senior employees who are covered thereby;

(b) Balance. Performance expectations established in the individual senior employee appraisal plan must include two parts:

(1) Expected results; and

(2) Those technical, leadership and/or managerial competencies or behaviors that contribute to, and are necessary to distinguish, levels of performance. In addition, for senior employees in supervisory positions, their performance expectations also must address appropriate measures or indicators of stakeholder and/or employee perspective when applicable, such that stakeholder/employee feedback is sought and used to inform decisions.

(c) *Accountability for the performance management of subordinates.* The performance expectations for individual senior employees in supervisory positions must clearly communicate their responsibility for ensuring—

(1) The performance expectations for individual subordinate employees clearly link to organizational mission, GPRAMA strategic goals, or other program or policy objectives; and

(2) The appraisal of their subordinate employees is based on established performance expectations that differentiate among the various levels of performance. An appraisal must be a realistic assessment of the employees' actual performance, including their contribution to organizational goals as measured in GPRAMA and other organizational plans.

(d) *Training.* Agencies must provide senior employees, rating and reviewing officials (including those in other services/appointments such as political appointments, Foreign Service, military, etc.), and PRB or SPRP members initial training, periodic refresher training, and annual reminders on the operation of the applicable agency performance management and pay and awards policies.

§ 430.407 Agency certification requests.

To receive system certification, an agency must provide documentation demonstrating that its appraisal system(s), in design, implementation, and application, meet the certification criteria in §§ 430.404 and 430.405 as well as the procedural requirements set forth in this section.

(a) In order for an agency's appraisal system to be certified, the agency head or designee must submit documentation in accordance with OPM instructions, including—

(1) A written request, which may include signed electronic formats, for certification of its appraisal system(s) to the Director of OPM, or an OPM official assigned to accept certification requests;

(2) Separate certification requests for systems applying to senior executives, senior professionals, and Offices of the Inspector General;

(3) A full description of the appraisal system(s) to be certified, including—

(i) Organizational and employee coverage information; and

(ii) Rating levels as described in § 430.404(b)(1) and (4) that establish clear distinctions between levels of performance so senior employees receive ratings based on assessments of their actual performance relative to their established performance expectations in any given appraisal period ;

(4) A sample of senior employee performance plans as specified by OPM, except as provided in paragraph (b) of this section;

(5) Documentation of organizational performance results and an explanation of how these results support the rating distribution in accordance with OPM instructions;

(6) Data required by the annual reporting requirement in § 430.409;

(7) Documentation of the pay policy and procedures for setting and adjusting pay and granting performance awards that includes—

(i) For the agency's senior executives covered by 5 CFR part 534, subpart D, the plan for setting and adjusting the rate of basic pay described in § 534.404(g);

(ii) For the agency's senior professionals covered by 5 CFR part 534, subpart E, the written procedures for setting and adjusting the rate of basic pay described in § 534.505; and

(iii) Policies established for award programs authorized under § 534.405 or responsibilities identified in § 451.106, as appropriate; and

(8) Any additional information that OPM and OMB may require to make a determination regarding certification.

(b) Agencies that participate in a peer review under § 430.404(a) must submit such documentation as OPM requires.

§ 430.408 OPM certification actions.

OPM will certify performance appraisal systems, with OMB concurrence, only for those agencies that comply with all related laws and regulations.

(a) Granting certification. At the request of an agency head or designee, the Director of OPM, at his or her discretion and in accordance with the requirements of this subpart and with OMB concurrence, may—

(1) Grant full certification, which covers a period of 24 months, of an agency's senior employee appraisal system(s) when the agency has—

(i) Demonstrated in the initial submission of its documentation, and without making any revisions directed by OPM, that it has designed and fully operationalized the certification criteria defined in §§ 430.404 and 430.405;

(ii) Met the documentation requirements in §430407; and

(iii) Demonstrated appropriate system application through the data reports required in § 430.409 based on the 2 most recently completed performance cycles (2 years of data).

(2) Grant provisional certification, which covers a period of 12 months, of an agency's senior employee appraisal system(s) when the agency has—

(i) Designed a senior employee appraisal system(s) that meets the certification criteria in §§430.404 and 430.405; and

(ii) Revised one or more senior employee performance plans in accordance with instructions from OPM in order to meet the certification requirements in § 430.404(a); or

(iii) Demonstrated appropriate system application through the data reports required in § 430.409 based on only the most recently completed performance cycle (1 year of data).

