

DEPARTMENT OF DEFENSE**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 9901**

RIN 3206-AL62

National Security Personnel System**AGENCY:** Department of Defense; Office of Personnel Management.**ACTION:** Proposed rule.

SUMMARY: The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing proposed regulations revising the National Security Personnel System (NSPS), a human resources management system for DoD, as originally authorized by the National Defense Authorization Act for Fiscal Year 2004 and amended by the National Defense Authorization Act for Fiscal Year 2008. The proposed regulation governs compensation, classification and performance management under NSPS. NSPS aligns DoD's human resources management system with the Department's critical mission requirements and protects the civil service rights of its employees.

DATES: Comments must be received on or before June 23, 2008.

ADDRESSES: You may submit comments identified by docket number NSPS-OPM-2008-0081 and/or Regulatory Information Number (RIN) 3206-AL62. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. There are two methods for submitting comments. Please submit only one set of comments via one of the methods described.

- *Preferred Method for Comments:* The preferred method for submitting comments is through the Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Alternative Method for Comments:* If unable to access the Federal Rulemaking Portal, comments may be mailed to the following address: DOD/OPM/NSPS Public Comments, PO Box 14474, Washington, DC 20044.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Mailed comments must be in paper form. No mailed comments in electronic form (CDs, floppy disk, or other media) will be accepted. The Federal Rulemaking Portal, <http://www.regulations.gov>, will contain any

public comments as received, without change, unless the comment contains security-sensitive material, confidential business information, or other information for which public disclosure is restricted by statute. If such material is received, we will provide a reference to that material in the version of the comment that is placed in the docket. The docket system is an "anonymous access" system, which means that DoD and OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. Unless a comment is submitted anonymously, the names of all commenters will be public information.

Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked "late," and DoD and OPM are not required to consider them in formulating a final decision.

Before acting on this proposal, DoD and OPM will consider all comments we receive on or before the closing date for comments. Comments filed late will be considered only if it is possible to do so without incurring expense or delay. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: For DoD, Bradley B. Bunn, (703) 696-5604; for OPM, Charles D. Grimes III, (202) 606-8079.

SUPPLEMENTARY INFORMATION: The Department of Defense (DoD or "the Department") and the Office of Personnel Management (OPM) are proposing to amend the National Security Personnel System (NSPS or "the System"), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, November 24, 2003) and amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181, January 28, 2008). The following information is intended to provide interested parties with relevant background material about (1) the changes to the regulations, (2) the process used to make the changes, (3) a description of the revised NSPS regulations, and (4) an analysis of the costs and benefits of those proposed regulations.

To the extent that this rule is consistent with the rule published in **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Rules and Regulations] [Page 66115-66220] (<http://edocket.access.gpo.gov/2005/05-21494.htm>), the supplementary

information pertaining to that rule is adopted as part of the supplementary information to this rule.

The Need for Change

DoD civilian employees are unique in Government: They are an integral part of an organization that has a military function. DoD civilian employees complement and support the military around the world. To support the interests of the United States in today's national security environment, civilian employees must be an integrated, flexible, and responsive part of the DoD team. Just as new threats, new missions, new technology, and new tactics are changing the work of the military, they are changing the work of DoD's 700,000 civilian employees.

The Department's experience operating under the current NSPS regulations as well as the 20 years of experience with transformational personnel demonstration projects, covering nearly 30,000 DoD employees, has shown that fundamental change in personnel management has a positive impact on individual career growth and opportunities, workforce responsiveness, and innovation; all these things enhance mission effectiveness.

Public Law 108-136 amended title 5, United States Code, to provide the Department with the authority to meet this transformation challenge through development and deployment of the NSPS. Public Law 110-181, while amending Public Law 108-136, continues to promote a performance culture in which the performance and contributions of the DoD civilian workforce are linked to strategic mission objectives and are more fully recognized and rewarded. It also retains flexibilities to streamline the method for classifying positions and to provide a more flexible support structure for both pay and classification in order to help attract skilled and talented workers; retain and appropriately reward current employees; respond to DoD mission requirements; and create opportunities for employees to participate more fully in the total integrated workforce. The System offers the more than 181,000 currently covered employees a contemporary pay banding construct, which includes performance-based pay. NSPS allows the Department to be more competitive in setting salaries and to adjust salaries based on factors, such as labor market conditions, performance, and changes in duties. The updated HR management system rules more specifically govern how retained classification, compensation, and performance management flexibilities

will be implemented. The greater level of detail reflects a continued commitment to greater transparency regarding provisions of Pub. L. 110–181 and system improvements in light of operational experience with NSPS. The System retains the core values of the civil service, including merit systems principles and veterans' preference, and allows employees to be paid and rewarded based on performance, innovation, and results.

Significant Changes to the Original Law

The original NSPS statute was enacted on November 24, 2003, and provided the Secretary of Defense, in regulations jointly prescribed with the Director of OPM, the authority to establish a flexible and contemporary civilian personnel system called the National Security Personnel System. This new civilian personnel system was intended to cover most of the approximately 700,000 DoD civilian employees, including blue-collar employees.

Among its features, it provided authority to establish a pay-for-performance system that recognizes and rewards employees based on performance and contribution to the mission; a new pay banding system to replace the General Schedule (GS); a simplified job classification process and flexible processes to assign new or different work; streamlined hiring processes and the ability to offer more competitive, market-sensitive compensation; improved workforce shaping procedures that reduce disruption with greater emphasis on performance as a factor in retention; expedited disciplinary and employee appeals processes for faster resolution of workplace issues, while preserving due process rights of employees; and a labor-management relations system that recognized DoD's critical national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees. The changes to labor relations included the ability to negotiate at the national level instead of negotiating with more than 1,500 local bargaining units, and the ability to establish a new independent third party to resolve labor relations disputes in DoD.

Public Law 110–181 amended title 5, United States Code, retaining authority for performance-based pay and classification and compensation flexibilities, but substantially modifying other NSPS authorities. The law, among other things—

- Brings NSPS under Governmentwide labor-management relations rules.
- Excludes Federal Wage System (blue collar) employees from coverage under NSPS.
- Requires DoD to collectively bargain procedures and appropriate arrangements for bringing DoD bargaining unit employees under NSPS prior to conversion of these employees.
- Brings NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions.
- Brings NSPS under Governmentwide rules for workforce shaping (reduction in force, furlough, and transfer of function).
- Requires that this rule be considered a major rule for the purposes of section 801 of title 5, United States Code, with advance Congressional notification for OPM/DoD jointly-prescribed NSPS regulations.
- Gives these rules the status of Governmentwide rules for the purpose of collective bargaining under chapter 71 when these rules are uniformly applicable to all organizational or functional units included in NSPS.
- Mandates that all employees with a performance rating above “unacceptable” or who do not have current performance ratings receive no less than sixty percent of the annual Governmentwide General Schedule pay increase (with the balance allocated to pay pool funding for the purpose of increasing rates of pay on the basis of employee performance).

Based on the changes Public Law 110–181 made to Section 9902 of title 5, the proposed rule deletes subparts F, G, H, and I (dealing with workforce shaping, adverse actions, appeals, and labor relations, respectively) of the current NSPS regulations. Subpart E (dealing with staffing) is also removed.

Public Law 110–181 also modifies the authority to conduct national-level bargaining and retains the rights of employees to organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established pursuant to law. It extends and expands exclusions from NSPS coverage for certain DoD laboratories through October 1, 2011. Some of these laboratories operate under demonstration project authorities which provide their own pay-for-performance systems.

In establishing the revised System, only certain provisions of title 5, United

States Code, may be waived or modified by DoD and OPM:

- Chapter 43 (dealing with performance management);
- Chapter 51 (dealing with General Schedule job classification);
- Chapter 53 (dealing with pay for General Schedule employees and pay for certain other employees), except for certain sections for which waiver or modification is barred by law; and
- Subchapter V of chapter 55 (dealing with premium pay), except sections 5544 (dealing with prevailing rate employees) and 5545b (dealing with firefighter pay).

Two Years Operational Experience Under NSPS

In order to provide consistency and uniformity of application throughout the Department, certain NSPS features previously described in DoD implementing issuances have been incorporated into this regulation. DoD now has more than 2 years of experience with these features and has determined that they effectively support key performance parameters of NSPS. In addition, the regulation includes modifications made to NSPS as a result of operational lessons learned over the last 2 years.

Classification

Effective Date of Classification of Position

The regulation now provides specific details for entitlement to retroactive effective date of a classification decision. While the prior regulation provided for both a classification reconsideration process and a retroactive effective date, more detail has been provided to enhance transparency of the regulation as well as to provide for a uniform and consistent rule.

The Table of Changes further addresses this and other changes in the NSPS regulation in the area of Classification.

Compensation

Compensation Architecture

The proposed regulation modifies rules governing the current compensation structure by removing the link between increases in the minimum rate of the rate range and across-the-board increases. This change enables more flexibility in responding to labor market changes that may impact the lower end of a pay range for an occupation, but not the middle or upper ranges. Also, discretionary authority is now provided to give additional general salary increases to designated

occupational series within a pay band. This flexibility enables management to adjust pay to recognize market forces when the pay band itself is market competitive, but due to rapidly changing markets, the current salaries paid to employees in certain occupations are not.

Pay Administration

Several changes have been made in the area of pay administration. Pay setting flexibilities have been expanded to permit discretionary within-grade increase buy-ins when employees from outside of NSPS move to a NSPS position. Safeguards have been incorporated for employees who are moved to NSPS via management-directed actions. In these cases, the regulation now specifies a required within-grade increase buy-in. A significant level of detail has been added to describe how pay is administered upon promotion, reassignment, reduction in band and appointment to the Federal service. Most of this detail reflects the pay setting rules that have been applied during the past 2 years of NSPS operation. These practices are incorporated now to increase transparency in the system and because they have been effective in operation.

The proposed rule retains management's flexibility to set pay within a given range, but provides safeguards by placing limitations on the factors management may use in exercising their discretion as well as establishing pay increase limits that cannot be exceeded without higher level review. There have also been some modifications to pay setting practices based on DoD's experience with the System. Most significantly, pay setting rules for employees moving into NSPS from other systems or moving from NSPS positions covered by targeted local market supplements have been revised. Pay for these employees was previously set using the base salary. Pay will now be set using "adjusted salary" (includes base salary plus any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment. In these cases, when the new position is in a different location, a geographic pay conversion will be processed. These rules allow management to set pay more competitively and equitably compensate employees by permitting pay to be set in a manner that prevents a loss in adjusted salary in certain circumstances. Further changes in NSPS pay setting rules include the discretion to adjust the

rate of pay of a teacher moving into NSPS up to 20 percent to take into account the shorter work year incorporated in the annual rate of a teacher paid under 20 U.S.C. 901.

Pay Retention

Pay retention rules have been modified to provide a "grandfather" clause for employees who are covered by General Schedule grade and pay retention rules at the time they are converted into NSPS. These employees will not be subject to the 104-week limit on pay retention. They will be entitled to pay retention indefinitely subject to specifically identified pay retention termination events. Much detail has been added in the area of pay retention to identify circumstances for which pay retention is mandatory, eligibility requirements for optional pay retention and events leading to termination of pay retention. These rules reflect current practices under NSPS.

Accelerated Compensation for Developmental Positions (ACDP)

"Treatment of Developmental Positions" (Section 9901.345) has been modified to specify criteria for Accelerated Compensation for Developmental Positions (ACDP) increases, identify the range of pay increases that are permitted under this discretionary authority, and to expand the discretionary use of ACDP to employees in developmental or trainee level positions assigned to the lowest pay band of a nonsupervisory pay schedule. To date, this authority has only been available to employees in developmental or trainee level positions in professional and analytical occupations. The change provides additional flexibility to recognize pay progression patterns in other occupations.

Premium Pay

A critical feature of NSPS compensation is the ability to modify premium pay in response to current and future needs. This flexibility facilitates the Department's ability to accomplish its diverse mission. The revised regulation incorporates rules governing NSPS premium pay. Premium pay includes pay such as overtime pay, compensatory time off, holiday, Sunday, and standby pay. Among the premium pay features unique to NSPS are: on-call premium pay for health care personnel in specified circumstances, pay for weekend duty for health care personnel, and foreign language proficiency pay. For the most part, the regulations reflect current premium pay policies under NSPS, which include certain

modifications to the standard title 5 premium pay laws and regulations to address unique DoD mission requirements and differences in the NSPS classification and pay structure.

Conversion/Movement Out of NSPS

Regulations have been added to provide a process for converting employees out of NSPS when their position is removed from coverage under the System and to provide a "virtual GS grade" to employees who leave their NSPS position to accept employment in non-NSPS positions. These rules promote more equitable pay setting upon moves to different pay systems.

The Table of Changes further addresses these and other changes in the NSPS regulation in the area of Compensation.

Performance and Pay Pool Management

Higher Level Review

The proposed regulation more specifically outlines safeguards to ensure the NSPS performance and pay pool management system is fair and equitable based on employee performance. For example, under Subpart D, the revised regulation now provides for a higher level review of performance expectations. This review helps ensure that assigned employee objectives are reviewed for appropriateness and consistency within and across the organization and/or pay pool. This safeguard at the beginning of the performance management process helps to ensure equity at the end of it when performance payouts are paid from a common pay pool fund.

Calculating Annual Payout

Rating levels and share distribution ranges are also specified in the revised regulation as well as formulas for share values and calculation of performance payouts. This revised language enhances system transparency for all by providing additional specificity to these elements. The language also clarifies the intended application of a common share value (expressed as a percent of pay) throughout an entire pay pool, to include all sub pay pools. This further preserves equity across a pay pool.

Flexibility in Extending Performance Appraisal Periods

The authority to extend individual performance appraisal periods to enable employees to meet minimum performance appraisal periods is specified as well as limitations on this authority. By specifically providing for extension of individual rating cycles, valued performers and higher level

performing employees moving to NSPS positions can more quickly benefit from the NSPS performance based pay features.

Pay Pools

The pay pool concept has also been further defined in this regulation by providing parameters for pay pool composition and specifying the roles of pay pool officials within the pay pool process.

Much thought was given to achieving the “right” balance between safeguards and management flexibility. For example, although pay pool share ranges have been specified for each rating level, management still has the flexibility to determine assignment of shares within that range. System safeguards were added to ensure fairness, equity, and a performance focus by expressly stating and limiting the factors which may be used in the determination of share assignment. Similarly, management still retains the flexibility and authority to determine the distribution of a performance payout between base salary increase and bonus or a combination thereof. However, to ensure safeguards within the system, the factors management may use in exercising this authority have also been expressly defined and limited to ensure fairness, equity, and a performance focus. While pay pool funding is still determined by management, higher-level reviews have been required to provide internal controls.

Reconsideration Process

Employee performance reconsideration rights have been expanded to permit reconsideration of individual performance objective ratings

in addition to the overall rating of record. This change recognizes that many pay pools use raw performance scores as a guide in determining how many shares to assign to employees. Since raw performance scores may be impacted by individual performance objective ratings, the ability to request review of individual performance objectives enables employees to seek redress on all performance rating decisions affecting their pay.

Other Changes

Other changes reflected in this regulation include language providing salary increases for employees who did not meet the minimum period of performance due to an approved paid leave status or performance of labor activities on “official time”. These pay adjustments will be based on the modal rating of a pay pool. Likewise, provisions have been made to adjust the pay of employees returning from temporary assignments outside of NSPS or returning from long-term training for which no NSPS performance plan was assigned. These changes ensure that employee pay is not harmed by the failure to meet a minimum performance period or inability to rate performance while they either exercise statutory leave entitlements or fulfill other important roles to the organization.

Finally, the regulations permit coverage under NSPS pay setting and classification flexibilities for employees who are appointed for less than 90 days by providing limited coverage of these employees under Subpart D of Performance Management. Providing access to NSPS pay setting flexibilities for these positions enhances DoD’s

competitive position in the labor market when hiring temporary employees for 90 days or fewer.

The Table of Changes addresses these and other changes in the NSPS regulation.

Process for Developing Proposed Regulations

Working Groups

In January 2008, working groups began meeting to revise the current regulations. The working groups were functionally aligned to cover the following human resources program areas: (1) Compensation (classification and pay banding); (2) performance management; (3) hiring, assignment, and pay setting; and (4) workforce shaping. The working groups, staffed by DoD employees and OPM, identified and developed options and alternatives for consideration in the revised design of NSPS. These were then reviewed and approved for incorporation by DoD and OPM senior officials prior to formal coordination and publication in the **Federal Register**.

General Provisions—Subpart A

This subpart has been changed to bring NSPS into compliance with the National Defense Authorization Act for Fiscal Year 2008 and incorporate planned changes. Key changes to this subpart include deleting references to subparts that have been removed; revising the list of defined terms; and adding actions that require OPM approval prior to implementation.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.101(a)	<i>Purpose.</i> Amends paragraph to delete reference to a new labor-management system and include a provision enabling the Secretary to establish implementing issuances to supplement any matter covered by the regulation.
§ 9901.101(b)(1)	Amends paragraph to delete reference to a new labor-management system.
§ 9901.101(b)(2)	Amends paragraph to delete references to a labor relations system.
§ 9901.102(a)	<i>Eligibility for coverage.</i> Amends paragraph to remove reference to subparts E through I.
§ 9901.102(b)	Amends paragraph to (1) clarify the Secretary’s sole and exclusive discretion to decide to apply coverage to an eligible category or categories of employees; (2) delete reference to subparts E, F, G, and H; (3) incorporate information previously found at § 9901.105(b) requiring DoD to advise OPM in advance when it intends to extend coverage of NSPS to specific categories of employees.
§ 9901.102(d)	Amends paragraph to reflect the interrelationship of the classification, pay, and performance management systems established under NSPS.
§ 9901.102(e)	Amends paragraph to clarify the Secretary’s sole and exclusive discretion to decide to rescind coverage of NSPS for a particular category of employees or an organization or functional unit.
§ 9901.102(f)(3)	Amends paragraph to change reference from § 9901.373 to § 9901.371 to reflect number change in another subpart.
§ 9901.103	<i>Definitions.</i> Deletes definitions for <i>furlough</i> , <i>initial probationary period</i> , <i>in-service probationary period</i> , <i>labor organization</i> , <i>mandatory removal offenses</i> , and <i>MSPB</i> . Adds definitions for <i>appraisal period</i> , <i>comparable pay band or comparable level of work</i> , <i>Component</i> , <i>higher pay band or higher level of work</i> , <i>lower pay band or lower level of work</i> , <i>pay pool</i> , <i>Pay Pool Manager</i> , <i>Pay Pool Panel</i> , and <i>Performance Review Authority</i> . Revises definitions for <i>basic pay</i> , <i>day</i> , <i>implementing issuances</i> , <i>National Security Personnel System</i> , <i>promotion</i> , <i>rating of record</i> , <i>reassignment</i> , and <i>reduction in band</i> to add or delete information and add clarity.

Citation	Description of proposed change
§ 9901.104	<i>Scope of authority.</i> Amends section to delete paragraphs (a), (f), (g), and (h) and to redesignate the remaining paragraphs. Deletes language allowing the Department to waive portions of chapter 53 related to pay and job grading for Federal Wage System employees. Adds reference to section 5544 (dealing with premium pay for Federal Wage System employees) as another premium pay provision that may not be waived.
§ 9901.105	<i>OPM coordination and approval.</i> Amends the title of this section to add information on actions requiring OPM approval prior to implementation. Deletes paragraphs (f) and (g). Also, deletes paragraphs (h) and (i) and moves material in those paragraphs to paragraphs (d) and (e), respectively.
§ 9901.105(a)	Amends paragraph to add requirement to request OPM approval in advance of implementation of certain actions.
§ 9901.105(b)	Replaces the former § 9901.105(b) paragraph and adds items previously found at § 9901.105(c), (d), and (e).
§ 9901.105(c)	Revises paragraph to add actions requiring the Director's approval prior to implementation.
§ 9901.105(d)	Places material previously found at § 9901.105(h) in this paragraph.
§ 9901.105(e)	Places material previously found at § 9901.105(i) in this paragraph and notes that some actions require OPM approval.
§ 9901.106	<i>Relationship to other provisions.</i> Deletes the material formerly at § 9901.106 and replaces with material formerly found at § 9901.107. Removes material related to application of the back pay law in 5 U.S.C. 5596 previously found at § 9901.107(b)(2) and (3).
§ 9901.106(b)(1)	Amends paragraph to include material previously found at § 9901.107(b). Deletes reference to chapters 31, 33, 35, 71, 75, and 77.
§ 9901.106(b)(2)	Amends paragraph to include material previously found at § 9901.107(b)(1). Deletes reference to chapters 31, 33, 35, 71, 75, and 77 and removes reference to subparts E through I. Removes reference to physicians' comparability allowances under 5 U.S.C. 5948 previously found at § 9901.107(b)(1)(iv).
§ 9901.106(c)(2)	Adds paragraph specifying that the authority in 5 U.S.C. 5948 to provide physicians' comparability allowances to GS physicians does not apply to NSPS physicians.
§ 9901.107	<i>Program evaluation.</i> Moves material previously found at § 9901.108 (and deletes that section) and deletes requirements related to employee representatives.