(3) Grant provisional certification to an agency more than once.

(b) *Extending certification.* (1) Consistent with the requirements of this subpart, the Director of OPM, at his or her discretion or upon the request of an agency head or designee, may grant a single extension of up to six additional months for an agency's appraisal system certification. The discretionary use of the Director's extension authority will be reserved for rare, exceptional circumstances.

(2) When requesting an extension, the agency head or designee must submit a written request, which may include signed electronic formats, to OPM outlining why the agency needs the extension and how the extension will support effective performance management. OPM will consider requests for extensions on a case-by-case basis.

§ 430.409 Annual reporting requirement.

Agencies must provide OPM with the annual summary ratings or ratings of record, as applicable, and rates of basic pay, pay adjustments, and performance and cash awards for their senior employees in accordance with instructions for OPM's annual data call and at any other time as needed to support a certification request.

§ 430.410 Termination of certification.

(a) Any time OPM determines that an agency's certified appraisal system is no longer in compliance with certification criteria, OPM, with OMB concurrence, may terminate such certification.

(b) An agency's system certification is terminated automatically when OPM withdraws performance appraisal system approval or mandates corrective action because of misapplication of the system as authorized under § 430.210(c) or § 430.314(c).

(c) OPM will notify the agency head at least 30 calendar days in advance of the termination and the reason(s) for the termination, as well as any expected corrective action.

(d) Upon such termination, and until its system certification is reinstated, the agency must—

(1) Set a senior employee's rate of basic pay under 5 CFR part 534, subparts D or E as applicable, at a rate that does not exceed the rate for level III of the Executive Schedule.

(2) Limit aggregate compensation received in a calendar year by a senior employee to the rate for level I of the Executive Schedule.

(e) Performance awards, pay adjustments, and levels of pay in effect prior to such termination will remain in effect unless OPM finds that any such decision and subsequent action was in violation of law, rule, or regulation.

(f) OPM, with OMB concurrence, may reinstate certification to an agency whose certification has been terminated only after the agency demonstrates it has taken appropriate corrective action. A restored certification will terminate on the same date as the original certification. An agency with a terminated certification may choose to submit a new certification request once it has corrected the issue(s) that led to the termination.

(g) OPM may reinstate the certification of an appraisal system that has been terminated automatically under paragraph (b) of this section upon the agency's compliance with the applicable OPM-mandated corrective action(s).

PART 534 – PAY UNDER OTHER SYSTEMS

8. 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 Pub. L. 110–372, 122 Stat. 4043 (5 U.S.C. 5304, 5307, 5376).

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

9. In § 534.403, revise the first sentence of paragraph (b) to read as follows:

§ 534.403 SES rate range.

* * * * *

(b) *Termination 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 terminated under 5 CFR 430.410. * * *

10. In § 534.404—

- a. Revise paragraphs (b)(4)(ii) and (b)(4)(iii);
- b. Revise paragraphs (c)(1) and (c)(4) and add new paragraph (c)(6);
- c. Revise paragraph (e)(1):
- d. Revise paragraph (g)(3):
- e. Revise paragraph (i)(1).

The revisions and additions to read as follows:

§ 534.404 Setting and adjusting pay for senior executives.

* * * * *

(b) * * *

(4) * * *

(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 430.405(a)(2) and (b) (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 430.405(a)(2) and (b) (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 430.405(a)(2) and (b) (including the Inspector General, where applicable) may approve such a pay increase in limited circumstances, such as for an exceptionally meritorious accomplishment.

* * * * *

(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 paragraphs (c)(3), (c)(4), and (c)(6) of this section without regard to whether the senior executive has received a pay adjustment during the previous 12-month period.

(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 430.405(a)(2) and (b) (including the Inspector General, where applicable) determines that—

(6) When necessary to maintain an annual executive appraisal and pay adjustment cycle that permits pay adjustments on the first day of the 27th full bi-weekly pay period following the effective date of pay adjustments for the previous cycle, an authorized agency official may provide a pay adjustment to a senior executive not more than 2 days before an applicable 12-month period expires. The pay adjustment begins a new 12-month period for the purpose of paragraph (c)(1).

* * * * *

(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 subsequently increase a covered senior executive's rate of basic pay based upon a performance

appraisal under the certified system up to the rate for level II of the Executive Schedule, consistent with the limitations in § 534.403(a)(3), under the conditions prescribed in paragraph (b) of this section, 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).

* * * * *

(g) * * *

(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 430.405(a)(2) and (b) (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

* * * * *

(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 430.405(a)(2) and (b) (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).

* * * * *

§ 534.503 [Amended].

11. Amend § 534.503 as follows:

a. Remove the reference “§ 430.405(h)” from the definition “Certified” and add in its place “§ 430.410”, and remove from that definition the term “suspension” and add in its place “termination”;

b. Remove the reference “§ 430.405(h)” from the definition “Not certified” and add in its place “§ 430.410”, and remove from that definition the term “suspended” and add in its place “terminated”; and

c. Remove the reference “§ 430.404(a)(1) through (9)” and add in its place “§§ 430.404 and 430.405”.

12. Amend § 534.505 as follows:

a. Remove the reference “§ 430.404(a)(6)(i), (ii) and (iii)” and add in its place “§ 430.405(b)(1), (2) and (3)”; and

b. Remove the reference “§ 430.403(d)” and add in its place “§ 430.403(e)”.

c. Revise paragraph (a)(5) to read as follows:

§ 534.505 Written procedures.

(a) * * *

(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, pay actions proposed under § 534.507, and performance awards under § 451.104(a)(3) 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 and performance awards 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 and performance awards for senior professionals conform to the requirements of §§ 534.507 and 451.104(a)(3) respectively and appropriately correspond to proposed ratings of record and performance ratings.

* * * * *

§ 534.506 [Amended].

13. Amend § 534.506 to remove the reference “§ 430.404(a)(6)(i), (ii) and (iii)” and add in its place “§ 430.405(b)(1), (2) and (3)”.

14. In § 534.507, revise paragraph (a)(2) to read as follows:

§534.507 Annual increases in basic pay.

(a) * * *

(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 no later than 14 days after the date specified in paragraph (a)(1) of this section.

* * * * *

15. In § 534.509, revise paragraph (b) to read as follows:

§ 534.509 Preservation of an established rate of basic pay.

* * * * *

(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 terminated under § 430.410 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.

* * * * *

§ 534.510 [Amended].

16. Amend § 534.510 to remove the references “§ 430.404(a)(6)(i), (ii) and (iii)” and add in their place “§ 430.405(b)(1), (2) and (3)” wherever they occur.

5 CFR Chapter III—Office of Management and Budget

Subchapter C—Joint Regulations with the Office of Personnel Management

PART 1330—HUMAN RESOURCES MANAGEMENT

17. The authority citation for part 1330 continues to read as follows:

Authority: 5 U.S.C. chapter 43 and 5307(d).

18. Revise Subpart D of part 1330 to to read as follows:

Subparts A—C [Reserved]

Subpart D—Performance Appraisal System Certification

Sec.

- 1330.401 Purpose.
- 1330.402 Definitions.
- 1330.403 System certification.
- 1330.404 Certification criteria verified by OPM/OMB.
- 1330.405 Certification criteria verified by the agency.
- 1330.406 Additional appraisal system requirements.
- 1330.407 Agency certification requests.
- 1330.408 OPM certification actions.
- 1330.409 Annual reporting requirement.
- 1330.410 Termination of certification.

Authority: 5 U.S.C. 5307(d).

Subpart D – Performance Appraisal System Certification

§1330.401 Purpose.

(a) This subpart implements 5 U.S.C. 5307(d), which provides for certification of performance appraisal systems that as designed and applied make meaningful distinctions based on relative performance with respect to—

(1) Members of the Senior Executive Service (SES) paid under 5 U.S.C. 5382 and 5383;
and

(2) Employees in senior-level (SL) and scientific or professional (ST) positions paid under 5 U.S.C. 5376.

(b) The regulations in this subpart strengthen the application of performance-based-pay principles to senior employees. Specifically, the statutory provisions that these regulations implement authorize an agency to apply a higher maximum rate of basic pay in setting and adjusting rates of basic pay for senior employees (consistent with 5 CFR part 534, subparts D and E) and apply a higher annual aggregate limitation on pay (consistent with 5 CFR part 530, subpart B) to its senior employees, when OPM, with OMB concurrence, has certified that the design and application of the agency's appraisal systems for these employees make meaningful distinctions based on relative performance. This subpart establishes the certification criteria and procedures that OPM will apply in considering agency requests for such certification.