Classification—Subpart B

Subpart B provides DoD with the authority to replace the current GS classification and qualifications systems and other current classification systems with a new method of evaluating and classifying jobs by grouping them into occupational categories and levels of work for pay and other related purposes. Under NSPS, DoD (in coordination with OPM) will have the authority to establish qualifications for positions and to assign occupations and positions to broad occupational career groups, pay schedules, and pay bands (or levels).

The NSPS classification system fully supports the merit system principle that “equal pay should be provided for work

of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition for excellence in performance.”

The pay banding structure replaces artificial limitations created by current classification systems. Broad pay bands provide the ability to move employees more freely across a range of work and provide opportunities that are not possible when bound by traditional narrowly described work definitions. While pay banding provides greater flexibility and agility to the Department, the classification system continues to ensure employees have access to long-established protections related to the

classification of their positions.

Employees are permitted to request reconsideration of the classification (pay system, career group, occupational series, official title, pay schedule, or pay band) of their official positions of record at any time with DoD and/or OPM, as they can today under the GS system. The system described in subpart B, together with the revised pay system described in subpart C, will provide DoD with greater flexibility to adapt the Department's job and pay structure to meet present and future mission requirements.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.201(a)	<i>Purpose.</i> Amends paragraph to delete reference to prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV.
§ 9901.201(b)(2)	<i>Coverage.</i> Deletes former paragraph which referenced prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV.
§ 9901.202	<i>Coverage.</i> Deletes former paragraph § 9901.202(b)(2) which referenced prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, and redesignates remaining paragraphs accordingly.
§ 9901.203(a)	<i>Waivers.</i> Amends paragraph to delete reference to the prevailing rate system under 5 U.S.C. 5346 and 5346(c) and changes reference to § 9901.107 to § 9901.106 to reflect the renumbering of that section. Adds review of pay plan under 5 U.S.C. 5103.
§ 9901.203(b)	Adds reference to 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the Senior Executive Service (SES) and employees in senior-level positions compensated under 5 U.S.C. 5376 (SL/ST)) to reflect updates to U.S. Code.
§ 9901.204	<i>Definitions.</i> Modifies definition for <i>classification</i> to include a reference to <i>official title</i> and adds definition of <i>official title</i> .
§ 9901.205	<i>Bar on collective bargaining.</i> Deletes entire section.
§ 9901.212(d)	Restructures paragraph. Adds information on the Secretary's ability to use OPM qualification standards or establish unique qualification standards for NSPS positions. Deletes reference to § 9901.513.
§ 9901.221(b)(1)	Amends paragraph to delete reference to 5 U.S.C. 5346.
§ 9901.221(d)	Restructures paragraph and incorporates material previously found at § 9901.222(b) regarding retroactive effective dates.
§ 9901.221(d)(1)	Adds paragraph specifying retroactive classification date requirements and retroactive effective dates when § 9901.221(d) is applicable.

Citation	Description of proposed change
§ 9901.221(d)(2)	Adds paragraph specifying that the employee must file an initial request for review of the reduction in pay band or adjusted salary within 15 days to be eligible for retroactive corrective action.
§ 9901.221(d)(3)	Adds paragraph specifying that retroactive date can be established only if the appeal reversal is based on duties and responsibilities performed at the time of reduction.
§ 9901.221(e)	Redesignates former paragraph (d) as paragraph (e). Adds information to specify notification requirements when a classification action results in a reduction in an employee's pay band or adjusted salary.
§ 9901.222	<i>Review of classification decisions.</i> Revises title for clarity.
§ 9901.222(b)	Revises and restructures paragraph to address what may not be appealed.
§ 9901.222(c)	Adds paragraph to address handling of employee claim that his or her official position description is inaccurate.
§ 9901.222(d)	Relocates language found in paragraph (c) of the current regulations in proposed paragraph (d). Moves language formerly found in paragraph (d) of the current regulations to § 9901.224(d).
§ 9901.222(e)	Revises paragraph to provide that a determination under § 9901.222 will be based on criteria issued by the Secretary.
§ 9901.223	<i>Appeal to DoD for review of classification decisions.</i> Adds new § 9901.223 outlining DoD classification appeal process. <ul style="list-style-type: none"> • Establishes and explains employee right to representation. • Establishes the DoD classification appeals process. • States the binding nature of DoD appeal decisions. • Establishes employee and agency cancellation provisions.
§ 9901.224	<i>Appeal to OPM for review of classification decisions.</i> Adds new § 9901.224 describing OPM's classification appeal process.
§ 9901.231(a)	<i>Introduction to conversion section.</i> Amends paragraph to delete reference to a prevailing rate system. Adds cross reference to § 9901.371, which describes how to set an employee's pay at conversion.
§ 9901.231(b)	<i>Implementing issuances.</i> Adds language specifying that implementing issuances will include work level conversion tables that will be used to convert employees to an NSPS pay band. Deletes language regarding employees with grade retention immediately before conversion. This subject is now addressed in § 9901.231(d).
§ 9901.231(c)	<i>Temporary promotion prior to conversion.</i> Adds paragraph to clarify that an employee on a temporary promotion immediately prior to conversion of the temporary position into NSPS must be returned to his or her permanent position before processing the conversion.
§ 9901.231(d)	<i>Grade retention prior to conversion.</i> Adds paragraph to clarify that employees who are entitled to grade retention immediately before conversion will have their NSPS pay band set using the actual grade of the employee's current position—not the retained grade.

Pay and Pay Administration—Subpart C

This subpart provides DoD with authority to establish an NSPS pay system in lieu of the GS pay system or other pay systems that would apply to employees but for coverage under NSPS. The subpart has been revised to (1) incorporate changes in the National Defense Authorization Act (NDAA) for Fiscal Year 2008; (2) add more detailed rules drawn from existing NSPS implementing issuances; (3) make policy changes in certain areas; and (4) make technical changes and improvements. Key changes to this subpart include (1) adding a provision to define what constitutes a “rate of pay” for the purposes of applying 5 U.S.C. 9902(e)(9) (this change is explained in the Table of Changes); (2) adding regulations regarding pay limitations; (3) revising rules on NSPS

general salary increases (including changes to comply with the NDAA); (4) revising standard local market supplements to be generally equivalent to GS locality pay (as required by the NDAA); (5) adding detailed rules regarding performance payouts from pay pools and other performance-related payments; (6) adding detailed pay administration rules; (7) establishing detailed rules regarding premium pay under NSPS (including identification of specific modifications to standard title 5 premium pay rules); (8) adding more detailed rules on conversions into the NSPS pay system; and (9) establishing new rules regarding conversions out of the NSPS pay system. Modifications to this subpart reflect the unique pay-banding architecture of NSPS; enhance management's flexibilities to respond more competitively to labor markets; facilitate pay setting upon movements

between different pay systems; promote performance-based pay; provide the flexibility to facilitate the Department's ability to accomplish its diverse missions; and, in some cases, streamline and simplify pay administration rules.

Throughout this subpart, the terms “base salary” and “adjusted salary” are used. The use of the term “salary” is consistent with the terminology that has been used in NSPS since its inception. It is meant to capture the concept of continuing pay, excluding premium pay, bonuses, or other forms of variable pay. The term “base salary” refers to base or basic pay excluding any local market supplement. The term “adjusted salary” refers to an adjusted rate of basic pay that includes any applicable local market supplement.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.301	<i>Purpose.</i> Modifies to provide reference to waivers listed under § 9901.303.
§ 9901.302	<i>Prevailing rate employees.</i> Deletes paragraph § 9901.302(b)(2) related to waiver of the statutory provisions establishing pay systems for prevailing rate employees, consistent with 5 U.S.C. 9902(b)(4). Also deletes paragraph (c) to clarify that all employees in the NSPS classification and pay system are automatically covered by the premium pay provisions in §§ 9901.361 through 9901.364, as applicable.
§ 9901.303(a)(2)	<i>Premium pay.</i> Adds a reference to 5 U.S.C. 5544 (dealing with premium pay for prevailing rate employees) as an additional exception to the authority to waive the premium pay provisions in 5 U.S.C. chapter 55, subchapter V.
§ 9901.303(b)	<i>Prevailing rate employees.</i> Adds a paragraph referencing 5 U.S.C. 5341-5349 (dealing with prevailing rate employees) to the list of provisions in 5 U.S.C. chapter 53 that may not be waived.

Citation	Description of proposed change
§ 9901.303(c)	<i>Student loan repayments.</i> Revises existing paragraph to limit the Secretary's authority to modify the student loan repayment benefit provisions in 5 U.S.C. 5379. If necessary to address critical hiring needs, the Secretary may modify the minimum service period and the limitations on the amount of student loan repayment benefits.
§ 9901.304	<i>Definitions.</i> Adds definitions for the terms <i>adjusted salary</i> , <i>base salary</i> , <i>contributing factor</i> , <i>premium pay</i> , <i>retained rate</i> , and <i>sub pay pool</i> . Also, adds additional cross references to various terms that are defined in subpart A. Makes minor changes in various definitions to use the terms "base salary" and "adjusted salary" (which are currently used in NSPS implementing issuances). (Also, throughout the subpart, the terms "base salary" and "adjusted salary" are used as appropriate.) Revises definition of <i>modal rating</i> so that the group of employees used in determining the modal rating is the entire pay pool, not just a pay band within a pool. Revises definition of <i>performance share value</i> to specify that a share value is always computed as a percentage. Adds sentence to definition of <i>standard local market supplement</i> to conform with 5 U.S.C. 9902(e)(8)(A). Revises definition of <i>targeted local market supplement</i> to clarify that targeted local market supplements apply in place of any lower standard market supplement that is otherwise applicable. Makes minor changes in other definitions.
§ 9901.305	<i>Rate of pay.</i> Deletes former § 9901.305 and adds a new section providing an explanation of what it means to establish and adjust a "rate of pay" in the context of 5 U.S.C. 9902(e)(9). Under that section of law, "any rate of pay established or adjusted in accordance with [5 U.S.C. 9902] shall be non-negotiable, but shall be subject to procedures and appropriate arrangements of [5 U.S.C. 7106(b)(2)–(3)]." It is appropriate that NSPS regulations issued under authority of 5 U.S.C. 9902(a) address section 9902(e)(9) since section 9902(b) requires that the system established under section 9902(a) meets certain conditions, including the condition in section 9902(b)(5). Section 9902(b)(5) states that collective bargaining is subject to any "limitation on negotiability established pursuant to law," which would include the limitation in section 9902(e)(9). Proposed § 9901.305 defines the term "rate of pay" to include (1) various pay rates applicable to individual employees (i.e., base salary rate, local market supplement rate, and overtime and other premium pay rates), (2) the pay rates that constitute the structure of the pay system, including the amount or level of those rates and the applicability conditions that define the type and coverage of each rate (including range minimums and maximums, control points, local market supplements, general limitations on maximum base salary or adjusted salary rates, and premium pay rates), and (3) the percentage rate of total base salary payroll representing the portion of a pay pool devoted to performance pay increases. The term "rate of pay" encompasses payments that are paid on a recurring basis at an established level or amount. Thus, variable one-time bonuses are not included. A rate of pay cannot be understood as simply an amount. A rate amount only has meaning in the context of the required set of conditions that define what the rate is and when it applies. Any rate amount is inseparably connected to a set of defining conditions that determine when employees may receive that rate amount. In other words, one cannot establish or adjust a rate of pay for employees without taking into account both the amount of the rate and the required conditions defining applicability of the type and amount of pay in question. For example, it is impossible to establish a local market supplement by merely establishing the percentage amount of that supplement. For the local market supplement to have any meaning, the establishment of the supplement necessarily requires the establishment of the geographic area in which that supplement will apply. Similarly, establishing or adjusting the minimum rate of a band requires that the rate be connected to a particular band that covers a defined group of employees. Also, establishing a new category of hazardous duty pay requires establishing the type of hazardous conditions that are linked to a given percentage rate. Accordingly, § 9901.305 makes clear that, as far as the rates that comprise the pay structure are concerned, a "rate of pay" is comprised of two inseparable components or elements: (1) The intrinsic applicability conditions that define what the rate of pay is and to whom it applies and (2) the amount or level of the rate. Both the amount and the applicability conditions of a rate of pay may be established or adjusted.
§ 9901.311	<i>Major Features.</i> Amends to reflect (1) the use of the term "salary" instead of "pay", (2) changes resulting from implementation of NDAA for Fiscal Year 2008 (Public Law 110-181, January 28, 2008) in the area of local market supplements and general salary increases, and (3) a DoD policy change to delink general salary increases from adjustments in the minimum rate of the band.
§ 9901.312	<i>Maximum rates.</i> Replaces former § 9901.312 with a revised section, which establishes a maximum limitation or cap on adjusted salary rates for NSPS employees (excluding doctors and dentists) equal to the rate for level IV of the Executive Schedule plus 5 percent. In addition, the revised section provides the Secretary with authority to establish a higher adjusted salary limitation for defined categories of employees. Use of this authority is subject to coordination with OPM under § 9901.105.
§ 9901.313	<i>Aggregate compensation limit.</i> Adds a new section to establish rules governing aggregate compensation limits. Normally, the limit is equal to the rate for level I of the Executive Schedule; however, in special circumstances, the Secretary may establish a cap equal to the Vice President's annual salary for specified categories of employees (subject to coordination with OPM). A special limitation tied to the President's salary applies to doctors and dentists, consistent with the similar pay limit for Department of Veterans Affairs doctors and dentists under title 38.
§ 9901.314	<i>Compensation comparability.</i> Revises § 9901.314 (formerly § 9901.313) to change references to calendar year 2008 to calendar year 2012, consistent with paragraphs (4)–(5) of new section 9902(e) in title 5, United States Code, as amended by section 1106 of Pub. L. 110–181.
§ 9901.321(c)	<i>Control points.</i> Adds a new paragraph (c) to address control points, which were previously addressed solely in § 9901.342(d). This makes clear that control points (i.e., limitations on pay setting and pay progression within a pay band that apply to specified groups of similar positions) are part of the structure of the pay system. The new paragraph includes a listing of the factors that may be considered in establishing control points: mission requirements, budget, labor market factors, and benchmarks based on duties, responsibilities, competencies, qualifications, and performance.
§ 9901.322(a)	<i>Rate ranges.</i> Clarifies that the term "rate range" refers to the range minimum and range maximum.

Citation	Description of proposed change
§ 9901.322(e)	<i>Adjustment of maximum rates in conjunction with general salary increase.</i> Adds requirement that the maximum rate of all pay bands must be adjusted by no less than the percentage amount of the NSPS general salary increase under § 9901.323(a)(1) effective on the date of that increase. This rule ensures that any eligible employee will receive the full amount of the NSPS general salary increase under § 9901.323(a)(1). Other general salary increases under § 9901.323 could be less than the increase in the band maximum, in which case the general salary increase would be limited by the band maximum.
§ 9901.323(a)	<i>General salary increase.</i> Revises § 9901.323 to provide that general salary increases are no longer linked to increases in the minimum rate of an employee's rate range. Instead general salary increases for employees in various bands will be determined separately, subject to the rules in this section. This section also incorporates in § 9901.323(a)(1) the new statutory requirement in 5 U.S.C. 9902(e)(7), as enacted by section 1106 of Pub. L. 110–181. Under section 9902(e)(7), all eligible employees (i.e., all employees except those with an unacceptable performance rating) in all NSPS pay bands are entitled to a general salary increase at the time of a GS general pay increase under 5 U.S.C. 5303, and that increase may not be less than 60 percent of the GS general pay increase. Under these proposed regulations, the NSPS general salary increase would be the same percentage for all eligible employees, except that the increase for retained rate employees would be fixed at 60 percent of the GS general pay increase (or lowest permitted amount established by law). As required by section 9902(e)(7), the portion of the GS general pay increase amount that is not provided as an NSPS general salary increase must be allocated to NSPS pay pool funding for the purpose of increasing base salary rates on the basis of employee performance. For example, if the GS general pay increase is 2.5 percent and the NSPS general salary increase for eligible employees in all pay bands is 1.5 percent (60 percent of GS general pay increase), the balance of 1.0 percent would be added to the pay pool and used to fund performance-based base salary increases. Proposed new § 9901.323(a)(2) makes clear that the Secretary may provide additional NSPS general salary increases for all eligible employees (except retained rate employees) in a designated occupational series in a pay band at other times to address labor market conditions, staffing difficulties, or mission priorities. This authority is subject to coordination with OPM under § 9901.105. These additional general salary increases are not system-wide increases, but instead are applied as needed. The amount and timing of the increases (if any) may vary by employee category. (Under current regulations, the Secretary could give varying general salary increases for employees in various bands by adjusting the band minimum rates by varying amounts, since adjustments in band minimum rates currently drive general salary increases; thus, a similar flexibility already exists.)
§ 9901.323(b)	<i>Unacceptable performers.</i> Revises paragraph (b) to provide that an employee who is denied a general salary increase based on an unacceptable performance rating, but who receives a rating above unacceptable for a subsequent appraisal period, is eligible to receive the next general salary increase occurring on or after the date the employee is given a rating of record above unacceptable. For example, if an employee is denied a general salary increase under § 9901.323(a)(1) in a given January, and if the next general salary increase occurs in the next January, then the employee will be eligible for that next increase if he or she receives a rating of record above unacceptable on or before the effective date of that next January increase. The employee may not receive the lost general salary increase on a delayed basis, even if the employee receives a mid-cycle rating under § 9901.412(b)(2).
§ 9901.323(c)	<i>Special additional increase.</i> Provides the Secretary with discretionary authority to provide a special additional salary increase for certain employees who are ineligible for a performance payout, such as an employee without an NSPS rating of record because he or she has not been in NSPS for the minimum 90-day period. Eligible employees may receive the system-wide general salary increase under § 9901.323(a)(1) plus an additional increase equal to the difference between the GS general pay increase and the NSPS general salary increase. Retained rate employees are not eligible for this additional increase.
§ 9901.323(d)	<i>Increases limited by band maximum.</i> Provides that a general salary increase under paragraph (a)(2) or paragraph (c) of § 9901.323 may be applied only to the extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.
§ 9901.323(e)	<i>Increase in conjunction with increase in band minimum.</i> Provides that if the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.
§ 9901.331(b)	<i>Computation of local market supplements.</i> Adds a new paragraph describing how local market supplements are computed and are subject to a rate cap.
§ 9901.331(c)	<i>Official worksite.</i> Adds a new paragraph providing that, in administering NSPS local market supplements, DoD will use the same concept of official worksite as used in the GS locality pay program, consistent with the requirements of 5 U.S.C. 9902(e)(8)(A), as enacted by section 1106 of Public Law 110–181.
§ 9901.331(d)	<i>Treatment of local market supplement as basic pay.</i> Redesignates former § 901.332(c) as new § 9901.331(d). Revises paragraph (d)(9) to clarify that a local market supplement is considered basic pay at the point of conversion into or out of the NSPS pay system for the purpose of applying the adverse action provisions in 5 U.S.C. chapter 75, subchapter II. (See also §§ 9901.351(g), 9901.371(d), and 9901.372(f).) Deletes former paragraph (d)(10) dealing with treatment of local market supplements as basic pay in determining internal NSPS payments and adjustments, since the regulations for those NSPS payments and adjustments now clearly address whether base salary or adjusted salary is used. Revises paragraph (d)(11) (formerly (d)(12)) to clarify that other statutory provisions must “expressly” address treatment of local market supplements as basic pay to have an effect. Also, provides that other NSPS regulations may address the basic pay issue.
§ 9901.332(a)	<i>General.</i> Deletes existing paragraph (a) and replaces it with a new paragraph explaining the relationship of standard and targeted local market supplements to 5 U.S.C. 9902(e)(8).