§ 1330.402 Definitions.

In this subpart—

Agency means an agency as that term is defined in 5 U.S.C. 105 and an Office of Inspector General, which is considered a separate agency for purposes of applying all provisions relating to the Senior Executive Service under the Inspector General Act of 1978 (5 U.S.C. App 6(d)).

Agency head means the head of an agency and includes the Inspector General when applying the provisions of this subpart to Offices of the Inspector General.

Annual summary rating means the overall rating level that an appointing authority assigns at the end of the appraisal period as defined in § 430.303.

Appraisal system means the policies, practices, and procedures an agency establishes under 5 U.S.C. chapter 43 and 5 CFR part 430, subparts B and C, or other applicable legal authority, for planning, monitoring, developing, evaluating, and rewarding employee

performance. This includes appraisal systems and appraisal programs as defined in § 430.203 and performance management systems as defined in § 430.303.

Certification criteria means the factors used to determine whether an agency appraisal system as designed and applied makes meaningful distinctions based on relative performance.

GPRAMA means the Government Performance and Results Modernization Act of 2010.

OMB means the Office of Management and Budget.

OPM means the Office of Personnel Management.

Peer review means the review under § 1330.404(a) of performance plans by one agency for another agency, both having fully certified performance appraisal systems, to determine whether they meet the certification criterion for Aligned Results.

Performance expectations means—

(1) the critical elements, performance requirements, and performance standards that constitute the senior executive performance plans, as defined in § 430.303, established for senior executives;

(2) the performance elements and standards that constitute the performance plans, as defined in § 430.203, established for senior professionals; or

(3) other appropriate means authorized under performance appraisal systems not covered by 5 U.S.C. chapter 43 for communicating what a senior employee is expected to do and the measures that demonstrate success, including contribution to agency performance where appropriate.

Program performance measures means results-oriented measures of performance, whether at the agency, component, or function level, which include, for example, measures under GPRAMA.

PRB means Performance Review Board, as described in § 430.311.

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 as defined in § 430.203.

Relative performance means the performance of a senior employee compared to the performance expectations established for his or her position (including contribution to agency performance) and those expectations must be set at a level that is sufficiently high to be commensurate with the authorities and responsibilities of a senior employee in the Federal Government. This does not permit peer ranking or peer comparison for rating purposes.

Senior employee means a senior executive or a senior professional.

Senior executive means a member of the Senior Executive Service (SES) paid under 5 U.S.C. 5382 and 5383.

Senior professional means an employee in a senior-level (SL) or scientific or professional position (ST) paid under 5 U.S.C. 5376.

SPRP means Senior Professional Review Panel as described in § 534.505(a)(5).

§ 1330.403 System certification.

(a) OPM, with OMB concurrence, will certify an agency appraisal system under § 1330.408 when a review of that system's design (*i.e.*, system documentation), implementation (*i.e.*, performance plans), and application (*i.e.*, pay, performance awards, and ratings upon which they are based) reveals that the agency meets the certification criteria established in §§ 1330.404 and 1330.405 and has followed the procedural requirements set forth in § 1330.407, and results in a finding that the system as designed and applied makes meaningful distinctions based on relative performance and otherwise conforms to statutory and regulatory requirements relating to performance appraisal, pay, and awards.

(b) Each certification granted shall cover a specific period of time and is not renewable.

(c) Agencies subject to 5 U.S.C. chapter 43 and 5 CFR part 430 seeking certification of their appraisal systems must submit systems that have been approved by OPM under § 430.210 or § 430.314, as applicable.

(d) Agencies not subject to the appraisal provisions of 5 U.S.C. chapter 43 and 5 CFR part 430 seeking certification of their appraisal system(s) under this subpart must submit appropriate documentation to demonstrate that each system complies with the appropriate legal authority that governs the establishment, implementation, and application of that system.

(e) For senior professionals, an agency must establish an appraisal system(s), as defined in §1330.402, that meets the requirements of 5 CFR part 430, subpart B, and is separate from the system(s) established to cover its SES members under 5 CFR part 430, subpart C. At its discretion, an agency may include system features in its senior professional appraisal system(s) that are the same as, or similar to, the features of its SES appraisal system(s), as appropriate. For the purpose of certification under this subpart, such senior professional appraisal system(s) with 10 or more senior professionals covered by the system(s), must include a requirement for centralized review of senior professionals' ratings of record and proposed pay and performance awards actions.

§ 1330.404 Certification criteria verified by OPM/OMB.

To be certified, an agency's applicable appraisal system(s) for senior executives or senior professionals must meet the following certification criteria, as verified by OPM, with OMB concurrence:

(a) *Aligned results*. (1) Performance expectations for individual senior employees must derive from, and clearly align with, the agency's mission and organizational goals, such as those

communicated through GPRAMA strategic goals, program and policy objectives, and/or annual performance plans and budget priorities.

(2) Performance plans must contain performance expectations, including at least one critical element focusing on business results, that—

(i) Apply to their respective areas of responsibility and control;

(ii) Reflect expected agency and/or organizational outcomes and outputs, performance targets or metrics, policy/program objectives, and/or milestones;

(iii) Identify specific programmatic crosscutting, external, and partnership-oriented goals or objectives, as applicable; and

(iv) Are stated in terms of observable, measurable, and/or demonstrable performance (e.g., quality, quantity, timeliness, or cost effectiveness, as applicable).

(3) OPM may establish additional procedures to allow agencies to conduct peer reviews of the performance plans to determine whether the plans meet this criterion. When conducting peer review, agencies may not conduct concurrent reciprocal reviews.

(b) *Performance distinctions*. (1) Appraisal systems must include summary levels of performance as described in 5 CFR 430.305(a)(6) for senior executives, and for senior professionals at least one summary level of performance above fully successful.

(2) Agency application of performance appraisal systems must—

(i) Result in meaningful distinctions based on relative performance; and

(ii) Take into account the assessment of the agency's performance against relevant program performance measures, as described in §1330.405(a), employee performance expectations, and such other relevant factors as may be appropriate.

(3) Authorized agency officials, as designated through agency delegated authority, must appraise senior employee performance accurately and realistically so that senior employees who have demonstrated the highest performance and/or exceptional contribution to the agency's performance receive the highest annual summary ratings or ratings of record, as applicable.

(4) Agencies with equivalent appraisal systems not otherwise subject to this part must provide for clearly distinguishing and identifying the rating that reflects the highest level of performance.

(5) Agencies may not equate the requirement to make distinctions based on relative performance to permitting a forced distribution of annual summary ratings or ratings of record, which is prohibited under §§ 430.208(c) and 430.305(a)(5). However, methods used to make distinctions among employees or groups of employees such as comparing, categorizing, and ranking employees or groups on the basis of their performance may be used for purposes other than assigning a summary level including, but not limited to, award determinations.

(c) *Pay differentiation.* (1) Agencies must ensure senior employees who have demonstrated the highest performance receive the highest annual summary ratings or ratings of record, as applicable, and the largest corresponding performance awards, pay adjustments, and rates of pay, in accordance with applicable limitations;

(2) Agencies must ensure differentiation is evident separately in the pay adjustments, performance awards, and rates of pay;

(3) Agencies must ensure they make pay adjustments and performance awards for senior employees in a timely manner.

(i) For senior executives, the pay adjustments authorized under 5 CFR 534.404(b)(3) and the performance awards authorized under 5 U.S.C. 5384 must have effective dates not later than 5 months after the end of the applicable appraisal period;

(ii) For senior professionals, agencies must make pay adjustments in accordance with the requirements in § 534.505(b) and pay performance awards as soon as practicable after the end of the appraisal period; and

(4) Agencies must develop processes for making pay decisions and granting awards affecting senior employees that comply with Governmentwide law, regulation, and guidance. To make these processes transparent agencies must provide access to the appraisal and pay policies that govern the decisions and communicate the results as required in § 1330.405(c).

§1330.405 Certification criteria verified by the agency.

To be certified, an agency's applicable appraisal system(s) for senior executives or senior professionals must meet the following certification criteria, as verified by the agency in accordance with instructions provided by OPM:

(a) *Organizational assessment and guidelines.* Agencies must comply with all applicable OMB requirements for assessing organizational performance and may use those assessments to inform the individual ratings of its senior employees. The results of these assessments are shared with individuals involved in the rating process through the issuance of guidelines based at least in part upon those assessments. The guidelines must—

(1) Address agency performance overall and with respect to each of its particular missions, components, programs, policy areas, and support functions—such as reports of the agency's GPRAMA goals, annual performance plans and targets, program performance measures, and other appropriate indicators;

(2) Be communicated by the agency head, or an individual specifically designated by the agency head for such purpose, to affected senior employees, their rating and reviewing officials, and PRB and SPRP members;

(3) Be provided at the conclusion of the appraisal period but before individual senior employee performance ratings are recommended, so that they inform individual performance appraisals; and

(4) Not take the form of quantitative limitations on the number of ratings at any given rating level.