Citation	Description of proposed change
§ 9901.332(b)	<i>Standard local market supplements.</i> Deletes existing paragraph (b) and replaces it with a separate paragraph regarding standard local market supplements, incorporating statutory requirements in 5 U.S.C. 9902(e)(8)(A), as enacted by section 1106 of Public Law 110–181. Under section 9902(e)(8)(A), NSPS must provide standard local market supplements in the same manner as GS locality pay under 5 U.S.C. 5304 and 5304a. The proposed regulations give effect to this provision by requiring that NSPS standard local market supplements (1) be the same percentage amounts as GS locality payments, (2) be linked to the same geographic areas established under the GS locality pay program, and (3) be based on the same “official worksite” concept used in administering the GS locality pay program. In addition, NSPS standard local market supplements will generally be administered in other respects in a manner that parallels the administration of GS locality payments (e.g., a higher targeted local market supplement trumps a standard local market supplement just as a higher GS special rate supplement trumps a GS locality payment), except when differences are required due to differences between the NSPS and GS pay systems. For example, under NSPS, adjusted salary rates (including any local market supplement) are generally capped at the rate for level IV of the Executive Schedule plus 5 percent to accommodate the 5-percent extension of certain base salary ranges, while GS locality-adjusted rates are capped at the rate for level IV of the Executive Schedule. Also, NSPS local market supplements are paid on top of a retained pay rate, while GS locality pay is not. (Instead, locality pay is considered in setting and adjusting a GS retained rate.) In addition, while GS locality pay applies to all GS employees stationed in locality pay areas, NSPS standard local market supplements are not applicable to physicians and dentists, since (1) they are entitled to higher base salary and adjusted salary ranges to achieve comparability with title 38 physicians and dentists in the Department of Veterans Affairs and (2) their adjusted salary rates are designed to apply on a worldwide basis with no variation based on location (consistent with title 38).
§ 9901.332(c)	<i>Targeted local market supplements.</i> Replaces existing paragraph (c) with a new paragraph regarding targeted local market supplements. Targeted local market supplements are similar to GS special rate supplements. They are used to address staffing problems associated with a specific category of employees. They are payable when higher than any otherwise applicable standard local market supplement. Language formerly under paragraph (c) moves to § 9901.331(d).
§ 9901.333	<i>Setting and adjusting local market supplements.</i> Adds a new paragraph (a) to provide that standard local market supplements are set and adjusted consistent with the setting and adjusting of GS locality payments, as required by 5 U.S.C. 9902(e)(8)(A). Also, merges former paragraphs (a) and (b) into a new paragraph (b), which is revised to focus solely on targeted local market supplements.
§ 9901.334(b)	<i>Unacceptable performers.</i> Revises paragraph (b) to provide that an employee who is denied a local market supplement adjustment based on an unacceptable performance rating, but who receives a rating above unacceptable for a subsequent appraisal period, is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of that new rating of record, or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).
§ 9901.341	<i>Performance-based pay system.</i> Modifies paragraph for editorial purposes.
§ 9901.342(a)	<i>Overview of performance payout section.</i> Modifies paragraph (a)(1) to reflect the current implementation state of the NSPS performance-based pay system. Modifies paragraph (a)(2) to: (1) Delete reference to “a more current rating of record, consistent with the former § 9901.409(b)” (while the provision for a mid-cycle rating of record still exists under § 9901.412(b)(2), specific reference to this type of rating of record is not required for that rating to serve as the basis for a performance increase); (2) Limit circumstances for which an employee who is not eligible for a rating of record may receive a payout to the circumstances prescribed in this regulation; and (3) Change cross reference to paragraphs (f) and (g) to reflect new location in paragraphs (i) and (j) and to incorporate reference to additional payout situations in paragraphs (k) and (l). Deletes paragraph (a)(3) as found in current regulations. This material is replaced with more specific information on pay pool officials in proposed § 9901.342(c), (d), and (e).
§ 9901.342(b)	<i>Performance pay pools.</i> Modifies paragraph (b)(1) to incorporate language regarding fair and consistent treatment of employees in the pay pool process, which is found in current regulations at § 9901.342(a)(3). Paragraphs (b)(2) and (b)(3) provide uniform and consistent criteria governing the establishment of performance pay pool structures, including sub pay pools. Paragraph (b)(4) contains language previously found in paragraph (b)(2). Paragraph (b)(5) states the requirement for higher-level approval of pay pool funding floors or ceilings.
§ 9901.342(c)	<i>Pay Pool Panel.</i> Adds a new paragraph describing the roles and responsibilities of the Pay Pool Panel.
§ 9901.342(d)	<i>Pay Pool Manager.</i> Adds a new paragraph describing the roles and responsibilities of the Pay Pool Manager.
§ 9901.342(e)	<i>Performance Review Authority.</i> Adds a new paragraph describing the roles and responsibilities of the Performance Review Authority.
§ 9901.342(f)	<i>Performance shares.</i> Relocates and modifies language found in current regulations at § 9901.342(c). The modifications include: • A table assigning a uniform range of shares to rating levels 3 through 5; • A uniform list of criteria establishing parameters for determination of share assignment within a range; and • Requirement that Pay Pool Managers and Panels review recommendations for share assignment for consistent application of criteria across a pay pool.
§ 9901.342(g)	<i>Performance payout.</i> Relocates and modifies language found in current regulations at § 9901.342(d). The modifications include: • Addition of the formula for determining the value of a share; • Addition of the formula for determining the dollar value of an individual employee's payout; • Addition of a uniform list of criteria that are the only factors that may be considered in determining distribution of a pay pool payout between bonus and base salary increase; • Clarification of effective date of a performance-based pay pool payout under this section; • Addition of uniform eligibility criteria to receive a performance-based payout under § 9901.342; and

Citation	Description of proposed change
	<ul style="list-style-type: none"> Modifications to language concerning performance payouts for employees on retained pay, which clarify that the performance payout must be in the form of a bonus and that the amount of the performance payout is based on the maximum rate of the pay band to which the employee is assigned.
§ 9901.342(h)	<i>Proration of performance payouts.</i> Relocates and modifies language found in current regulations at § 9901.342(e). Modifies cross-referenced paragraphs to reflect redesignations made in this proposed regulation.
§ 9901.342(i)	<i>Adjustments for employees returning after performing honorable service in the uniformed services.</i> Relocates and modifies language found in current regulations at § 9901.342(f). Modifies language to indicate that performance payouts will be based on an employee's "NSPS" rating of record instead of the "DoD" rating of record. This modification recognizes the potential inequities which may occur in comparing the NSPS and non-NSPS performance rating systems. Additionally, clarifies eligibility for performance bonus under specified circumstances and bar on prorating of pay pool payouts due to leave without pay or absence to perform uniformed service under 38 U.S.C. 4301 and § 353.102 of this chapter.
§ 9901.342(j)	<i>Adjustments for employees returning to duty after being in workers' compensation status.</i> Relocates and modifies language found in current regulations at § 9901.342(g). Modifies language to indicate that performance payouts will be based on an employee's "NSPS" rating of record instead of the "DoD" rating of record. This modification recognizes the potential difficulties which may occur in comparing the NSPS and non-NSPS performance rating systems. Additionally, clarifies eligibility for performance bonus under specified circumstances and bar on prorating of pay pool payouts due to leave without pay due to work-related injury under 5 U.S.C. chapter 81, subchapter I.
§ 9901.342(k)	<i>Adjustments for employees in special circumstances.</i> Adds a new paragraph providing a method of determining a performance payout for employees, who due to performance of union-related activities or absence while on paid approved leave, are unable to meet the minimum period for a performance rating of record.
§ 9901.342(l)	<i>Adjustments for employees returning from temporary assignments outside of NSPS or from long-term training for which no NSPS performance plan was assigned.</i> Adds a new paragraph providing a method of determining performance pay adjustments for employees who either did not meet the minimum period of performance due to temporary assignment outside of NSPS or long-term training or who met the minimum period and received a rating of record, but were outside of NSPS on the effective date of the payout.
§ 9901.343	<i>Pay reduction based on unacceptable performance and/or conduct.</i> Modifies section to limit the range of a pay reduction based on unacceptable performance and/or conduct from 1–10 percent of base salary to 5–10 percent of base salary. Additionally, updates cross-referenced paragraphs to reflect modifications to subpart C.
§ 9901.344	<i>Other performance payments.</i> Modifies section by changing title of Extraordinary Pay Increases (EPI) to Extraordinary Performance Recognition (EPR) and establishing uniform eligibility criteria and methods of payment for Extraordinary Performance Recognition (EPR) and Organizational Achievement Recognition (OAR) payments.
§ 9901.345	<i>Accelerated Compensation for Developmental Positions.</i> Modifies section by establishing uniform eligibility criteria for Accelerated Compensation for Developmental Positions (ACDP), limiting the form of an ACDP payment to that of a base salary increase, and adding general limits on the amount of ACDP that may be provided.
§ 9901.351	<i>General rules governing pay administration.</i> Adds a new section providing general pay setting rules.
§ 9901.351(a)	<i>Introduction.</i> Provides that base salary rates are used in pay administration, except when specifically otherwise provided.
§ 9901.351(b)	<i>Geographic recalculation.</i> Provides for a geographic recalculation on pay setting for movements from one geographic area to another geographic area, consistent with the geographic conversion principle described in 5 CFR 531.205. This provision is used in special circumstances when adjusted salary rates are used in applying certain pay administration rules.
§ 9901.351(c)	<i>Within-grade increase (WGI) adjustment equivalent.</i> Provides for a WGI equivalent for employees moving into NSPS, consistent with the conversion process in § 9901.371, under specified conditions. Provides for a WGI equivalent for employees moving into NSPS through a management-directed action, including a management-directed reassignment, realignment, or placement via the Priority Placement Program, Reemployment Priority List, or Interagency Career Transition Assistance Plan. An employee placed in an NSPS position through an employee-initiated reassignment may receive this same WGI equivalent at the discretion of the authorized management official.
§ 9901.351(d)	<i>Minimum rate.</i> Relocates language (with minor modifications) found in current regulations at § 9901.356(a). This provision states that an employee's base salary may not be less than the minimum rate of the employee's pay band, unless the employee does not receive a pay increase under § 9901.323 because of an unacceptable rating.
§ 9901.351(e)	<i>Maximum rate.</i> Relocates language (with minor modifications) found in current regulations at § 9901.356(b). This provision states that an employee's base salary may not be more than the maximum rate of the employee's pay band, unless provided for under the pay retention provisions in § 9901.356.
§ 9901.351(f)	<i>Pay periods and hourly rates.</i> Relocates language (with minor modifications) found in current regulations at § 9901.356(c). This provision states that the Secretary will follow the rules for establishing pay periods and computing pay rates in 5 U.S.C. 5504 and 5505.
§ 9901.351(g)	<i>Rate comparisons upon movement to an NSPS position.</i> Provides for the setting of an employee's NSPS rate of basic pay when the employee moves to an NSPS position by a management-directed action, consistent with the conversion rule in § 9901.371(d).
§ 9901.351(h)	<i>Adjustment of teacher annual rates.</i> Provides authority for an adjustment of up to 20 percent when an individual leaves a teaching position under 20 U.S.C. 901 and moves to NSPS. This adjustment is for the purpose of setting the individual's NSPS pay based on that adjusted rate. This adjustment will take into account the shorter work year applicable to a teacher position.
§ 9901.352	<i>Setting an employee's starting pay.</i> Revises section (formerly § 9901.351) providing specific rules to be applied in determining an employee's starting pay for individuals who are newly appointed or reappointed to the Federal service.
§ 9901.352(a)	<i>Considerations in setting starting pay.</i> Identifies factors to be considered in setting starting pay for a newly appointed or reappointed employee.

Citation	Description of proposed change
§ 9901.352(b)	<i>Definitions.</i> Defines the terms <i>newly appointed</i> and <i>reappointed</i> and clarifies the term <i>Federal service</i> . Clarifies that to be considered as reappointed, an employee must have been separated from Federal service for at least 1 full workday immediately before employment in an NSPS position.
§ 9901.353	<i>Setting pay upon reassignment.</i> Revises section (formerly § 9901.352) providing specific rules to be applied in determining an increase or decrease under a reassignment action.
§ 9901.353(a)	<i>General rules governing reassignment increases.</i> Makes minor changes in terminology to use the term “base salary”. Identifies factors to be used in making decision to grant a reassignment increase. Provides that an employee who is reassigned through reduction-in-force procedures will not incur a reduction in base salary and is not eligible for an increase in base salary, except to place the base salary at the minimum rate of the new pay band.
§ 9901.353(b)	<i>5 percent increase upon reassignment.</i> Provides for an employee’s base salary to be increased by up to 5 percent and provides for procedures in setting pay upon a reassignment. The authorized management official may decrease an employee’s base salary by any amount determined prior to the reassignment and with the employee’s agreement, as long as the employee’s base salary does not drop below the minimum of the assigned pay band. Provides for a higher-level approval of any increase or decrease upon a reassignment. Clarifies that an employee may receive only a total of a 5 percent cumulative increase to base salary as a result of employee-initiated action in any 12-month period, unless an exception is approved by a higher-level official.
§ 9901.353(c)	<i>Adjusted salary used for an employee-initiated reassignment.</i> Provides for use of adjusted salary in the pay setting of an employee on a voluntary reassignment. When an employee is voluntarily reassigned from a position with a targeted local market supplement or from a non-NSPS position (e.g., GS, Federal Wage System, Non-appropriated Fund), the authorized management official will set pay considering the employee’s adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians’ comparability allowance payable for the position held prior to the reassignment. If the NSPS adjusted salary is increased beyond the amount of the employee’s current adjusted salary plus any physicians’ comparability allowance, the percentage of the increase is counted toward the 12-month limitation. When an employee covered by a targeted local market supplement is changed to a new location where a different local market supplement and/or pay schedules apply, the employee’s current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b).
§ 9901.353(d)	<i>Management-directed reassignment.</i> Provides for the adjusted salary to be used in the pay setting of an employee on a management-directed reassignment. There are no limits to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation.
§ 9901.353(e)	<i>Adjusted salary used for a management-directed reassignment.</i> Provides for use of the adjusted salary in the pay setting of an employee on a management-directed reassignment. When an employee is reassigned by management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., GS, Federal Wage System, Nonappropriated Fund), the authorized management official will set pay considering the employee’s adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians’ comparability allowance payable for the position held prior to the reassignment. If the NSPS adjusted salary is increased beyond the amount of the employee’s current adjusted salary plus any physicians’ comparability allowance, the percentage of the increase is counted toward the 12-month limitation. When an employee covered by a targeted local market supplement is changed to a new location where a different local market supplement and/or pay schedules apply, the employee’s current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b).
§ 9901.353(f)	<i>Mandatory reduction in pay on reassignment.</i> Provides for a mandatory reduction of at least 5 percent and up to 10 percent to an employee’s base salary when an employee is involuntarily reduced in pay via reassignment based on unacceptable performance and/or conduct. This reduction may not cause an employee’s base salary to fall below the minimum rate of the employee’s assigned pay band. An employee’s base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.
§ 9901.353(g)	<i>Expiration or termination of temporary reassignment.</i> Provides that any increase received while on temporary reassignment will be reversed upon return to the employee’s prior position. The employee’s pay will then be reconstructed to credit the employee with increases he/she would have received if not for the temporary reassignment.
§ 9901.353(h)	<i>Reassigned to an NSPS supervisory position.</i> Provides that any increase received while on reassignment to a supervisory position will be reversed upon return to the employee’s prior position due to failure to complete a supervisory probationary period. The employee’s pay will then be reconstructed to credit the employee with increases he/she would have received if not for the reassignment to the supervisory position.
§ 9901.354	<i>Promotion.</i> Revises section (formerly § 9901.353) providing specific rules to be applied in determining an increase under a promotion action.
§ 9901.354(a)	<i>Setting pay upon promotion.</i> Provides for an employee’s base salary to be increased from 6 percent not to exceed 12 percent and provides for procedures in setting pay upon a promotion. Revises section to provide for a higher-level approval for any increase above 12 percent. Incorporates the term “base salary”.
§ 9901.354(b)	<i>Criteria used for a promotion.</i> Provides specific criteria used in determining an increase under a promotion action.
§ 9901.354(c)(1)	<i>Temporary promotion made permanent.</i> Provides that an employee’s base salary will remain unchanged when a temporary promotion is made permanent, and that no additional increase will be provided.
§ 9901.354(c)(2)	<i>Expiration or termination of temporary promotion.</i> Provides that any increase received while on temporary promotion will be reversed upon return to the employee’s prior position. The employee’s pay will then be reconstructed to credit the employee with increases he/she would have received if not for the temporary promotion.
§ 9901.354(d)(1)	<i>Promotion from pay retention.</i> Addresses how pay is set for an employee on retained pay who is repromoted to the pay band from which reduced (or comparable band).
§ 9901.354(d)(2)	<i>Promotion calculation for pay retention.</i> Addresses how an employee’s retained base salary will be used in calculating the promotion increase.

Citation	Description of proposed change
§ 9901.355	<i>Setting pay upon reduction in band.</i> Revises section (formerly § 9901.354) providing specific rules to be applied in determining an increase or decrease for setting pay upon reduction in band.
§ 9901.355(a)	<i>General.</i> Provides for an employee's base salary to be increased or decreased, and provides procedures in setting pay upon a reduction in band.
§ 9901.355(b)	<i>Pay reduction.</i> Provides authority to reduce an employee's base salary at least 5 percent and up to 10 percent on a reduction in band based on unacceptable performance and/or conduct. This reduction may not cause an employee's base salary to fall below the minimum rate of the employee's assigned pay band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.
§ 9901.355(c)	<i>Pay increase.</i> Provides for an employee's base salary to be increased by up to 5 percent, consistent with the reassignment increase procedures. An employee who is reduced in band through reduction-in-force procedures or by placement via the Priority Placement Program or Reemployment Priority List is not eligible for an increase in base salary, except to place the base salary at the minimum rate of the new pay band. Provides specific criteria used in determining an increase for setting pay upon reduction in band.
§ 9901.355(d)	<i>Termination of temporary promotion.</i> Provides that this section does not apply to a reduction in band in connection with the termination of a temporary promotion; instead, the rules in § 9901.354(c)(2) apply.
§ 9901.355(e)	<i>Probationary period.</i> Provides that any increase received while on promotion to a supervisory position will be reversed upon return to the employee's prior position due to failure to complete a supervisory probationary period. The employee's pay will then be reconstructed to credit the employee with increases he/she would have received if not for the promotion to the supervisory position.
§ 9901.356	<i>Pay retention.</i> Revises section (formerly § 9901.355) providing specific rules to be applied in determining an employee's entitlement to pay retention and the factors in terminating pay retention. Incorporates the term "base salary".
§ 9901.356(c)	<i>Period of pay retention.</i> Clarifies that pay retention will be granted for a period of 104 weeks.
§ 9901.356(d)	<i>Situations triggering eligibility.</i> Identifies specific situations when an employee under NSPS will be granted pay retention.
§ 9901.356(e)	<i>Optional pay retention.</i> Provides for a higher-level approval of any additional situations to grant pay retention.
§ 9901.356(f)	<i>Terminating conditions.</i> Identifies specific situations when pay retention will terminate under NSPS.
§ 9901.356(g)	<i>Pay setting upon termination.</i> Provides that an employee's pay will be set at the maximum rate of the pay band upon expiration of the 104-week period.
§ 9901.356(h)	<i>Pay adjustments after termination.</i> Provides that an employee is eligible for rate range adjustments and performance payouts upon termination of pay retention.
§ 9901.356(i)	<i>Situations when pay retention is not applicable.</i> Identifies specific circumstances when pay retention does not apply.
§ 9901.356(j)	<i>Performance payouts.</i> Provides that an employee on pay retention will receive any performance payouts in the form of bonuses, consistent with § 9901.342(g)(8).
§ 9901.356(k)	<i>Pay adjustments during pay retention.</i> Provides that employees on pay retention are eligible for general salary increases under § 9901.323(a)(1) and are eligible for local market supplement adjustments.
§ 9901.356(l)	<i>Extension of 104-week time limit.</i> Adds a new paragraph that allows for the 104-week time limit on pay retention under NSPS to be extended by the length of time that an employee is subject to a contingency operation or emergency.
§ 9901.356(m)	<i>Grandfather provision.</i> Provides that an employee with a preexisting entitlement to pay retention under 5 CFR part 536 before becoming covered by NSPS, or who obtains the entitlement to pay retention upon becoming covered by NSPS, is entitled to a retained rate without regard to the 104-week limit in § 9901.356(c).
§ 9901.361(a)	<i>Introduction.</i> Clarifies paragraphs providing waiver or modification of premium pay provisions of 5 U.S.C. chapter 55, subchapter V, and adds reference to §§ 9901.363 and 9901.364, which establish new types of premium payments in addition to those found in 5 U.S.C. chapter 55, subchapter V.
§ 9901.361(b)	<i>Provisions not waived or modified.</i> Deletes existing paragraph (b) and replaces it with separate sections, new §§ 9901.362 through 9901.364. Adds new paragraph (b) referencing 5 U.S.C. 5544 (dealing with premium pay for prevailing rate employees) and 5 U.S.C. 5545b (dealing with firefighter pay) to clarify that those premium pay provisions are not waived or modified.
§ 9901.361(c)	<i>Applicability of Fair Labor Standards Act.</i> Deletes existing paragraph (c) and replaces it with separate sections, new §§ 9901.362 through 9901.364. Adds new paragraph (c) to clarify that these regulations do not affect the applicability of FLSA overtime pay provisions.
§ 9901.361(d)	<i>Applying regulations in 5 CFR part 550, subpart M.</i> Clarifies that the reference to "locality pay" in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Clarifies that firefighters compensated under subpart M are eligible for compensatory time off for travel or for religious purposes and foreign language proficiency pay.
§ 9901.361(e)	<i>Physicians and dentists.</i> Provides that physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances.
§ 9901.361(f)	<i>Senior Executive Service.</i> Provides that members of the Senior Executive Service (SES) are ineligible for premium pay under NSPS, except for compensatory time off for religious observances. This is consistent with the treatment of SES members under the standard title 5 premium pay provisions.
§ 9901.362	<i>Modification of standard provisions.</i> Adds a new section that identifies the modifications to the title 5 premium pay provisions and related regulations and any specific additional requirements.
§ 9901.362(a)	<i>Premium pay limitations.</i> Establishes the rules governing the premium pay limitations. The premium pay caps are consistent with title 5. In special circumstances, the Secretary may establish a higher annual premium pay cap equal to the Vice President's annual salary for specified categories of employees and situations on a time-limited basis.