(b) *Oversight*. The agency head or the individual specifically designated under paragraph (a)(2) of this section must certify for a particular senior employee appraisal system that—

(1) The senior employee rating process makes meaningful distinctions based on relative performance;

(2) The results of the senior employee appraisal process take into account the agency's assessment of its performance against program performance measures, as well as other relevant considerations, as appropriate;

(3) Performance awards, pay adjustments, and levels of pay based on the results of the rating process accurately reflect and recognize distinctions in individual performance and/or contribution to the agency's performance; and

(4) Final decisions include PRB or SPRP recommendations regarding senior employee ratings and must—

(i) Be consistent with 5 CFR part 430, subparts B and C; and

(ii) Appropriately reflect the employee's performance expectations, relevant program performance measures, and such other relevant factors as the PRB or SPRP may find appropriate.

(c) Communication of results. Agencies must communicate annually to senior employees, rating and reviewing officials, and PRB or SPRP members the results of the application of the appraisal process (*i.e.*, overall ratings distributions, average adjustment in the rate of basic pay for each rating level, and average performance award for each rating level, as applicable) while assuring confidentiality of protected information.

§ 1330.406 Additional appraisal system requirements.

To be certified, an agency's appraisal system must meet the requirements of 5 CFR part 430, subparts B or C, as applicable, or other applicable legal authority. Agencies are responsible for ensuring their senior employee appraisal systems provide for—

(a) Consultation. Performance expectations for senior employees must be developed with the input and involvement of the senior employees who are covered thereby;

(b) Balance. Performance expectations established in the individual senior employee appraisal plan must include two parts:

(1) Expected results; and

(2) Those technical, leadership and/or managerial competencies or behaviors that contribute to, and are necessary to distinguish, levels of performance. In addition, for senior employees in supervisory positions, their performance expectations also must address appropriate measures or indicators of stakeholder and/or employee perspective when applicable, such that stakeholder/employee feedback is sought and used to inform decisions.

(c) *Accountability for the performance management of subordinates.* The performance expectations for individual senior employees in supervisory positions must clearly communicate their responsibility for ensuring—

(1) The performance expectations for individual subordinate employees clearly link to organizational mission, GPRAMA strategic goals, or other program or policy objectives; and

(2) The appraisal of their subordinate employees is based on established performance expectations that differentiate among the various levels of performance. An appraisal must be a realistic assessment of the employees' actual performance, including their contribution to organizational goals as measured in GPRAMA and other organizational plans.

(d) *Training.* Agencies must provide senior employees, rating and reviewing officials (including those in other services/appointments such as political appointments, Foreign Service, military, etc.), and PRB or SPRP members initial training, periodic refresher training, and annual reminders on the operation of the applicable agency performance management and pay and awards policies.

§ 1330.407 Agency certification requests.

To receive system certification, an agency must provide documentation demonstrating that its appraisal system(s), in design, implementation, and application, meet the certification criteria in §§ 1330.404 and 1330.405 as well as the procedural requirements set forth in this section.

(a) In order for an agency's appraisal system to be certified, the agency head or designee must submit documentation in accordance with OPM instructions, including—

(1) A written request, which may include signed electronic formats, for certification of its appraisal system(s) to the Director of OPM, or an OPM official assigned to accept certification requests;

(2) Separate certification requests for systems applying to senior executives, senior professionals, and Offices of the Inspector General;

(3) A full description of the appraisal system(s) to be certified, including—

(i) Organizational and employee coverage information; and

(ii) Rating levels as described in § 1330.404(b)(1) and (4) that establish clear distinctions between levels of performance so senior employees receive ratings based on assessments of their actual performance relative to their established performance expectations in any given appraisal period ;

(4) A sample of senior employee performance plans as specified by OPM, except as provided in paragraph (b) of this section;

(5) Documentation of organizational performance results and an explanation of how these results support the rating distribution in accordance with OPM instructions;

(6) Data required by the annual reporting requirement in § 1330.409;

(7) Documentation of the pay policy and procedures for setting and adjusting pay and granting performance awards that includes—

(i) For the agency's senior executives covered by 5 CFR part 534, subpart D, the plan for setting and adjusting the rate of basic pay described in § 534.404(g);

(ii) For the agency's senior professionals covered by 5 CFR part 534, subpart E, the written procedures for setting and adjusting the rate of basic pay described in § 534.505; and

(iii) Policies established for award programs authorized under § 534.405 or responsibilities identified in § 451.106, as appropriate; and

(8) Any additional information that OPM and OMB may require to make a determination regarding certification.