Citation	Description of proposed change
§ 9901.362(b)	<i>Overtime pay.</i> Identifies requirements and modifications pertaining to the overtime pay (including compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations. The proposed rule modifies the overtime hourly rate cap that applies to FLSA-exempt employees and the method for crediting overtime hours. In addition, time in a travel status does not constitute hours of work for overtime pay purposes unless actual work is performed; however, qualifying travel time not treated as hours of work will generate compensatory time off for travel hours under § 9901.362(j). Finally, any FLSA-exempt employee may be required to receive compensatory time off in lieu of overtime pay for an equal amount of overtime work.
§ 9901.362(c)	<i>Night pay.</i> Identifies the modifications to the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations. An employee who performs overtime work at night is entitled to night pay regardless of whether the overtime work is scheduled before or after the administrative workweek begins. Night pay is not payable during paid absences, except for certain types listed in paragraph (c)(2).
§ 9901.362(d)	<i>Sunday pay.</i> Identifies the modifications to the Sunday pay provisions in 5 U.S.C. 5546 and related regulations. Work for which Sunday pay is payable is limited to applicable hours of work that are actually performed on a Sunday. In other words, Sunday pay continues to apply to nonovertime hours of work performed by full-time employees, not to exceed 8 hours for any daily tour of duty (unless the employee is on a compressed schedule); however, unlike the standard title 5 provision, non-Sunday hours within a daily tour of duty that includes Sunday hours do not count as Sunday work.
§ 9901.362(e)	<i>Pay for holiday work.</i> Identifies the modifications to the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations. An employee receives pay that is twice the employee's adjusted salary hourly rate for each hour worked on a holiday, including overtime hours. If hours worked on a holiday are overtime hours, the overtime pay is contained within the double-time holiday pay rate.
§ 9901.362(f)	<i>Standby duty pay.</i> Identifies requirements and modifications for the standby duty provisions in 5 U.S.C. 5545(c)(1) and related regulations. Limits coverage to firefighters ineligible for coverage under subpart M of part 550 and to emergency medical technicians not involved in fire protection activities unless the Secretary extends coverage to other occupations. Modifies the standby duty pay formula by using an employee's adjusted salary to compute standby duty pay. Standby pay attributable to the rate beyond GS-10, step 1, is not creditable for retirement purposes. Also bars receipt of any other premium pay for an employee receiving standby duty pay.
§ 9901.362(g)	<i>Administratively uncontrollable overtime pay.</i> Provides that the administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and is not applicable to NSPS employees.
§ 9901.362(h)	<i>Law enforcement availability pay.</i> Provides that the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations apply.
§ 9901.362(i)	<i>Pay for duty involving physical hardship or hazard.</i> Identifies requirements and modifications in connection with the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations. Permits the Secretary to establish new categories of hazardous duty pay (HDP), subject to OPM approval as required by § 9901.106(c). In determining eligibility for HDP, the occupational safety and health standards (OSHA) consistent with the permissible exposure limit (PEL) are generally used. An employee is eligible to receive HDP when he or she performs an assigned duty (as listed in Appendix A) and preventive measures have not reduced the element of hazard below the PEL. However, HDP may not be paid to employees in occupations or jobs in which unusual physical risk is inherent.
§ 9901.362(j)	<i>Compensatory time off for travel.</i> Identifies the requirements and modifications in connection with the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations. Employees who are required to travel away from their official worksite when such time is not otherwise compensable are eligible for compensatory time off. If an employee is required to travel on a nonworkday, commuting time more than 1 hour beyond the employee's normal commuting time is creditable travel time. Also provides the procedures for crediting compensatory time off for travel and the treatment of unused compensatory time off when DoD employees move between NSPS and non-NSPS positions.
§ 9901.362(k)	<i>Compensatory time off for religious observances.</i> Identifies requirements and modifications in connection with the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations. Prohibits payment for any unused religious compensatory time off under any circumstances.
§ 9901.362(l)	<i>Air traffic controller differential.</i> Provides that the air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for paragraphs (a)(1) and (d) of that section. Authorizes the payment of a 5-percent differential to eligible air traffic controllers. In addition, the Secretary may extend a 10-percent differential to air traffic controllers who perform on-the-job training under certain circumstances.
§ 9901.363(a)	<i>Coverage under premium pay provisions for health care personnel.</i> Adds a new section that provides premium payments for eligible DoD "health care personnel" (as defined in this paragraph) covered under NSPS. These payments include on-call premium pay, night pay, and pay for weekend duty, consistent with parallel provisions that apply to Department of Veterans Affairs health care personnel under title 38, United States Code.
§ 9901.363(b)	<i>On-call premium pay.</i> Allows heads of DoD Components to authorize on-call premium pay for officially scheduled "on-call" time when health care personnel are not otherwise compensated for that on-call time. An employee officially scheduled to be on-call is paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status. The proposed rule provides the pay administration rules for on-call pay.
§ 9901.363(c)	<i>Night pay for health care personnel.</i> Authorizes night pay for eligible employees who are scheduled to work between 6 p.m. and 6 a.m. An employee is paid 10 percent of his or her adjusted salary hourly rate for each hour worked between 6 p.m. and 6 a.m. This rate is applied to the entire tour if the employee works 4 or more hours between 6 p.m. and 6 a.m. The proposed rule provides the pay administration rules for night pay.
§ 9901.363(d)	<i>Pay for weekend duty for health care personnel.</i> Authorizes pay for weekend duty for eligible employees who are scheduled to work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday. An employee will be paid 25 percent of his or her adjusted salary hourly rate for each hour of work during that period. The proposed rule provides the pay administration rules for pay for weekend duty.

Citation	Description of proposed change
§ 9901.364	<i>Foreign language proficiency pay.</i> Adds a new section to provide that NSPS employees may be paid foreign language proficiency pay (FLPP) if certified as proficient in foreign languages identified as necessary for national security interests and not in receipt of FLPP under 10 U.S.C. 1596 and 10 U.S.C. 1596a. FLPP is a competency-based premium pay which the Department can pay an employee to maintain his or her skills in a critical language regardless of job. The proposed rule specifies the conditions for payment.
§ 9901.371	<i>Conversion into NSPS pay system.</i> Consolidates all provisions related to conversion into the NSPS pay system, including provisions found in §§ 9901.371 and 9901.373 in the current regulations. Adds additional detailed rules as noted by paragraph below.
§ 9901.371(a)	<i>Introduction.</i> Provides cross reference to § 9901.231, which contains information on determining an employee's NSPS pay band upon conversion into NSPS. Corrects cross reference to reflect changes made by these proposed regulations.
§ 9901.371(b)	<i>Implementing issuances.</i> Addresses the Secretary's authority to issue implementing issuances prescribing policies and procedures for conversions into NSPS.
§ 9901.371(c)	<i>Bar on pay reduction.</i> Incorporates material previously found at § 9901.373(a). Clarifies that simultaneous actions must be processed before applying this rule, consistent with § 9901.371(e).
§ 9901.371(d)	<i>Rate comparison.</i> Incorporates and clarifies material previously found at § 9901.373(b).
§ 9901.371(e)	<i>Simultaneous actions.</i> Incorporates material previously found at § 9901.373(c).
§ 9901.371(f)	<i>Temporary promotion prior to conversion.</i> Incorporates material previously found at § 9901.373(d), including the requirement to reconstruct pay in the permanent position of record prior to conversion.
§ 9901.371(g)	<i>Grade retention prior to conversion.</i> Addresses how to treat employees who were on grade retention prior to conversion.
§ 9901.371(h)	<i>Pay retention prior to conversion.</i> Addresses how to treat employees who were on pay retention prior to conversion.
§ 9901.371(i)	<i>Conversion adjustments.</i> Provides that the only base salary adjustments that may be made in conjunction with conversion are those listed in paragraphs (j) through (m).
§ 9901.371(j)	<i>Within-grade increase (WGI) adjustment.</i> Provides for a prorated within-grade adjustment for eligible GS employees converting into NSPS to account for the time since their last equivalent pay increase.
§ 9901.371(k)	<i>Special increase for employees on temporary promotion prior to conversion.</i> Authorizes management to preserve an employee's rate of basic pay held on a temporary promotion immediately prior to conversion of that temporary promotion position into NSPS if the employee is placed back into that temporary position after its conversion.
§ 9901.371(l)	<i>Special increases equivalent to a GS promotion increase.</i> Adopts provisions to (1) provide for a one-time base salary increase after conversion for eligible employees that would permit an increase in base salary equivalent to what they would have received in their career ladder position had it not been converted into NSPS, and (2) provide for a base salary increase when an employee has been selected for a position that converts into NSPS before the employee is actually placed in the position that would equal the increase the employee would have received if placed into that position prior to its conversion (e.g., GS-12 employee selected for a GS-13 position that would be a promotion before conversion but a reassignment after conversion).
§ 9901.371(m)	<i>Adjustment for physicians and dentists.</i> Authorizes special conversion adjustment for a GS physician or dentist who was regularly receiving physicians' comparability allowance or premium pay prior to conversion so that his/her base salary at the time of conversion may be increased by the Component to account for the loss of the allowance and premium pay under NSPS.
§ 9901.372	<i>Conversion or movement out of NSPS pay system.</i> Adds a new section that addresses pay setting when employees convert or move out of the NSPS pay system and are placed in another Federal pay system (e.g., the General Schedule). Additional information on these rules is provided by paragraph below. (Existing § 9901.372 in the current regulations is deleted, since it dealt with the establishment of the initial NSPS pay ranges, which has already occurred.)
§ 9901.372(a)	<i>General.</i> Introduces the new § 9901.372, which now addresses the treatment of an employee who is converted out of NSPS when the Secretary makes a decision to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit or who moves from a position covered by NSPS to a position in a different pay system. Provides definitions of "conversion" and "movement" and related terms.
§ 9901.372(b)	<i>Classification of covered position.</i> Provides for a requirement that prior to converting an employee and his/her position out of NSPS, the position must be classified consistent with appropriate classification guidance and/or other appropriate criteria applicable to the gaining system (usually, the General Schedule). (Such a classification determination is not needed if an employee is moving out of the NSPS by some action other than conversion.)
§ 9901.372(c)	<i>Determining pay under the new system.</i> Establishes a requirement that the pay setting rules of the gaining system be applied when an employee converts or moves out of NSPS. For the purpose of applying those rules, the employee's final pay under NSPS is based on the employee's NSPS permanent position as of the day immediately before the date of conversion or movement out of NSPS. Also, provides that NSPS rules do not apply to any personnel or pay action taking effect on the date of conversion or movement.
§ 9901.372(d)	<i>Virtual GS grade and rate.</i> Prescribes rules for establishing a virtual GS grade and rate of pay to be used for the purpose of applying GS pay administration rules upon conversion or movement from NSPS.
§ 9901.372(e)	<i>GS within-grade increases.</i> States rule that NSPS service is creditable for GS within-grade increase purposes, as required by regulations at 5 CFR part 531, subpart D.
§ 9901.372(f)	<i>Comparison of rates of basic pay.</i> Provides that any reallocation of an employee's adjusted pay between basic pay and any locality payment, local market supplement, special rate supplement, or equivalent supplement in conjunction with conversion or movement out of NSPS does not have adverse action consequences, since such supplements are considered basic pay under 5 U.S.C. chapter 75 at the point of conversion or movement.

Performance Management—Subpart D

Subpart D regulates performance management for NSPS employees. The regulations have been revised to (1) establish in regulation the performance management system required by 5 U.S.C. 9902, as amended by the National Defense Authorization Act for Fiscal Year 2008, (2) provide for uniform and consistent application of

the System within the Department of Defense, and (3) incorporate planned changes. Key changes to this part include (1) revising or adding definitions for clarity or to address concepts added to the regulation (such as appraisal period, minimum period, pay pool manager, pay pool panel, and performance review authority), (2) adding new sections or paragraphs to existing or revised sections to ensure

uniform and consistent application of the System (such as minimum period, employees on time-limited appointments, and appraisal periods), and (3) rewriting some sections and paragraphs for regulatory format and clarity.

The following Table of Changes lists, by specific regulatory section, a brief description of each significant change.

Citation	Description of proposed change
§ 9901.401(b)	<i>Performance Management System.</i> Amends paragraph (b) to clarify the system is established in the regulations and its implementation and operation will adhere to the statutory requirements listed in the paragraph.
§ 9901.402(a)	<i>Coverage.</i> Amends paragraph (a) to refer to all of § 9901.102.
§ 9901.402(c)	<i>Applicability.</i> Amends paragraph (c) to allow application of this subpart under provisions specified in § 9901.408 to employees who do not meet the minimum performance period described in § 9901.407.
§ 9901.404	<i>Definitions.</i> Revises current definition for minimum period to conform to new § 9901.407. Adds cross-reference to new definitions in § 9901.103 for <i>appraisal period</i> , <i>Pay Pool Manager</i> , <i>Pay Pool Panel</i> , and <i>Performance Review Authority</i> .
§ 9901.405(a)	<i>System requirements.</i> Amends the section to clarify that these regulations establish the performance management system required by 5 U.S.C. 9902 and the Secretary may further define the System through implementing issuances.
§ 9901.405(b)(1)	<i>System requirements—coverage.</i> Deletes requirement for an NSPS performance management system to “specify the employees covered by the system(s)” since these regulations establish the system. In accordance with § 9901.102(b)(2), coverage under subpart D is a mandatory requirement for all employees covered by any subpart of this regulation. Subsequent paragraphs under § 9901.405 are redesignated accordingly.
§ 9901.405(b)(3)	<i>System requirements—minimum period.</i> Moves current paragraph (b)(3) on the minimum period and places it in a separate section, new § 9901.407, and redesignates the remaining paragraphs accordingly.
§ 9901.405(b)(5)	<i>System requirements—rating levels.</i> Adds a new paragraph specifying the rating levels that apply to the NSPS performance management system established under this subpart.
§ 9901.405(c)	<i>System requirements—supervisory responsibilities.</i> Rewords paragraph and its paragraphs for regulatory format and clarity.
§ 9901.406(b)	<i>Performance expectations—communication.</i> Restructures for regulatory format and clarity and redesignates the paragraph accordingly.
§ 9901.406(h)	<i>Performance expectations—approval.</i> Adds new paragraph requiring higher-level review of performance expectations.
§ 9901.406(i)	<i>Performance expectations—plan approval.</i> Adds new paragraph specifying an NSPS performance plan is an approved plan when given to the employee in writing.
§ 9901.407	<i>Minimum period.</i> Adds a new section addressing the minimum appraisal period and eligibility for appraisal. Subsequent sections are renumbered accordingly.
§ 9901.408	<i>Employees on time-limited appointments.</i> Adds a new section permitting the evaluation of employees on time-limited appointments not expected to exceed 90 days. Subsequent sections are renumbered accordingly.
§ 9901.409	<i>Monitoring and developing performance.</i> Redesignates and retitles current § 9901.407 and combines it with developing performance. Additional revisions are noted by paragraph below.
§ 9901.409(a)	<i>Monitoring and developing performance—interim review.</i> Amends paragraph (a) to require at least one documented interim performance review while specifying that periods of performance of less than 180 days do not require a documented interim review.
§ 9901.409(b)	<i>Monitoring and developing performance—development.</i> Adds a new paragraph emphasizing the value of developing employee performance.
§ 9901.410	<i>Addressing performance that does not meet expectations.</i> Redesignates current § 9901.408. Revisions are noted by paragraph below.
§ 9901.410(a)(1)	<i>Addressing performance that does not meet expectations—unacceptable performance.</i> Adds a new paragraph requiring the identification of specific performance deficiencies that employees must improve.
§ 9901.410(b)	<i>Addressing performance that does not meet expectations—taking action.</i> Revises the paragraph to specify adverse actions will be taken under 5 U.S.C. chapter 75 or other applicable procedures, such as those for National Guard Technicians.
§ 9901.411	<i>Appraisal periods.</i> Adds a new section specifying the dates associated with the annual appraisal period and rating of record.
§ 9901.412	<i>Rating and rewarding performance.</i> Relocates provisions dealing with rating and rewarding performance from § 9901.409 in the current regulations to a new § 9901.412. Additional revisions are noted by paragraph below.
§ 9901.412(a)	<i>Rating and rewarding performance—forced distribution.</i> Adds a new paragraph prohibiting the forced distribution of ratings.
§ 9901.412(b)	<i>Rating and rewarding performance—additional rating of record.</i> Restructures the paragraph for regulatory format and clarity, amends it to specify that an additional rating of record to reflect sustained improved performance may only be used following an unacceptable rating of record, and specifies the effective date of such a rating.
§ 9901.412(c)	<i>Rating and rewarding performance—assessments.</i> Moves language regarding when a rating of record is final from current § 9901.409(c) to proposed § 9901.412(e).
§ 9901.412(d)	<i>Rating and rewarding performance—impact of misconduct.</i> Adds a new paragraph clarifying that misconduct may impact the rating of record.
§ 9901.412(e)	<i>Rating and rewarding performance—final rating.</i> Adds new language to specify that the Pay Pool Manager is the final approval authority for ratings of record and incorporates the requirement from current § 9901.409(c) regarding when a rating of record is final.

Citation	Description of proposed change
§ 9901.412(f)	<i>Rating and rewarding performance—communication.</i> Moves requirement regarding communication of ratings from current § 9901.409(d) to proposed § 9901.412(f) and otherwise is unchanged.
§ 9901.412(g)	<i>Rating and rewarding performance—approved absence from work.</i> Moves requirement regarding approved absence from work from current § 9901.409(f) to proposed § 9901.412(g) and otherwise is unchanged.
§ 9901.412(h)	<i>Rating and rewarding performance—ratings of record.</i> Restructures for regulatory format and clarity and moves the last sentence from current § 9901.409(b)(1)–(3) into proposed paragraph (h)(3).
§ 9901.412(i)	<i>Rating and rewarding performance—job change.</i> Adds a new paragraph addressing the special situation of employees who change jobs after the end of the appraisal cycle and before the payout date.
§ 9901.412(j)	<i>Rating and rewarding performance—additional appraisal.</i> Moves current paragraph (i) to proposed paragraph (j) and adds a reference to implementing issuances.
§ 9901.413	<i>Reconsideration.</i> Relocates provisions dealing with reconsideration of ratings of record from § 9901.409 in the current regulations to a new section § 9901.413. Additional revisions are noted by paragraph below.
§ 9901.413(a)	<i>Reconsideration—nonbargaining unit employees.</i> Revises to specify the roles and responsibilities of the deciding officials and to expand topics of reconsideration to include a job objective rating.
§ 9901.413(b)	<i>Reconsideration—bargaining unit employees.</i> Reforms language previously in paragraph § 9901.409(h) to comply with 5 U.S.C. chapter 71, expands topics to include a job objective rating, and restructures and revises for regulatory format and clarity.
§ 9901.413(c)	<i>Reconsideration—revised ratings.</i> Adds a new paragraph addressing revised ratings that result from reconsideration.

Next Steps

The National Defense Authorization Act for Fiscal Year 2008 requires that this rule be considered a major rule for the purpose of section 801 of title 5, United States Code. As such, before it can take effect, the Department will submit to each House of the Congress and to the Comptroller General a report containing the rule, a general statement relating to the rule, and the proposed effective date of the rule. The rule may not be effective until the date occurring 60 days after the later of (1) Congressional receipt of the report, or (2) the date the rule is published in the **Federal Register**. Congress has the opportunity to delay implementation of the rule based on the procedures set forth in 5 U.S.C. 801–808.

DoD intends to continue implementing the new NSPS HR system in phases or spirals. The Act provides that not more than 100,000 employees may be added to the System in any calendar year. As has been the case from the beginning, NSPS continues to be an event-driven system, and no decisions have been made at this time regarding when or whether additional groups or organizations will be converted to NSPS. Such decisions will be based on the best interests of the Department.

The Act also requires the Comptroller General to conduct annual reviews in calendar years 2008, 2009, and 2010. The reviews will address—

(1) Employee satisfaction with the National Security Personnel System, and

(2) The extent to which the Department of Defense has effectively implemented accountability mechanisms and internal safeguards. DoD will fully support the Comptroller General in any review of the System.

E.O. 12866, Regulatory Review

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in the National Security Personnel System. DoD and OPM have analyzed the expected costs and benefits of the revised HR system, and that analysis is presented below.

Among the NSPS requirements is to maintain a system that is competitive, cost effective, and fiscally sound, while also being flexible, credible, and trusted. NSPS will allow DoD to move towards market-sensitive pay, to continue pay increases based on performance, and to have the flexibility to offer competitive salaries. While these flexibilities will improve DoD's ability to attract and retain a high-performing workforce, actual payroll costs under this System are constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system.

The continuing implementation of NSPS will result in some additional program implementation costs. This includes delivering training specifically for NSPS, conducting outreach to employees and other parties, and improving automated systems associated with NSPS performance management.

As has been the practice with implementing NSPS and other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This includes a within-grade increase (WGI) “buyout,” in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that

would have been incurred under the current system at some point. However, under NSPS, WGIs no longer exist. Once covered employees are under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI “buyout” is not treated as a “new” cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system. The portion of the WGI buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the cost benefit analysis for regulatory review purposes.

DoD estimates the overall costs associated with continuing to implement NSPS will be approximately \$143 million from Fiscal Years 2009 through 2011. These estimates are based upon past experience, guidance from the Comptroller General, and ensuring that implementation costs are determined in the same way across the services and Defense Agencies and captured in official accounting systems.

The primary benefit to the public of NSPS resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. Taken as a whole, the changes included in these proposed regulations will improve upon

the original NSPS regulations and result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

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

Regulatory Flexibility Act

DoD and OPM have determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

E.O. 12988, Civil Justice Reform

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

E.O. 13132, Federalism

DoD and OPM have determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

List of Subjects in 5 CFR Part 9901

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

Linda M. Springer,

Director, Department of Defense.

Gordon England,

Deputy Secretary of Defense.

Accordingly, under the authority of section 9902 of title 5, United States

Code, the Department of Defense and the Office of Personnel Management are proposing to revise part 9901 of title 5, Code of Federal Regulations to read as follows:

PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)

Subpart A—General Provisions

Sec.

- 9901.101 Purpose.
- 9901.102 Eligibility and coverage.
- 9901.103 Definitions.
- 9901.104 Scope of authority.
- 9901.105 OPM coordination and approval.
- 9901.106 Relationship to other provisions.
- 9901.107 Program evaluation.

Subpart B—Classification

General

- 9901.201 Purpose.
- 9901.202 Coverage.
- 9901.203 Waivers.
- 9901.204 Definitions.

Classification Structure

- 9901.211 Career groups.
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Classification Process

- 9901.221 Classification requirements.
- 9901.222 Review of classification decisions.
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- 9901.224 Appeal to OPM for review of classification decisions.

Transitional Provisions

- 9901.231 Conversion of positions and employees to NSPS classification system.

Subpart C—Pay and Pay Administration

General

- 9901.301 Purpose.
- 9901.302 Coverage.
- 9901.303 Waivers.
- 9901.304 Definitions.
- 9901.305 Rate of pay.

Overview of Pay System

- 9901.311 Major features.
- 9901.312 Maximum rates of base salary and adjusted salary.
- 9901.313 Aggregate compensation limitations.
- 9901.314 National security compensation comparability.

Rate Ranges and General Salary Increases

- 9901.321 Structure.
- 9901.322 Setting and adjusting rate ranges.
- 9901.323 Eligibility for general salary increase.

Local Market Supplements

- 9901.331 General.
- 9901.332 Standard and targeted local market supplements.
- 9901.333 Setting and adjusting local market supplements.
- 9901.334 Eligibility for pay increase associated with a supplement adjustment.

Performance-based Pay

- 9901.341 General.
- 9901.342 Performance payouts.
- 9901.343 Pay reduction based on unacceptable performance and/or conduct.
- 9901.344 Other performance payments.
- 9901.345 Accelerated Compensation for Developmental Positions (ACDP).

Pay Administration

- 9901.351 General.
- 9901.352 Setting an employee's starting pay.
- 9901.353 Setting pay upon reassignment.
- 9901.354 Setting pay upon promotion.
- 9901.355 Setting pay upon reduction in band.
- 9901.356 Pay retention.

Premium Pay

- 9901.361 General provisions.
- 9901.362 Modification of standard provisions.
- 9901.363 Premium pay for health care personnel.
- 9901.364 Foreign language proficiency pay.

Conversion Provisions

- 9901.371 Conversion into NSPS pay system.
- 9901.372 Conversion or movement out of NSPS pay system.

Subpart D—Performance Management

- 9901.401 Purpose.
- 9901.402 Coverage.
- 9901.403 Waivers.
- 9901.404 Definitions.
- 9901.405 Performance management system requirements.
- 9901.406 Setting and communicating performance expectations.
- 9901.407 Minimum period of performance.
- 9901.408 Employees on time limited appointments.
- 9901.409 Monitoring and developing performance.
- 9901.410 Addressing performance that does not meet expectations.
- 9901.411 Appraisal period.
- 9901.412 Rating and rewarding performance.
- 9901.413 Reconsideration of ratings.

Authority: 5 U.S.C. 9902

Subpart A—General Provisions

§ 9901.101 Purpose.

(a) This part contains regulations governing the National Security Personnel System (NSPS) within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM). The Secretary may establish implementing issuances to supplement any matter covered by these regulations.

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law; support the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS, which these regulations are designed to facilitate, are as follows: *High-Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded and *Schedule*—NSPS will be operational and demonstrate success prior to November 2009.

§ 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, civilian employees of DoD are eligible for coverage under one or more of subparts B through D of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may decide to apply subparts B through D to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employees may be covered by subparts B or C of this part unless that category is also covered by subpart D of this part. DoD will advise OPM in advance regarding the extension of NSPS coverage to specific categories of DoD employees under this paragraph.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of

one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, and performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, and performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may decide to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit, subject to § 9901.372 and any related implementing issuances. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to paragraphs (f)(2) and (3) of this section, the Secretary may, at his or her sole and exclusive discretion, decide to apply one or more subparts of this part as of a specified effective date to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code.

(2) Paragraph (f)(1) of this section applies only if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Secretary.

(3) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from

their current pay system. The conversion of such employees into NSPS will be governed by the rules in § 9901.371, as established in any implementing issuances prescribed by the Secretary under § 9901.371(b).

§ 9901.103 Definitions.

In this part:

Appraisal period means the period of time for reviewing employee performance (as described in § 9901.411).

Band means *pay band*.

Basic pay means an employee's pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.331(d) only, basic pay includes any local market supplement. In subpart C, when basic pay is exclusive of any additional pay, the term "base salary" is used, and when basic pay includes a local market supplement, the term "adjusted salary" is used.

Career group means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

Comparable pay band or *comparable level of work* means pay bands with the equivalent level of work, based on the NSPS classification structure, within and across varying pay schedules and career groups, regardless of the specific earning potential of the bands. When moving from a non-NSPS position to NSPS, a comparable level of work means a grade or level which is determined to be at an equivalent level of work as the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

Component means the Office of the Secretary of Defense (OSD), the Military Departments, Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense.

Contribution means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

Day means a calendar day, unless expressly provided otherwise under applicable law or regulations.

Department or DoD means the Department of Defense.

Director means the Director of the Office of Personnel Management.

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

General Schedule or GS means the General Schedule classification and pay system established under Chapter 51 and Subchapter III of Chapter 53 of Title 5, U.S. Code.

Higher pay band or higher level of work means a pay band designated to be a higher level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, a higher level of work means a grade or level which is determined to be at a higher level of work than the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Implementing issuance(s) means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries and Under Secretaries of the Military Departments to establish or carry out a policy or procedure implementing this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary.

Lower pay band or lower level of work means a pay band designated to be a lower level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, a lower level of work means a grade or level which is determined to be at a lower level of work than the NSPS position to be filled, based on application of the NSPS classification structure as described in implementing issuances.

Military Department means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

National Security Personnel System (NSPS) means the human resources management system established under 5 U.S.C. 9902(a) and these regulations.

Occupational series means a group or family of positions performing similar types of work. Occupational series are

assigned a number for workforce information purposes (e.g., 0110, Economist Series; 1410, Librarian Series).

OPM means the Office of Personnel Management.

Pay band or band means a work level and associated pay range within a pay schedule.

Pay pool means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also refers to the funds designated for performance payouts to employees covered by a pay pool.

Pay Pool Manager means the management official designated to manage the pay pool, resolve discrepancies, ensure consistency, and approve recommendations concerning employee rating of record, share assignment, and payout distribution.

Pay Pool Panel means management officials, including the Pay Pool Manager, of the organizations or functions represented in the pay pool that assist the Pay Pool Manager in the reconciliation of recommended ratings of record, share assignments, and payout distribution.

Pay schedule means a set of related pay bands for a specified category of employees within a career group.

Performance means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

Performance Review Authority means a management official who manages and oversees the operation of one or more pay pools and ensures procedural and funding consistency among pay pools under its authority.

Principal Staff Assistants means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

Promotion means the movement of an employee from one pay band to a higher pay band while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work.

Rating of record means a performance appraisal approved by a Pay Pool Manager—

(1) After completion of an appraisal period covering an employee's

performance of assigned duties against performance expectations over the applicable period; or

(2) As needed following an unacceptable rating to reflect a substantial and sustained change in the employee's performance since the last rating of record.

Reassignment means the movement of an employee, either employee-initiated or management-directed, to a different position or set of duties in the same or a comparable pay band while continuously employed. This includes the movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a comparable level of work.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band on a permanent basis while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work.

Secretary means the Secretary of Defense, consistent with 10 U.S.C. 113.

SES means the Senior Executive Service established under 5 U.S.C. Chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Unacceptable performance means performance of an employee which fails to meet one or more performance expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

§ 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, and pay for certain other employees, except as provided in § 9901.303; and

(d) Chapter 55, Subchapter V, dealing with premium pay, except sections 5544 and 5545b.

§ 9901.105 OPM coordination and approval.

(a) The Secretary will coordinate with or request approval from OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Pre-decisional coordination under paragraph (b) of this section is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of DoD pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. Chapter 11. Approval from OPM is required in certain circumstances, as provided in paragraph (c) of this section.

(b) DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) that significantly differ from Governmentwide standards;

(3) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(4) Establishing alternative or additional classification criteria for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards;

(5) Establishing maximum rates of base salary under § 9901.312(a);

(6) Establishing a higher adjusted salary rate cap for a designated category of positions under § 9901.312(d);

(7) Approving waivers under § 9901.313(a)(3) of the normally applicable aggregate compensation limit;

(8) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a) and 9901.322;

(9) Determining general salary increases under § 9901.323(a)(2); and

(10) Establishing and adjusting targeted local market supplements under §§ 9901.332(c) and 9901.333(b).

(c) The Secretary will request approval from the Director prior to—

(1) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts and service commitments;

(2) Approving waivers of normally applicable premium pay limitations, as authorized under § 9901.362(a)(2);

(3) Determining pay bands for which an FLSA-exempt employee is paid overtime at an hourly rate equal to the employee's adjusted base salary hourly rate, as authorized under §§ 9901.362(b)(6)(i); and

(4) Establishing new hazardous duty pay categories under § 9901.362(i)(3).

(d) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(e) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination or approval and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

§ 9901.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b)(1) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions Under Chapters 43, 51, 53, and 55 (Subchapter V Only), of Title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances.

(2) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (i.e., Chapters 43, 51, 53, and 55 (Subchapter V only) of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through D of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b; and

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754.

(c)(1) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 101–509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(2) Physicians' comparability allowances under 5 U.S.C. 5948 do not apply to employees covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

§ 9901.107 Program evaluation.

The Secretary will evaluate the regulations in this part and their implementation.

Subpart B—Classification

General

§ 9901.201 Purpose.

(a) This subpart establishes a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51, in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(b) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

§ 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.106, and 9901.222(d) (with respect to OPM's authority to act on requests for classification decisions under 5 U.S.C. 5112(b) and review of pay plan under 5 U.S.C. 5103).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS-15, is not waived for the purpose of defining and allocating Senior Executive Service (SES) positions under 5 U.S.C. 3132 and

3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—e.g., 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards), 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions), and 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the SES and employees in SL/ST positions).

§ 9901.204 Definitions.

In this subpart:

Band means *pay band*.

Basic pay has the meaning given that term in § 9901.103.

Career group has the meaning given that term in § 9901.103.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, official title, career group, pay schedule, and pay band for pay and other related purposes.

Competencies has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Official title means the position title prescribed in an NSPS classification standard or by supplemental Component guidance.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Position or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee.

Classification Structure

§ 9901.211 Career groups.

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

§ 9901.212 Pay schedules and pay bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the

type and range of difficulty and responsibility, qualifications or competencies, or other characteristics of the work encompassed by the pay band.

(d) The Secretary will—

- (1) Use qualification standards established or approved by OPM, or establish qualification standards for positions covered by NSPS, in accordance with § 9901.105(b)(2); and
- (2) Designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band.

Classification Process

§ 9901.221 Classification requirements.

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as he or she considers necessary for the purpose of this section.

(d) Except as otherwise provided in this paragraph or required by law, the effective date of a classification action is the date the authorized management official certifies the classification decision (i.e., signs or electronically validates the position description).

(1) A retroactive effective date for a classification action is permitted only if the classification action resulted in a reduction in pay band or adjusted salary and if that action is subsequently reversed on appeal.

(2) In order for a corrective action to be retroactive, the employee must file an initial request for review of the classification action with DoD or OPM not later than 15 calendar days after the effective date of the reduction.

(3) A retroactive date may be established only if the appeal reversal is based on the duties and responsibilities performed at the time of reduction. Retroactive action is mandatory under these circumstances.

(e) A classification action is implemented by a personnel action, which must be taken within four pay

periods following the effective date. If a classification action results in a reduction in an employee's pay band or adjusted salary, the employee must be advised, in writing, of the action and proposed effective date at least 7 days before the personnel action is taken. The written notice will inform the employee of the reason for the reclassification, of the right to appeal the classification decision, and that appeals must be filed within the time limitations in § 9901.223 for entitlement to retroactive action.

§ 9901.222 Review of classification decisions.

(a) An individual employee may request that DoD or OPM review the classification (i.e., pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) Under this section, an employee may not appeal to either DoD or OPM the issues designated as nonappealable to the Office in 5 CFR 511.607 or the accuracy of NSPS pay schedule and pay band classification criteria. The nonappealable issues include—

(1) Classification of a proposed position or one to which the employee is not officially assigned;

(2) Classification of a position to which an employee is detailed or temporarily promoted;

(3) Accuracy of the official position description, including the inclusion or exclusion of a duty (subject to paragraph (c) of this section);

(4) Classification of a position based on position-to-position comparisons rather than the NSPS classification criteria; and

(5) Classification of a position for which a DoD or an OPM appeal decision was previously rendered unless there is a later change in the governing classification criteria or a material change in the requirements of the position.

(c) When the accuracy of the official position description is questioned by the employee, the employee will be directed to raise this issue with the employee's supervisor. If management and the employee cannot resolve this issue, the accuracy of the position description will be determined using the applicable administrative or negotiated grievance procedure. If, after completing this procedure, the issue is not resolved, the appeal will be decided on the basis of the actual duties and responsibilities assigned by management and performed by the employee.

(d) An employee may request that OPM review a DoD determination made

under paragraph (a) of this section. If an employee does not request an OPM review, DoD's classification determination is final and not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary.

§ 9901.223 Appeal to DoD for review of classification decisions.

(a) *Employee representation.* An employee may designate in writing a representative of his or her choice to assist in the preparation and presentation of an appeal. A management official may disallow an employee's representative when—

(1) An individual's activities as a representative would cause a conflict of interest or position,

(2) An employee cannot be released from his or her official duties because of the priority needs of the Government, or

(3) An employee's release would give rise to unreasonable costs to the Government.

(b) *DoD classification appeal process.*

(1)(i) Prior to filing an appeal, an employee must formally raise the areas of concern to his or her immediate supervisor, either orally or in writing, identifying the communication as the first step in the NSPS classification appeal process.

(ii) The supervisor must respond to the employee concern within 30 calendar days of receiving the query.

(iii) If an employee is not satisfied with the supervisory response, the employee may initiate a classification appeal.

(2) Employee appeals to DoD must be submitted through the employee's servicing Human Resources Office.

(3) An employee may file a classification appeal at any time. When the issue involves a classification action that resulted in a reduction in band or adjusted salary, to preserve any entitlement to retroactive pay, the employee must file any appeals no later than 15 calendar days after the effective date of the personnel action. When an employee shows that he or she did not receive notice of the applicable time limit or was prevented from timely filing by circumstances beyond the employee's control, the deciding official may grant an extension of the appeal period.

(4) An employee must provide the following documentation when filing an appeal:

(i) The employee's name, mailing address, and office telephone and fax numbers;

(ii) The employing Component and the exact location of the employee's

position within the Component (installation name, mailing address, organization, division, branch, section, unit);

(iii) The name, address, business telephone and fax numbers of the employee's representative, if any;

(iv) A statement of the employee's requested pay system, official position title, occupational series, pay schedule, and/or pay band; and

(v) Reasons why the employee believes the position is incorrectly classified. The employee must refer to classification standards that support the appeal and state specific points of disagreement with the current classification. The employee may also include a statement of facts that he or she thinks may affect the final classification decision.

(c) *Binding decisions.* DoD appeal decisions constitute certificates that are binding on all administrative, certifying, payroll, disbursing, and accounting offices within DoD.

(d) *Cancellation.* (1) An employee or representative may cancel an appeal at any time before DoD issues a decision by providing written notification to the DoD deciding official.

(2) DoD may cancel an appeal if any of the following occur:

(i) The employee, or his or her representative, does not furnish requested information within the required time period;

(ii) The employee is no longer officially assigned to, or is removed from, the position;

(iii) The duties and responsibilities of the position are significantly changed while the case is pending; or

(iv) The position is abolished.

§ 9901.224 Appeal to OPM for review of classification decisions.

(a) An employee's request for OPM review of DoD classification determination will follow the procedures in 5 CFR part 511, subpart F—Classification Appeals.

(b) Effective dates of OPM classification appeal decisions will be consistent with 5 CFR 511.702.

(c) Employee appeals to OPM may be submitted directly to OPM.

(d) OPM's final determination on an appeal made under this section is not subject to further review or appeal.

Transitional Provisions

§ 9901.231 Conversion of positions and employees to NSPS classification system.

(a) *Introduction.* This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under

this subpart. (See § 9901.371 for conversion rules related to setting an employee's pay.) Positions and employees in affected organizational or functional units may convert from the GS system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose of this part, the terms "convert," "converted," "converting," and "conversion" refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b) and exclude employees who move from a noncovered position to a position already covered by NSPS.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Those issuances will establish the work level conversion tables used to place an employee in a pay band based on the level of work of the employee's position in the formerly applicable pay system.

(c) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. That official position of record (including occupational series and grade) is used in determining the employee's career group, pay schedule, and band upon conversion.

(d) *Grade retention prior to conversion.* For an employee who is entitled to grade retention immediately before conversion, the grade of the actual position of record (not the grade being retained) is used in determining the employee's band upon conversion.