(b) Agencies that participate in a peer review under §1330.404(a) must submit such documentation as OPM requires.

§1330.408 OPM certification actions.

OPM will certify performance appraisal systems, with OMB concurrence, only for those agencies that comply with all related laws and regulations.

(a) Granting certification. At the request of an agency head or designee, the Director of OPM, at his or her discretion and in accordance with the requirements of this subpart and with OMB concurrence, may—

(1) Grant full certification, which covers a period of 24 months, of an agency's senior employee appraisal system(s) when the agency has—

(i) Demonstrated in the initial submission of its documentation, and without making any revisions directed by OPM, that it has designed and fully operationalized the certification criteria defined in §§ 1330.404 and 1330.405;

(ii) Met the documentation requirements in § 1330.407; and

(iii) Demonstrated appropriate system application through the data reports required in § 1330.409 based on the 2 most recently completed performance cycles (2 years of data).

(2) Grant provisional certification, which covers a period of 12 months, of an agency's senior employee appraisal system(s) when the agency has—

(i) Designed a senior employee appraisal system(s) that meets the certification criteria in §§1330404 and 1330.405; and

(ii) Revised one or more senior employee performance plans in accordance with instructions from OPM in order to meet the certification requirements in § 1330.404(a); or

(iii) Demonstrated appropriate system application through the data reports required in § 1330.409 based on only the most recently completed performance cycle (1 year of data).

(3) Grant provisional certification to an agency more than once.

(b) Extending certification. (1) Consistent with the requirements of this subpart, the Director of OPM, at his or her discretion or upon the request of an agency head or designee, may grant a single extension of up to six additional months for an agency's appraisal system certification. The discretionary use of the Director's extension authority will be reserved for rare, exceptional circumstances.

(2) When requesting an extension, the agency head or designee must submit a written request, which may include signed electronic formats, to OPM outlining why the agency needs the extension and how the extension will support effective performance management. OPM will consider requests for extensions on a case-by-case basis.

§ 1330.409 Annual reporting requirement.

Agencies must provide OPM with the annual summary ratings or ratings of record, as applicable, and rates of basic pay, pay adjustments, and performance and cash awards for their senior employees in accordance with instructions for OPM's annual data call and at any other time as needed to support a certification request.

§ 1330.410 Termination of certification.

(a) Any time OPM determines that an agency's certified appraisal system is no longer in compliance with certification criteria, OPM, with OMB concurrence, may terminate such certification.

(b) An agency's system certification is terminated automatically when OPM withdraws performance appraisal system approval or mandates corrective action because of misapplication of the system as authorized under § 430.210(c) or § 430.314(c).

(c) OPM will notify the agency head at least 30 calendar days in advance of the termination and the reason(s) for the termination, as well as any expected corrective action.

(d) Upon such termination, and until its system certification is reinstated, the agency must—

(1) Set a senior employee's rate of basic pay under 5 CFR part 534, subparts D or E as applicable, at a rate that does not exceed the rate for level III of the Executive Schedule.

(2) Limit aggregate compensation received in a calendar year by a senior employee to the rate for level I of the Executive Schedule.

(e) Performance awards, pay adjustments, and levels of pay in effect prior to such termination will remain in effect unless OPM finds that any such decision and subsequent action was in violation of law, rule, or regulation.

(f) OPM, with OMB concurrence, may reinstate certification to an agency whose certification has been terminated only after the agency demonstrates it has taken appropriate corrective action. A restored certification will terminate on the same date as the original certification. An agency with a terminated certification may choose to submit a new certification request once it has corrected the issue(s) that led to the termination.

(g) OPM may reinstate the certification of an appraisal system that has been terminated automatically under paragraph (b) of this section upon the agency's compliance with the applicable OPM-mandated corrective action(s).

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