Subpart C—Pay and Pay Administration

General

§ 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. Chapter 53 and 5 U.S.C. Chapter 55, subchapter V, as authorized by 5 U.S.C. 9902 (subject to the limitations on waivers in § 9901.303). Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in

conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

§ 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. Chapter 53, Subchapter III;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. Chapter 53, Subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. Chapter 53 are waived with respect to that category of employees, except as provided in § 9901.106 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. Chapter 55, Subchapter V (except sections 5544 and 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions established by the Secretary under §§ 9901.361 through 9901.364 in lieu of the provisions in 5 U.S.C. Chapter 55, Subchapter V.

(b) The following provisions of 5 U.S.C. Chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Sections 5341 through 5349, dealing with prevailing rate systems;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. Chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS classification and pay system

established under this part or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and Subchapter V of Chapter 55. The reference to "Chapter 51" in section 5371(c) is deemed to include a classification system established under Subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5379 continues to apply but is modified to allow the Secretary to modify the minimum service period and the limitations on the amount of student loan benefits in order to address critical hiring needs, subject to § 9901.105.

§ 9901.304 Definitions.

In this part:

Adjusted salary means an NSPS employee's base salary plus any local market supplement paid to that employee. For an employee moving into NSPS from a non-NSPS position, *adjusted salary* also refers to non-NSPS base salary plus any applicable locality pay under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, or any equivalent supplement.

Band means *pay band*.

Base salary means an NSPS employee's pay, as set by the authorized management official, before deductions and exclusive of additional pay of any kind (e.g., local market supplement). For an employee moving into NSPS from a non-NSPS position, *base salary* also refers to non-NSPS pay, before deductions and exclusive of additional pay of any kind (e.g., locality pay or a special rate supplement).

Basic pay has the meaning given that term in § 9901.103.

Bonus means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay for any purpose.

Career group has the meaning given that term in § 9901.103.

Comparable pay band or *comparable level of work* has the meaning given in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Component has the meaning given that term in § 9901.103.

Contributing factor means attributes of job performance that are significant to the accomplishment of individual job objectives.

Contribution has the meaning given that term in § 9901.103.

Contribution assessment means the determination made by the Pay Pool Manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

CONUS or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Day has the meaning given that term in § 9901.103.

Department or *DoD* has the meaning given in § 9901.103.

Employee has the meaning given that term in § 9901.103.

General Schedule or *GS* has the meaning given that term in § 9901.103.

Implementing issuance(s) has the meaning given that term in § 9901.103.

Local market supplement means a geographic- and occupation-based supplement paid in addition to an employee's base salary, including a standard local market supplement or a targeted local market supplement, as described in § 9901.332.

Modal rating means, for the purpose of pay administration, the most frequent rating of record assigned to employees within a particular pay pool for a particular rating cycle.

National Security Personnel System (NSPS) has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Official worksite has the meaning given that term in 5 CFR 531.605.

OPM has the meaning given that term in § 9901.103.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay pool has the meaning given that term in § 9901.103.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance payout means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

Performance Review Authority has the meaning given that term in § 9901.103.

Performance share means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples based on the employee's rating of record and specified factors, as provided in § 9901.342(f).

Performance share value means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage of base salary.

Premium pay means payments for work performed under special

conditions or circumstances, as authorized under 5 U.S.C. Chapter 55, Subchapter V, or §§ 9901.361 through 9901.364 (including compensatory time off).

Promotion has the meaning given that term in § 9901.103.

Rate range means the range of base salary rates applicable to employees in a particular pay band, as described in § 9901.321. Each rate range is defined by a minimum and maximum base salary rate.

Rating of record has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103.

Reduction in band has the meaning given that term in § 9901.103.

Retained rate means a retained base salary rate (i.e., excluding any local market supplement) above the applicable pay band maximum rate as established for an NSPS employee under the pay retention provisions in § 9901.356. For GS employees, *retained rate* has the meaning given that term in 5 CFR part 536.

Secretary has the meaning given that term in § 9901.103.

Standard local market supplement means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies. Standard local market supplements are generally administered for covered employees in the same manner as locality-based comparability payments under 5 U.S.C. 5304 and 5304a.

Sub pay pool means a subset of a pay pool that is defined for the purpose of reconciling ratings of record, share assignments, and payout determinations.

Targeted local market supplement means a local market supplement established to address recruitment or retention difficulties or for other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of any lower standard local market supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.305 Rate of pay.

(a) The term "rate of pay" in 5 U.S.C. 9902(e)(9) means—

(1) An individual employee's base salary rate, local market supplement rate, and overtime and other premium pay rates (including compensatory time off);

(2) The rates comprising the structure of the pay system that govern the setting and adjusting of the individual employee rates identified in paragraph (a)(1) of this section, including the amount of each rate in the pay structure (expressed as a dollar amount or a percentage) and the conditions defining applicability of each rate, illustrative examples include, but are not limited to—

(i) The amount of band rate range minimum and maximum rates and the applicability conditions defining the category of employees covered by the band;

(ii) The level at which control points within a band rate range are set and the applicability conditions defining the category of employees to which each control point applies;

(iii) The percentage value of local market supplement rates and the applicability conditions defining coverage (e.g., the geographic area in which the employee's official worksite must be located);

(iv) The levels constituting maximum rates of base salary and adjusted salary and the applicability conditions connected to a given level; and

(v) The value of various types of premium pay rates and the applicability conditions defining the type of work or other requirements that must be met to qualify for each type and level of premium pay; and

(3) The percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees' base salary rates.

(b) For the purpose of 5 U.S.C. 9902(e)(9), the establishment or adjustment of a rate of pay includes the establishment or adjustment of the amount or level of the rate and of the applicability conditions defining which employees may receive the type and level of pay in question. Illustrative examples of actions that establish or adjust a rate of pay include, but are not limited to, the following:

(1) Establishing the starting base salary rate for a newly hired employee;

(2) Establishing a retained rate for an employee;

(3) Determining the amount of various adjustments in an employee's base salary rate such as general increases, performance pay increases, extraordinary performance recognition increases, organizational or team achievement recognition increases, pay reductions for unacceptable performance or conduct, reassignment increases and decreases, promotion increases, accelerated compensation for

developmental positions increases, and retained rate adjustments;

(4) Establishing or adjusting the minimum or maximum rate of a band rate range or control points within that range;

(5) Establishing or adjusting the percentage amount, geographic area of a given local market supplement, or other coverage requirements associated with that supplement;

(6) Establishing or adjusting an employee's local market supplement when the employee's eligibility status changes (e.g., the employee's official worksite is changed);

(7) Determining the requirements for employees to be covered by a discretionary action under the premium pay regulations (e.g., higher premium pay limit under § 9901.362(a)(2), identification of bands at which overtime rate equals the employee's adjusted salary rate under § 9901.362(b)(6)(i), or establishment of new hazardous duty pay category under § 9901.362(i)(3)); and

(8) Determining that an employee is entitled to a premium pay rate under the established conditions.

Overview of Pay System

§ 9901.311 Major features.

Through the issuance of implementing issuances, the Secretary will further define a pay system that governs the setting and adjusting of covered employees' rates of base salary and adjusted salary and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for general salary increases and adjustments in local market supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on base salary administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §§ 9901.361 through 9901.364.

§ 9901.312 Maximum rates of base salary and adjusted salary.

(a) Subject to § 9901.105, the Secretary may establish a limitation on the maximum rate of base salary provided under authority of this subpart.

(b) No employee may receive, under authority of this subpart, an adjusted salary rate greater than the rate for level IV of the Executive Schedule plus 5 percent. The payable local market supplement for an employee must be reduced as necessary to comply with this limitation.

(c) Paragraphs (a) and (b) of this section do not apply to physicians and dentists (in occupational series 0602 and 0680, respectively).

(d) Subject to § 9901.105, the Secretary may establish a higher adjusted salary rate limitation for a specified category of positions in lieu of the limitation in paragraph (b) of this section based on mission requirements, labor market conditions, availability of funds, and any other relevant factors.

§ 9901.313 Aggregate compensation limitations.

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, no additional payment (premium pay, allowance, differential, bonus, award, or other similar cash payment) may be paid to an employee in a calendar year if, or to the extent that, when added to the adjusted salary paid to the employee for service performed as an employee in the Department or in another Federal agency, the payment would cause the total aggregate compensation to exceed the annual rate for Executive Level I as in effect on the last day of that calendar year.

(2) In the case of physicians and dentists (in occupational series 0602 and 0680, respectively) payment to the employee may not cause aggregate compensation received in a calendar year to exceed the salary of the President of the United States as in effect on the last day of that calendar year.

(3) Subject to § 9901.105, the Secretary may provide for a higher aggregate compensation limitation equal to the annual rate payable to the Vice President under 3 U.S.C. 104 as in effect on the last day of the calendar year in

the case of specified categories of employees for whom a waiver has been authorized under § 9901.362(a)(2).

(4) The limitation described in this paragraph (a) applies to the total amount of aggregate compensation actually received by an employee during the calendar year without regard to the period of service for which such compensation is earned.

(b) *Types of compensation.* For the purpose of this section, aggregate compensation is the total of—

(1) Adjusted salary received as an employee of the Department;

(2) Premium pay under 5 U.S.C. Chapter 55, Subchapter V, and this subpart;

(3) Incentive awards and performance-based cash awards under 5 U.S.C. 4501–4523 and this part;

(4) Recruitment and relocation incentives under 5 U.S.C. 5753;

(5) Retention incentives under 5 U.S.C. 5754;

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

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

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

(9) Extended assignment incentives under 5 U.S.C. 5757;

(10) Post differentials based on environmental conditions for employees stationed outside the continental United States or in Alaska under 5 U.S.C. 5941(a)(2);

(11) Foreign language proficiency pay under 10 U.S.C. 1596 and 1596a;

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

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

(i) Back pay due to an unjustified personnel action under 5 U.S.C. 5596 (but only if the back payments were originally payable in a previous calendar year);

(ii) Overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201–219 and 5 CFR Part 551);

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

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

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

(14) Payments received from another agency during the calendar year, prior to employment with the Department, that are subject to 5 U.S.C. 5307.

(c) *Administration of aggregate limitation.* (1) At the time a payment covered by paragraph (b) of this section

(other than adjusted salary) is authorized for an employee, the employee may not receive any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the limitation applicable to the employee under this section at the end of the calendar year.

(2) Payments that are creditable for retirement purposes (e.g., law enforcement availability pay (LEAP) or standby premium pay) and that are paid to an employee at a regular fixed rate each pay period may not be deferred or discontinued for any period of time in order to make another payment that would otherwise cause an employee's pay to exceed any limitation described in or established by this section.

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), if the estimated aggregate compensation to which an employee is entitled exceeds the applicable limitation under this section for the calendar year, the Department must defer all authorized payments (other than adjusted salary) at the time when otherwise continuing such payments would cause the aggregate compensation actually received by any employee during the calendar year to exceed the applicable limitation. Any portion of a payment deferred under this paragraph will become available for payment as provided in paragraph (d) of this section. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(4) If the Department makes an incorrect estimate of aggregate compensation at an earlier date in the calendar year, the sum of an employee's remaining payments of adjusted salary (which may not be deferred) may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable limitation under this section. In this case, the employee will become indebted to the Department for any amount paid in excess of the aggregate limitation. To the extent that the excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, the debt must be nullified on January 1 of the next calendar year. As part of the correction of the error, the excess amount will be deemed to have been paid on January 1 of the next calendar year (when the debt was extinguished)

as if it were a deferred excess payment as described in paragraph (c)(3) of this section and must be considered part of the employee's aggregate compensation for the new calendar year.

(d) *Payment of excess amounts.* (1) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), any amount that is not paid to an employee because of the annual aggregate compensation limitation under this section must be paid in a lump-sum payment at the beginning of the following calendar year. Any amount paid the following calendar year will be taken into account for purposes of applying the limitations with respect to such calendar year. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(2) If a lump-sum payment causes an employee's estimated aggregate compensation to exceed the applicable limitation under this section, the Department must consider only the employee's adjusted salary and payments that are creditable for retirement purposes (e.g., LEAP or standby pay) in determining the extent to which the lump-sum payment may be paid and will defer all other payments, in order to pay as much of the excess amount as possible. Any payments deferred under this paragraph, including any portion of the excess amount that was not payable, will become payable at the beginning of the next calendar year.

(3) If an employee moves to another Federal agency or to another position within the Department not covered by NSPS, and, at the time of the move, the employee has received payments in excess of the aggregate limitation under 5 U.S.C. 5307, the employee's indebtedness for the excess amount received will be deferred from the effective date of the transfer until the beginning of the next calendar year. Effective January 1 of the new calendar year, the debt will be nullified and the excess amount will be considered in applying that year's aggregate limitation.

(4) If an employee transfers to another agency and, at the time of transfer, the employee has excess payments deferred to the next calendar year, the provisions of 5 U.S.C. 5307 are applicable.

(5) The following conditions permit payment of excess aggregate compensation without regard to the calendar year limitation:

(i) If an employee dies, the excess amount is payable immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If an employee separates from Federal service, the entire excess amount is payable following a 30-day break in service. If the individual is reemployed in the Department under NSPS in the same calendar year as separation, any previous payment of an excess amount will be considered part of that year's aggregate compensation for the purpose of applying the limitations described in this section for the remainder of the calendar year.

§ 9901.314 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2012, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on, at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2012 for compensation of the civilian employees included in the NSPS. The formula will ensure that, in the aggregate, employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, "compensation" for civilian employees means adjusted salary, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.

Rate Ranges and General Salary Increases

§ 9901.321 Structure.

(a) Subject to § 9901.105, the Secretary will establish ranges of base salary rates for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

(c) The Secretary may establish and adjust control points within a pay band to manage compensation (e.g., limitations on pay setting and pay progression within a pay band that apply to specified positions). The Secretary may consider only the following factors in developing control points: Mission requirements, labor market conditions, and benchmarks against duties, responsibilities, competencies, qualifications, and performance.

§ 9901.322 Setting and adjusting rate ranges.

(a) Subject to § 9901.105, the Secretary may set and adjust the rate ranges (i.e., range minimums and maximums) established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

(e) The maximum rate of each band must be adjusted at the time of a general salary increase under § 9901.323(a)(1) (excluding a lesser increase approved for retained rate employees) by no less than the percentage amount of that increase.

§ 9901.323 Eligibility for general salary increase.

(a) Employees with a current rating of record above “unacceptable” (Level 1) and employees who do not have a current rating of record for the most recently completed appraisal period are eligible to receive an approved general salary increase in their base salary rate subject to the following requirements:

(1) A general salary increase must be provided to eligible employees in all NSPS pay bands at the same time that a General Schedule annual adjustment takes effect under 5 U.S.C. 5303. The amount of such general salary increase is determined by the Secretary, but may not be less than 60 percent of the

General Schedule annual adjustment under 5 U.S.C. 5303 (unless a lesser percentage is allowed by law). Such general salary increase must be the same percentage amount for all eligible employees under NSPS, except that the increase for employees receiving a retained rate is limited to the lowest permitted amount (i.e., 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 unless a lesser percentage is allowed by law).

(2) In addition to the general salary increase under paragraph (a)(1) of this section, and subject to § 9901.105, a general salary increase may be provided to all eligible employees (excluding employees receiving a retained rate under § 9901.356) in a designated occupational series in a pay band at times other than the effective date of the General Schedule annual adjustment under 5 U.S.C. 5303 if the Secretary determines that such an increase is necessary considering only labor market conditions, staffing difficulties, and mission priorities. Different general salary increases may be provided under this paragraph (a)(2) to employees in different occupational series or pay bands.

(b) Employees with a current rating of record of “unacceptable” will not receive a general salary increase under this section. If such an employee receives a rating of record above unacceptable for a subsequent appraisal period, the employee is eligible for any general salary increase taking effect on or after the date the employee is given a rating of record above unacceptable.

(c)(1) The Secretary may provide an additional increase in the base salary rate equal to the difference between the percent of the General Schedule annual adjustment under 5 U.S.C. 5303 and the amount of the NSPS general salary increase under paragraph (a)(1) of this section to employees ineligible for performance payout under § 9901.342. This increase is effective at the same time as the NSPS general salary increase.

(2) The increase under paragraph (c)(1) of this section does not apply to employees who—

(i) Are ineligible for a performance payout due to an NSPS rating of record of Level 1 or Level 2;

(ii) Move from a non-NSPS to an NSPS position, or who are newly hired or reappointed to an NSPS position, on the effective date of the performance payment; or

(iii) Are receiving a retained rate under § 9901.356.

(d) A general salary increase under paragraph (a)(2) or paragraph (c) of this section may be applied only to the

extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.

(e) If the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable (Level 1) to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.

Local Market Supplements

§ 9901.331 General.

(a) *Introduction.* The base salary ranges established under §§ 9901.321 through 9901.322 may be supplemented in appropriate circumstances by local market supplements, as described in this section. These supplements are set and adjusted as described in § 9901.333. The sum of an employee's base salary plus any applicable local market supplement constitutes the employee's adjusted salary.

(b) *Computation.* Local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar. A local market supplement is payable only to the extent that it does not cause an employee's adjusted salary rate to exceed the rate limitation described in § 9901.312(b).

(c) *Official worksite.* When a local market supplement is linked to a geographic area, the employee's entitlement to the local market supplement is contingent on the employee's official worksite (as defined in 5 CFR 531.605) being located in that geographic area.

(d) *Treatment as basic pay.* Local market supplements are considered basic pay only for the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

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

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. Chapter 59, Subchapter III, to the extent authorized by the Department of State;

(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment

incentives under 5 U.S.C. Chapter 57, Subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, Subpart L;

(9) Determining whether an employee's rate of basic pay is reduced at the point of conversion or movement into or out of the NSPS pay system for the purpose of applying 5 U.S.C. Chapter 75, Subchapter II (dealing with adverse actions), consistent with §§ 9901.351(g), 9901.371(d), and 9901.372(f);

(10) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(11) Any other provisions for which DoD local market supplements are expressly treated as basic pay by law or under this part.

§ 9901.332 Standard and targeted local market supplements.

(a) *General.* NSPS employees may receive standard or targeted local market supplements as described in paragraphs (b) and (c) of this section. Consistent with 5 U.S.C. 9902(e)(8), the full amount of standard and targeted local market supplements must be provided to employees who receive a rating of record above unacceptable (Level 1) or who do not have a rating of record for the most recently completed appraisal period. As provided in § 9901.334, an employee with an unacceptable rating of record may not receive an increase in a standard or targeted local market supplement. Standard local market supplements are designed to satisfy the requirements of 5 U.S.C. 9902(e)(8)(A), while targeted local market supplements are the "other local market supplements" referenced in 5 U.S.C. 9902(e)(8)(B).

(b) *Standard local market supplements.* Employees are entitled to standard local market supplements that are generally equivalent to locality payments under 5 U.S.C. 5304 and 5304a, subject to the following requirements:

(1) The percentage values of standard local market supplements must be identical to the percentage values of locality payments established under 5 U.S.C. 5304 and 5304a, except as provided in § 9901.334 with respect to employees with an unacceptable rating of record;

(2) The geographic areas in which standard local market supplements apply must be identical to the corresponding geographic areas

established for locality payments under 5 U.S.C. 5304;

(3) An employee's entitlement to a standard local market supplement is based on whether the employee's official worksite (defined consistent with the requirements in 5 CFR 531.605) is located in the given local market area;

(4) The applicable standard local market supplement is paid on top of a retained rate (consistent with the NSPS modification of the pay retention rules);

(5) The cap on an adjusted salary rate that includes a standard local market supplement is the rate for level IV of the Executive Schedule plus 5 percent (consistent with the NSPS extension of the highest band base rate ranges by 5 percent), as provided in § 9901.312(b), except as otherwise provided under § 9901.312(d);

(6) A standard local market supplement does not apply if an employee is entitled to a higher targeted local market supplement; and

(7) Standard local market supplements are not applicable to physicians and dentists (in occupational series 0602 and 0680, respectively), since they receive higher base salary and adjusted salary rates (including any applicable targeted local market supplements) to achieve comparability with physicians and dentists paid under 38 U.S.C. chapter 74 and since their adjusted salary rates apply on a worldwide basis.

(c) *Targeted local market supplements.* Subject to § 9901.105, the Secretary may establish targeted local market supplements for specifically defined categories of employees, subject to the following:

(1) The conditions for coverage under a targeted local market supplement may be based on occupation, band, organizational unit, geographic location of official worksite, specializations, special skills or qualifications, or other appropriate factors;

(2) A targeted local market supplement applies to an employee eligible for a standard local market supplement only if the targeted local market supplement is a larger amount; and

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively) or as otherwise provided under § 9901.312(d), an employee's adjusted salary that includes an applicable targeted local market supplement may not exceed the rate cap equal to the rate for Executive Level IV plus 5 percent, as provided in § 9901.312(b).

§ 9901.333 Setting and adjusting local market supplements.

(a) Standard local market supplements are set and adjusted consistent with the setting and adjusting of corresponding General Schedule locality payments under 5 U.S.C. 5304 and 5304a.

(b) Subject to § 9901.105, the Secretary may set and adjust targeted local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. Chapter 59, and any other relevant factors. The Secretary may determine the effective date of newly set or adjusted targeted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with current ratings of record above "unacceptable" (Level 1), and employees who do not have current ratings of record for the most recently completed appraisal period, are eligible to receive any pay increase resulting from that adjustment.

(b) An employee with a current rating of record of "unacceptable" will not receive a pay increase under this section (i.e., the employee's local market supplement percentage will not be increased). Once such an employee has a new rating of record above "unacceptable," the employee is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of the new rating of record, or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).

Performance-Based Pay

§ 9901.341 General.

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions authorize payments to employees based on individual performance or contribution, or team or organizational performance, as a means of fostering a high-performance culture that supports mission accomplishment.

§ 9901.342 Performance payouts.

(a) *Overview.* (1) The NSPS pay system will be a performance-based pay system and will result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period. Unless otherwise provided in this section, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (i) through (l) of this section, such employee will not be eligible for a performance payout under this part.

(b) *Performance pay pools.* (1) Pay pools and pay pool oversight will be established and managed in accordance with implementing issuances published by the Secretary, in such a manner as to ensure employees are treated fairly and consistently, and in accordance with merit system principles.

(2) Consistent with paragraph (b)(1) of this section, pay pool composition will be based on organization structure, classification structure, function of work, location, and/or organization mission. The decision on pay pool composition will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(3) Where determined appropriate, management may establish one or more subsets of a pay pool population (i.e., sub pay pools) for the purpose of reconciling ratings of record, share assignments, and payout determinations. Sub pay pools share in the common fund of the overall pay pool and operate within the requirements and guidelines established for the pay pool to which they belong.

(4) The Secretary may determine a percentage of pay to be included in pay pools and paid out in accordance with accompanying implementing issuances as—

- (i) A performance-based pay increase;
- (ii) A performance-based bonus; or
- (iii) A combination of a performance-based pay increase and a performance-based bonus.

(5) The decision to apply a funding floor or ceiling to a pay pool, including the amount of such floor or ceiling, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(c) *Pay Pool Panel.* (1) Consistent with this section, the Pay Pool Panel—

- (i) Reviews rating of record, share assignment, and payout distribution decisions;
- (ii) Makes adjustments, which in the Panel's view would result in equity and consistency across the pay pool; and
- (iii) Elevates any disagreement between the Pay Pool Panel and the employee's supervisory chain to the Pay Pool Manager or Performance Review Authority, as applicable, for resolution.

(2) The Pay Pool Panel members may not participate in payout deliberations or decisions that directly impact their own ratings of record or pay.

(d) *Pay Pool Manager.* The Pay Pool Manager—

- (1) Provides oversight of the Pay Pool Panel;
- (2) Consistent with this section, is the final approving authority for performance ratings; and
- (3) May not participate in payout deliberations or decisions that directly impact his/her own rating of record or pay.

(e) *Performance Review Authority (PRA).* Consistent with this section, the PRA—

- (1) Oversees the operation of pay pools established under NSPS;
- (2) Ensures procedural and funding consistency among pay pools under NSPS; and
- (3) May not participate in payout deliberations or decisions that directly impact his/her own rating of record or pay.

(f) *Performance shares.* (1) Performance shares will be used to determine performance pay increases and/or bonuses. The range of shares which may be assigned for each rating level is as follows:

PERFORMANCE SHARE RANGES TABLE

Rating of record	Share range available for assignment
Level 5	5 or 6 shares.
Level 4	3 or 4 shares.
Level 3	1 or 2 shares.
Level 2	No shares.
Level 1	No shares.

(2) The only factors that may be used in determining share assignment are complexity of the work, level of responsibility, compensation (e.g., recent salary increases, current salary in relation to control points or pay band maximum, current salary in relation to labor market), overall contribution to the mission of the organization, organizational success, raw performance scores, and impact of contributing factors. Pay Pool Managers and/or Pay Pool Panels will review share assignment recommendations to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(g) *Performance payout.* (1) A performance share is expressed as a percentage of an employee's rate of base salary and is a common value throughout the pay pool. The percent value of a performance share is calculated by dividing the pay pool fund (expressed in dollars) by the summation of the products of multiplying each employee's base salary times the number of shares earned by the employee.

[Share Value(%) = Pay Pool Fund(\$)/Σ(base salary of each pay pool member × shares assigned each pay pool member)]

(2) An employee's performance payout is calculated by multiplying the employee's base salary as of the end of the pay pool's appraisal period times the number of shares earned by the employee times the share value.

[Employee Performance Payout = Base Salary × Shares × Share Value]

(3) A performance payout may be an increase in base salary, a bonus, or a combination of the two. An increase in base salary may not cause the employee's rate of base salary to exceed the maximum rate or applicable control point of the employee's band rate range. The decision to pay a bonus, including the amount of such bonus, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization.

(4) The factors management may consider in determining the amount to

be paid out as a bonus versus an increase in the rate of base salary are limited to the following:

- (i) Current base salary in relation to appropriate rate range;
- (ii) Current base salary, level of responsibility and complexity of work performed in comparison with others in similar work assignments;
- (iii) Performance-based compensation received during the rating cycle associated with promotions, reassignments, or awards;
- (iv) Salary levels of occupations in comparable labor markets;
- (v) Attrition and retention rates of critical shortage skilled personnel;
- (vi) Expectation of continued performance at that level; and
- (vii) Overall contribution to the mission of the organization.

(5) When an employee's base salary is not increased based on a control point, a performance payout will be paid as a bonus in lieu of the increase to base salary.

(6) The effective date of an increase in base salary made under this section will be the first day of the first pay period beginning on or after January 1 of each year.

(7) Unless otherwise specified in this section, employees who are no longer covered by NSPS on the effective date of the payout or who moved out of NSPS on a permanent move after the end of their rating cycle but before the effective date of the payout are not entitled to a performance-based payout.

(8) For employees receiving a retained rate above the applicable pay band maximum, the entire performance payout must be in the form of a bonus payment. Any performance payout in the form of a bonus for a retained rate employee will be computed based on the maximum rate of the assigned pay band.

(h) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding prorating of performance payouts for employees who, during the period between performance payouts, are—

- (1) Hired, transferred, reassigned, or promoted into NSPS;
- (2) In a leave-without-pay status (except as provided in paragraphs (i) and (j) of this section); or
- (3) In other circumstances where prorating is considered appropriate.

(i) *Adjustments for employees returning after performing honorable service in the uniformed services.* The rate of base salary for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4301 *et seq.* and 5 CFR 353.102) and returns through

the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316) will be set prospectively. The Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section. Proration in the case of employees covered by this paragraph is prohibited.

(j) *Adjustments for employees returning to duty after being in workers' compensation status.* The rate of base salary for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. Chapter 81, Subchapter I (in a leave-without-pay status or as a separated employee), will be set prospectively. For the intervening period, the Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under

this section, adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section. Proration in the case of employees covered by this paragraph is prohibited.

(k) *Adjustments for employees in special circumstances.* The Secretary will adjust the rate of base salary for an employee who performs activities on "official time" (as defined in 5 U.S.C. 7131) or who is on extended approved paid leave. The Secretary will credit these employees with increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(l) *Adjustments for employees returning from temporary assignments outside of NSPS or returning to NSPS from long-term training for which no NSPS performance plan was assigned.* The Secretary will set the rate of base salary prospectively for an employee who returns from a temporary assignment (including a supervisory

probationary assignment) outside of NSPS or from long-term training (e.g., industry assignment) for which no NSPS performance plan was assigned. The Secretary will credit the employee with increases under § 9901.323 and increases to base salary under this section based on the employee's NSPS rating of record for the appraisal period upon which these adjustments are based. An employee who is eligible for a rating of record for the appraisal period upon which performance-based base salary increases are granted is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution. If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be made prospectively based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool, pay schedule, and pay band who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.

An employee's rate of base salary may be reduced based on a determination of unacceptable performance, conduct, or both after applying applicable adverse action procedures. Such a reduction will be at least 5 percent of base salary and may not exceed 10 percent of base salary unless the employee has been changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.353 and 9901.355.) An employee's rate of base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

§ 9901.344 Other performance payments.

(a) The decision to grant other performance payouts, including the amount of such payouts, will be reviewed and approved by an official of the employee's Component who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no

official at a higher level in the organization. In accordance with implementing issuances, authorized officials may make other performance payments to—

(1) Reward extraordinary individual performance, as described in paragraph (b) of this section;

(2) Recognize organizational or team achievement, as described in paragraph (c) of this section; and

(3) Provide for other special circumstances.

(b)(1) An Extraordinary Performance Recognition (EPR) is an increase to base salary, a bonus, or a combination of these intended to reward employees when the payout formula does not adequately compensate them for their extraordinary performance and results. The EPR payment is in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

(2) Only employees who have achieved a Level 5 NSPS rating of record for the most recently completed appraisal period are eligible for an EPR.

(3) The amount of an EPR awarded in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point.

(c)(1) Organizational/Team Achievement Recognition (OAR) payments may be made in the form of an increase to base salary, a bonus, or a combination of these in order to recognize the members of a team, organization or branch whose performance and contributions have successfully and directly advanced organizational goals. The OAR payment is made in conjunction with the annual performance payout.

(2) To receive an OAR, an employee must have an NSPS rating of record of Level 3 or higher for the most recently completed appraisal period.

(3) The amount of the OAR payment provided in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point.

§ 9901.345 Accelerated Compensation for Developmental Positions (ACDP).

(a) Accelerated Compensation for Developmental Positions (ACDP) is an increase to base salary that may be provided to employees participating in Component training programs or in other developmental capacities as

determined by Component policy. ACDP recognizes growth and development in the acquisition of job-related competencies combined with successful performance of job objectives.

(b) The use of ACDP is limited to employees in the lowest pay band of a nonsupervisory pay schedule who are in developmental or trainee level positions.

(c) Components choosing to provide ACDP increases must establish and document standards by which such employees will be identified and growth and development criteria by which additional pay increases will be determined.

(d) The amount of the ACDP increase generally will not exceed 20 percent of an employee's base salary. The decision to grant an ACDP exceeding 20 percent of an employee's base salary must be made on a case-by-case basis and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no official at a higher level in the organization.

(e) The amount of the ACDP increase may not cause the employee's base salary to exceed the top of the employee's pay band or any applicable control point.

(f) To qualify for an ACDP, an employee must have a rating of record of Level 3 (or equivalent non-NSPS rating of record) or higher, consistent with § 9901.405. An ACDP may be awarded to an employee who does not have a rating of record if an authorizing official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or higher. This performance assessment does not constitute a rating of record.

(g) An ACDP increase may not be granted unless the employee is in a pay and duty status in an NSPS-covered position on the effective date of the increase.

(h) The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

Pay Administration

§ 9901.351 General.

(a) *Introduction.* The pay administration provisions in §§ 9901.351 through 9901.356 are applied using base salary rates, except when specifically otherwise provided.

(b) *Geographic recalculation.* When an employee covered by a targeted local market supplement moves to a position

in a new location where a different local market supplement and/or pay schedule applies, the employee's adjusted salary before the move will be recalculated to reflect a local market supplement (standard or targeted, as appropriate) for the employee's existing position—as if that position were at the same location as the position to which the employee is moving, consistent with the geographic conversion principle described at 5 CFR 531.205. For employees moving from a non-NSPS position to an NSPS position in a different location covered by a different salary supplement, the employee's adjusted salary under the former system will be recalculated as if the former position were located in the new location, consistent with the geographic conversion principle described at 5 CFR 531.205.

(c) *Within-grade increase (WGI) adjustment equivalent.* (1) When an employee is permanently placed (not by conversion under § 9901.371) in an NSPS position from a GS position through a management-directed action, including a management-directed reassignment, realignment, movement into NSPS, or placement via the Priority Placement Program (PPP), Reemployment Priority List (RPL), or Interagency Career Transition Assistance Plan (ICTAP), the employee will receive an increase to base salary equivalent to the amount he or she would have received as a WGI adjustment if the employee had converted into NSPS with his or her organization, as provided in § 9901.371.

(2) An employee who is placed in an NSPS position from a GS position through an employee-initiated reassignment may, at the discretion of the authorized management official, receive this same WGI adjustment equivalent increase described in paragraph (c)(1) of this section. The decision to grant this increase will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component. At a minimum, the higher-level approval level may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at a higher level in the organization.

(3) An increase provided under paragraphs (c)(1) and (c)(2) of this section occurs before any other increases provided under NSPS, may not cause the employee's base salary to exceed the maximum rate of the assigned pay band, and is in addition to any other discretionary increase the employee may be eligible to receive.

(d) *Minimum rate.* Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's base salary may not be less than the minimum rate of the employee's pay band.

(e) *Maximum rate.* Except as provided in § 9901.356, an employee's base salary may not exceed the maximum rate of the employee's band rate range.

(f) *Pay periods and hourly rates.* The Secretary will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of base salary will be converted to hourly rates of base salary in computing payments received by covered employees.

(g) *Rate comparisons upon movement to an NSPS position.* An employee who moves to an NSPS position from a non-NSPS position by management-directed action (excluding conversion under § 9901.371) will receive a rate of basic pay that is not less than the employee's rate of basic pay immediately before movement (after making adjustments consistent with those made under § 9901.371(e) for employees who convert to NSPS). For this purpose and for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), at the point of movement into NSPS, an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent payment under other legal authority.

(h) *Adjustment of teacher annual rates.* When an individual leaves a teaching position as defined in 20 U.S.C. 901 and moves to a position becomes covered by NSPS, the individual's existing annual base salary rate for the teaching position may be adjusted for the purpose of setting pay under NSPS. The adjustment will take into account the shorter work year applicable to the teacher position. The adjustment may not exceed 20 percent of the existing annual base salary rate of the teaching position.

§ 9901.352 Setting an employee's starting pay.

(a) Subject to the requirements of this section, the Secretary may set the starting base salary rate for individuals who are newly appointed or reappointed to the Federal service anywhere within the rate range of the assigned pay band (subject to any applicable control points). Pay will be set based upon the following considerations:

(1) Labor market considerations (i.e., availability of candidates and labor market rates);

(2) Specialized skills, knowledge, and/or education possessed by the employee in relation to the requirements of the position;

(3) Critical mission or business requirement(s);

(4) Salaries of other employees in the organization performing similar work; and

(5) Current salary of the candidate.

(b) For the purposes of this section, "newly appointed" means those individuals who have not previously been employed in the Federal service—i.e., this is their first/initial Federal appointment. The term "reappointed" means those individuals who have been previously employed in the Federal service and have been separated from the Federal service for at least 1 full workday immediately before employment in an NSPS position. The term "Federal service" includes civilian service as an employee of any entity of the Federal Government, including the judicial branch, legislative branch, and executive branch (including Government corporations, the Postal Regulatory Commission, the U.S. Postal Service and any nonappropriated fund (NAF) instrumentality described in 5 U.S.C. 2105(c)).

§ 9901.353 Setting pay upon reassignment.

(a)(1) A reassignment occurs when an employee moves, voluntarily or involuntarily, to a different position or set of duties within his/her pay band or to a position in a comparable pay band, or from a non-NSPS position to an NSPS position at a comparable level of work, on either a temporary or permanent basis. In NSPS, employees may be eligible for an increase or decrease to base salary upon temporary or permanent reassignment as described in this section.

(2) An employee who is reassigned through reduction-in-force (RIF) procedures is not eligible for an increase to base salary under this section (except as necessary to set the employee's rate at the band minimum). Such an employee's base salary will be protected by applying pay retention under § 9901.356.

(3) A decision to increase an employee's pay under this section will be based on one or more of the following factors:

(i) A determination that an employee's responsibilities will significantly increase;

(ii) Critical mission or business requirements;

(iii) Need to advance multi-functional competencies;

(iv) Labor market conditions (i.e., availability of candidates and labor market rates);

(v) Reassignment from non-supervisory to supervisory position;

(vi) Employee's past and anticipated performance and contribution;

(vii) Location of position;

(viii) Specialized skills, knowledge, or education possessed by the employee in relation to those required by the position; and

(ix) Salaries of other employees in the organization performing similar work.

(b)(1) Except as otherwise provided in paragraph (c) of this section, when an employee is voluntarily reassigned within his/her pay band or to a comparable pay band, an authorized management official may reduce the employee's base salary in any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range. In appropriate circumstances, an authorized management official may make approval of a reassignment contingent on the employee's acceptance of a reduced rate. Subject to paragraph (b)(2) of this section, an authorized management official may also increase the employee's current base salary by up to 5 percent (not to exceed the rate range maximum).

(2) The decision to grant a decrease or increase, including the amount of such decrease or increase, as applicable under paragraph (b)(1) of this section, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at the higher level in the organization. There are no limits to the number of times an employee may be reassigned; however, an employee may only receive up to a total of a 5 percent cumulative increase to base salary in any 12-month period as the result of an employee-initiated action, unless an exception to the 12-month limitation is approved by an authorized management official. The increase will be calculated as a percentage of the employee's base salary at the time the increase takes effect.

(c)(1) Subject to paragraphs (b)(2) and (c)(2) through (c)(4) of this section, as applicable, when an employee is voluntarily reassigned from a position with a targeted local market supplement

or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment.

(2) An authorized management official may—

(i) Set the employee's new adjusted salary equal to the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, received prior to the reassignment;

(ii) Decrease the employee's adjusted salary by any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range; or

(iii) Increase the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, by up to 5 percent (subject to the limitation that the resulting base salary may not exceed the rate range maximum).

(3) If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation under paragraph (b) of this section.

(4) When an employee covered by paragraph (c)(1) of this section moves geographically in conjunction with a voluntary reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b) before setting pay under paragraph (c)(2) of this section.

(d)(1) Except as otherwise provided in paragraphs (e) or (f) of this section, when an employee is reassigned via management-directed action within his/her current pay band or to a comparable pay band, an authorized management official will set pay at an amount no less than the employee's current base salary and may increase the employee's current base salary by up to 5 percent. (If the employee's current base salary exceeds the maximum of the new pay band, no increase is provided, and the employee's rate will be set at that maximum rate, or if the employee is eligible, converted to a retained rate as provided in § 9901.356.)

(2) The decision to grant an increase under paragraph (d)(1) of this section, including the amount of such increase, is discretionary and will be reviewed and approved by an official who is at a

higher level than the official who made the initial decision, as determined by a DoD Component, unless there is no official at a higher level in the organization. There is no limit to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation described in paragraph (b) of this section.

(e)(1) Subject to paragraph (d)(2), (e)(2), and (f) of this section, as applicable, when an employee is reassigned via management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set the employee's new adjusted salary at no less than the employee's adjusted salary (including any applicable locality pay, special rate supplement, or equivalent supplement) plus any physicians' comparability allowance payable for the position held prior to the reassignment, provided the resulting base salary does not exceed the maximum rate of the new pay band. Subject to the same maximum limitation, an authorized management official may also increase the employee's adjusted salary by up to 5 percent.

(2) When an employee covered by paragraph (e)(1) of this section moves geographically in conjunction with a management-directed reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules in § 9901.351(b) before setting pay under such paragraph (e)(1).

(3) For the purpose of determining whether an employee experienced a reduction in pay under 5 U.S.C. Chapter 75 when reassigned from a non-NSPS position under paragraph (e)(1) of this section, § 9901.351(g) applies.

(f) When an employee is involuntarily reduced in pay via reassignment to a comparable pay band through adverse action procedures (as a result of unacceptable performance and/or conduct), the authorized management official must reduce the employee's base salary by at least 5 percent, and may reduce it by up to 10 percent. However, the reduction may not cause an employee's base salary to fall below the minimum rate of the employee's assigned pay band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both. (See also § 9901.343.)

(g) When an employee returns to an NSPS position from a temporary reassignment to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary reassignment. A reassignment increase is not authorized when the employee returns to the position from which temporarily reassigned. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(h) When an employee is reassigned to an NSPS supervisory position but later returns to the NSPS position held before that reassignment (or comparable position) because of failure to complete an in-service (supervisory) probationary period, the employee's base salary rate must be reconstructed as if the employee had not been reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that reassignment. A reassignment increase upon return to the previous position (or comparable position) under this paragraph is not

authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after failure to complete a supervisory probationary period for a non-NSPS supervisory position.)

§ 9901.354 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, the employee will receive an increase in his or her base salary equal to at least 6 percent, but the resulting base salary rate may not be lower than the minimum rate or higher than the maximum rate of the new pay band. The decision to grant a promotion increase exceeding 12 percent must be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless a higher increase is necessary to reach the minimum rate of the new pay band or there is no official at a higher level in the organization.

(b) The authorized management official may consider only the following criteria in determining the amount of the promotion increase:

- (1) Critical mission or business requirements;
- (2) Employee's past and anticipated performance and contribution;
- (3) Specialized skills or knowledge possessed by the employee;
- (4) Labor market conditions (including availability of candidates and the labor market rates for similar types of employees at the level represented by the pay band to which the employee is being promoted);
- (5) Base salary rates paid to other employees in similar positions in the higher pay band; and
- (6) Location of position.

(c)(1) If an employee's temporary promotion is made permanent without a break, the employee's base salary will remain unchanged. No additional promotion increase may be provided.

(2) When an employee returns from a temporary promotion to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary promotion (i.e., using the rate range and

any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary promotion that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(d)(1) An employee on pay retention who is re-promoted to the pay band from which reduced (or a comparable band) is not automatically entitled to have his/her pay set in accordance with the promotion rules described in paragraphs (a) and (b) of this section. If the employee's retained rate falls within the rate range of the newly assigned pay band, the authorized management official may maintain the same base salary upon re-promotion, or increase the employee's base salary to a rate above his or her retained rate. However, the employee's new base salary may not exceed the rate that would be provided using the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating any increase approved by an authorized management official. If the employee's retained rate falls below the minimum rate of the newly assigned pay band, the employee's base salary must be set at least at the minimum rate of the band. If the employee's retained rate is higher than the maximum rate of the newly assigned pay band, pay retention will continue (subject to the requirements of § 9901.356).

(2) An employee who is promoted to a pay band higher than the one from which previously reduced in band will be covered by the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating the 6 percent (or higher) increase.

§ 9901.355 Setting pay upon reduction in band.

(a) *General.* When an employee is reduced in band, either voluntarily or involuntarily, the setting of the employee's base salary rate is subject to the rules in this section. As applicable, pay retention provisions established under § 9901.356 will apply. If pay retention does not apply, the employee's base salary may be reduced, subject to the requirements in paragraph (b) of this

section. The employee may be eligible for an increase to base salary, subject to the requirements in paragraph (c) of this section.

(b) *Pay reduction.* An employee's base salary may be reduced upon reduction in band, subject to the following requirements:

(1) No base salary reduction is made when pay retention is applicable, except under paragraph (b)(4) of this section.

(2) The reduction in base salary may not cause the rate to fall below the minimum rate of the employee's new band.

(3) The base salary must be reduced as necessary to ensure that the new base salary is no greater than the maximum rate of the employee's new band.

(4) Adverse action procedures in 5 U.S.C. Chapter 75 must be applied when an employee is involuntarily placed in a position in a lower pay band for unacceptable performance and/or conduct. In this circumstance, the authorized management official may reduce the employee's base salary. If such a reduction is made, it must be at least 5 percent, but no more than 10 percent, of an employee's base salary after applying adverse action procedures. However, a reduction in base salary under this paragraph may not cause an employee's base salary to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also § 9901.343.)

(5) If an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, the pay reduction is applied using adjusted salary rates, consistent with the reassignment rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the decrease, consistent with the provisions of § 9901.351(b)).

(c) *Pay increase.* An employee's base salary may be increased by an authorized management official upon reduction in band, subject to the following requirements:

(1) An employee who is reduced in band involuntarily—e.g., through reduction-in-force (RIF) procedures or by placement through the DoD Priority Placement Program (PPP) or Reemployment Priority List (RPL)—is not eligible for an increase to base salary (except if necessary to set the employee's base salary at the minimum rate of the new pay band).

(2) When an employee voluntarily moves to a lower pay band, the authorized management official may

increase the employee's base salary, but must set the employee's base salary within the rate range for the employee's band. An increase in base salary may be up to 5 percent of the employee's current base salary (not to exceed the maximum of the rate range). This increase of up to 5 percent is deemed to be a "reassignment increase" for the purpose of applying the 12-month limitation in § 9901.353(b)(2). Also, in applying this increase, adjusted salary rates will be used when an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, consistent with the reassignment increase rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the increase, consistent with the provisions of § 9901.351(b)). This increase is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reduction in band.

(3) A decision to increase an employee's pay under paragraph (c)(2) of this section will be based on—

(i) Critical mission or business requirements;

(ii) The need to advance multi-functional competencies;

(iii) The labor market conditions (i.e., availability of candidates, labor market rates for similar types of employees);

(iv) Reassignment from non-supervisory to supervisory position;

(v) Location of position;

(vi) Required specialized skills, knowledge, or education possessed by the employee;

(vii) Performance-based considerations; and

(viii) The base salary rates paid to other employees in similar positions in the lower pay band.

(d) *Termination of temporary promotion.* This section does not apply to a reduction in band associated with the termination of a temporary promotion. Instead, the rules in § 9901.354(c)(2) apply.

(e) *Failure to complete probationary period.* When an employee who fails to complete an in-service (e.g., supervisory) probationary period is reduced in band upon return to the position held before the probationary period (or a comparable position), the employee's current base salary rate must be reconstructed as if the employee had not been promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value

of such increases actually received by the employee during the promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the promotion (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the promotion that would have been applied to the employee if he or she had remained in the position held immediately before that promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9902.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

§ 9901.356 Pay retention.

(a) Pay retention prevents a reduction in base salary that would otherwise occur by preserving the former rate of base salary within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of base salary in applying pay retention.

(b) Pay retention will be based on the employee's rate of base salary in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of base salary applicable to the employee's position.

(c) Pay retention will be granted for a period of 104 weeks.

(d) Under NSPS, pay retention will be granted when an employee's base salary would otherwise be reduced in the following situations:

(1) As the result of reduction in force or reclassification;

(2) When an otherwise eligible employee is placed through the Priority Placement Program (PPP), including placement resulting from early registration, even though the employee does not have a specific reduction in force (RIF) notice;

(3) When an organization undergoes realignment or reduction, and

(i) An employee who would not be affected personally requests a reduction in band;

(ii) Management determines the employee's reduction in band results in placement in a more suitable position; and

(iii) That action lessens or avoids the impact of the RIF on other employees;

(4) When an employee accepts a position in a lower pay band designated in advance by the component as being

hard-to-fill using any of the following criteria:

(i) Rates of pay offered by non-Federal employers are significantly higher than those payable under NSPS for the area, location, occupational group, or other class of positions involved;

(ii) The remoteness of the area or location involved;

(iii) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(iv) Any other circumstances the Component considers appropriate, subject to review and approval by an official who is at a higher level than the official who made the initial decision;

(5) When an employee is reduced in band on return from an overseas assignment under the terms of a pre-established agreement including—

(i) An employee released from a period of service specified in his or her current transportation agreement due to an involuntary, management-initiated action other than for unacceptable performance and/or misconduct;

(ii) An employee, who has completed more than one year of service under a current agreement, released from a transportation agreement for compelling humanitarian or compassionate reasons; and

(iii) A non-displaced overseas employee under no obligation to return to the United States who is otherwise eligible for PPP registration in accordance with DoD Directive 1400.20;

(6) When an employee declines an offer to transfer with his or her function to a location outside the commuting area, or is identified with such function but does not receive an offer at the gaining activity, and is placed in a position in a lower pay band at the losing activity or any other DoD activity;

(7) When an employee accepts a position in a lower pay band offered by an activity to accommodate a disabling medical condition similar to the circumstances described in 5 CFR 831.1203(a)(4);

(8) When an employee occupying a position under a Schedule C appointment (authorized under 5 CFR 213.3301) is placed, other than for unacceptable performance and/or misconduct or at the employee's request, in a position in a lower pay band in the competitive service or in another Schedule C position, provided that such action is not solely the result of a change in agency leadership (change in administration);

(9) When an employee occupying an Army or Air Force dual status military technician position lost, or is scheduled

to lose, eligibility for dual status technician employment through no fault of his or her own and accepts placement without a break in service to a non-dual status technician position in a lower pay band;

(10) When an employee occupying a National Guard dual status technician position is involuntarily separated, through no fault of his or her own, and accepts placement, without a break in service, to a non-dual status technician position in a lower pay band;

(11) When an employee whose job is abolished declines an offer within the competitive area, but outside the commuting area, and is placed in a lower pay band position in the commuting area, provided the employee is not serving under a mobility agreement;

(12) When an employee's base salary is reduced as the result of the movement of his or her position from a DoD nonappropriated fund (NAF) instrumentality to coverage by the DoD civil service system without a break in service of more than three days; or

(13) When an employee's base salary would exceed the maximum of the rate range because the maximum of the rate range decreased or as a result of a management-directed reassignment.

(e) An authorized management official may grant pay retention for circumstances other than those detailed in paragraphs (d)(1) through (d)(13) of this section. This determination is discretionary, and appropriate use is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who recommended the determination. These circumstances may be specified in advance or may be approved on a case-by-case basis. This authority applies to personnel actions initiated by management, not at the employee's request, and other than for unacceptable performance and/or misconduct, and only if those actions would further the agency's mission in accordance with applicable law and regulation.

(f) Pay retention will terminate—

(1) At the end of the 104-week period;

(2) When the employee moves to another position with a rate range that encompasses the employee's retained rate;

(3) When an increase in the maximum rate for the employee's pay band causes the maximum rate to equal or exceed his/her retained rate, or the employee's base salary is encompassed within his or her assigned rate range as a result of a pay reduction based on unacceptable performance and/or conduct, subject to adverse action procedures;

(4) When the employee is no longer covered by an NSPS position or has a break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under another section of this regulation;

(5) When the employee is reduced in band for unacceptable performance and/or conduct; or

(6) When the employee is reduced in band at his or her request in circumstances other than stated in paragraph (d) of this section.

(g) An employee whose pay retention terminates at the end of the 104-week period will have his or her pay set at the maximum rate of the pay band in which he/she is currently assigned.

(h) Upon termination of pay retention, the employee immediately becomes eligible for any applicable general salary increase and performance payout which may include an increase to base salary, unless otherwise ineligible.

(i) Pay retention does not apply in the following circumstances:

(1) Declination of a position offer under RIF procedures set forth in 5 CFR part 351;

(2) Break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under paragraph (d) of this section;

(3) Movement from a non-DoD position to an NSPS-covered position;

(4) Failure to satisfactorily complete an in-service probationary period;

(5) Return to an employee's former position at the end of a temporary promotion or temporary reassignment;

(6) Reassignment or reduction in band for unacceptable performance and/or conduct; or

(7) Reassignment or reduction in band at the employee's request in circumstances other than stated in paragraph (d) of this section.

(j) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than base salary adjustments, as provided in § 9901.342(g)(8).

(k) An employee receiving a retained rate will receive any general salary increase under § 9901.323(a)(1), subject to the conditions in § 9901.323, and will receive any applicable local market supplement adjustment, subject to the conditions in § 9901.334.

(l) The 104-week time limit established under paragraphs (c) and (f)(1) of this section will be extended by a period of time equal to the length of time an employee is deployed away from his or her regular duty station in support of a contingency operation as defined in 10 U.S.C. 101, or an

emergency as determined in accordance with DoD Directive 1400.31, "DoD Civilian Work Force Contingency and Emergency Planning and Execution" (or any successor regulation).

(m) Any DoD employee with a preexisting entitlement to pay retention under 5 CFR part 536 immediately before becoming covered by NSPS, or who obtains entitlement to pay retention upon becoming covered by NSPS, will be entitled to a retained rate under this section without regard to the 104-week limit (as described in paragraphs (c) and (f)(1) of this section). Pay retention will terminate under the conditions in paragraphs (f)(2) through (f)(6) of this section.

Premium Pay

§ 9901.361 General provisions.

(a) *Introduction.* As provided in § 9901.303(a)(2), the provisions of 5 U.S.C. Chapter 55, Subchapter V, and related regulations are waived or modified as provided in paragraph (e) of this section and §§ 9901.362 through 9901.364 (except as provided in paragraph (b) of this section). To the extent that the provisions of 5 U.S.C. Chapter 55, Subchapter V, and related regulations are not waived or modified, NSPS employees and positions remain subject to those provisions. Sections 9901.363 and 9901.364 establish new types of premium payments in addition to those found in 5 U.S.C. Chapter 55, Subchapter V.

(b) *Provisions not waived or modified.* The following provisions of 5 U.S.C. chapter 55, subchapter V, are not waived or modified:

- (1) 5 U.S.C. 5544 (relating to prevailing rate employees); and
- (2) 5 U.S.C. 5545b (relating to firefighter pay).

(c) *Applicability of Fair Labor Standards Act.* The Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 201 *et seq.*) and OPM regulations in 5 CFR part 551 apply to NSPS employees. DoD must determine whether an employee is exempt or nonexempt under the FLSA minimum wage and overtime pay provisions in accordance with the FLSA and OPM regulations. In applying FLSA overtime pay provisions, local market supplements are treated the same as locality pay under 5 U.S.C. 5304 and are included in computing total remuneration, the hourly regular rate, and straight time rate under 5 CFR Part 551.

(d) *Applying regulations in 5 CFR Part 550, Subpart M.* In applying the regulations in 5 CFR part 550, subpart M (dealing with firefighter pay) to NSPS

employees, the reference to "locality pay" in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Consistent with 5 CFR 550.1306(a), a firefighter compensated under 5 CFR part 550, subpart M, may not receive additional premium pay except for compensatory time off for travel under § 9901.362(j) or for religious observances under § 9901.362(k) and foreign language proficiency pay under § 9901.364.

(e) *Physicians and dentists.* Physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances under § 9901.362(k).

(f) *Senior Executive Service.* Members of the Senior Executive Service under NSPS are not eligible for premium pay, except for compensatory time off for religious observances under § 9901.362(k).

§ 9901.362 Modification of standard provisions.

(a) *Premium pay limitations.* (1) An employee is covered by the premium pay limitations established under 5 U.S.C. 5547 and related regulations, except as provided in paragraph (a)(2) of this section. Notwithstanding the modification of various premium payments under this section, those payments are still considered to be payments in 5 U.S.C. Chapter 55, Subchapter V, for the purpose of applying 5 U.S.C. 5547 (including the purpose of determining the covered premium payments under 5 U.S.C. 5547(a)).

(2) Subject to § 9901.105, the Secretary may waive the limitations established by 5 U.S.C. 5547 and related regulations and instead apply an annual limitation equal to the rate payable under 3 U.S.C. 104 in the case of specified categories of employees and situations on a time-limited basis. Such a waiver may not apply with respect to additional compensation that is normally creditable as basic pay for retirement or any other purpose.

(b) *Overtime pay.* (1) An employee is covered by the overtime pay (including compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations, subject to the requirements and modifications described in paragraphs (b)(2) through (b)(6) of this section.

(2) Consistent with 5 U.S.C. 5542(c), an employee who is subject to section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, is covered by OPM's FLSA overtime regulations in 5 CFR part 551.

(3) Compensation for irregular or overtime work performed by National Guard Technicians is governed by 32 U.S.C. 709(h) and policies issued by the National Guard Bureau.

(4) Firefighters covered by 5 U.S.C. 5545b are subject to special overtime pay rules as described in that section and in 5 U.S.C. 5542(f) and in related regulations. (See also § 9901.361(d).)

(5) Compensatory time off earned under 5 U.S.C. 5543 must be used by the end of the 26th pay period after that in which it was earned. Compensatory time off not used within 26 pay periods will be paid at the overtime rate at which it was earned. Employees with unused compensatory time earned before June 8, 1997 (January 5, 1997, for Defense Logistics Agency employees), have had a separate "old compensatory time" account established for their use. Old compensatory time is charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested. Within each category of compensatory time, the oldest will be charged first. When a DoD employee separates, moves to another DoD Component, or transfers to another Federal agency, any unused compensatory time off balance will be paid at the overtime rate at which it was earned. Also, when an employee moves to a pay system that does not provide for compensatory time off (e.g., Senior Executive Service), any unused compensatory time off balance will be paid at the overtime rate at which it was earned.

(6) The following modifications to 5 U.S.C. 5542 and 5543 and related regulations apply:

(i) The overtime hourly rate cap for FLSA-exempt employees based on the rate of basic pay for the minimum rate for GS-10 does not apply; instead, an FLSA-exempt employee is entitled to an overtime hourly rate equal to 1.5 times the employee's adjusted salary hourly rate unless the employee is in a pay band for which the overtime hourly rate is set equal to the employee's adjusted salary hourly rate based on a determination by the Secretary, subject to § 9901.105;

(ii) An FLSA-exempt employee will be compensated for overtime work (whether regular or irregular or occasional) using a quarter of an hour as the smallest fraction of an hour, with minutes rounded to the nearest full fraction of an hour;

(iii) An FLSA-exempt employee may not be credited with overtime hours of work for travel time unless that travel involves the performance of actual work while traveling; instead, any such

noncreditable travel hours may be credited as earned compensatory time off for travel, subject to the requirements in paragraph (j) of this section; and

(iv) An FLSA-exempt employee may be required to receive compensatory time off under 5 U.S.C. 5543 in lieu of overtime pay, regardless of the type of overtime work or the amount of the employee's adjusted salary rate.

(c) *Night pay.* An employee is covered by the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations, except for the following modifications:

(1) Night pay is payable for irregular or occasional overtime work in the same manner it is payable for regularly scheduled work; and

(2) Night pay is not payable during paid absences, except for a period of court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off during religious observances, or when excused from duty on a holiday.

(d) *Sunday pay.* An employee is covered by the Sunday pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Work for which Sunday pay is payable (i.e., Sunday work) is limited to applicable hours of work that are actually performed on Sunday (i.e., the definition of "Sunday work" in 5 CFR 550.103 applies except that non-Sunday hours are excluded even if those hours are within a daily tour of duty that includes Sunday hours); and

(2) Consistent with section 624 of the Treasury and General Government Appropriations Act, 1999 (as found in section 101(h) of Division A of Public Law 105-277, October 21, 1998), Sunday pay is not payable unless an employee actually performed work during the time corresponding to such pay (i.e., no Sunday pay for periods of paid leave, compensatory time off, credit hours, paid excused absence, or other paid time off).

(e) *Pay for holiday work.* An employee is covered by the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Holiday premium pay is paid at twice an employee's adjusted salary hourly rate for each hour (including overtime hours) an employee is ordered or approved to work on a holiday;

(2) For FLSA-exempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under paragraph (b) of this section for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate; and

(3) For FLSA-nonexempt employees, the payment for overtime hours worked on a holiday has two components: payment required under 5 CFR 551.512 for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate.

(f) *Standby duty pay.* (1) An employee is covered by the standby duty pay provisions in 5 U.S.C. 5545(c)(1) and related regulations, subject to the requirements and modifications in paragraphs (f)(2) through (f)(6) of this section.

(2) Except as provided in paragraph (f)(3), eligibility for regularly scheduled standby duty is limited to firefighters classified to the 0081 occupation who are not eligible for coverage under 5 U.S.C. 5545b, and to emergency medical technicians not involved in fire protection activities who are required to perform standby duty.

(3) The Secretary may approve extending standby duty premium pay coverage to occupations other than those cited in paragraph (f)(2) of this section. Component proposals to extend coverage will explain why employees within the specified occupational group must regularly remain at the duty station longer than ordinary periods of duty, a substantial part of which involves remaining in a standby status rather than performing actual work, and must address how the criteria in 5 CFR 550.143 are met.

(4) The standby percentage is always multiplied by an employee's adjusted salary rate regardless of the amount.

(5) Standby pay attributable to use of an adjusted salary rate exceeding the applicable GS-10, step 1, rate limitation is not considered to be paid under 5 U.S.C. 5545(c)(1) and thus is not creditable basic pay for retirement purposes.

(6) No additional premium pay for hours of overtime work (whether regularly scheduled or irregular or occasional), including compensatory time off, is payable to an employee receiving standby duty pay.

(g) *Administratively uncontrollable overtime pay.* The administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and will not be applied to NSPS employees. Compensation for such work will be made under the applicable provisions of this section.

(h) *Law enforcement availability pay.* An employee is covered by the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations, except that the reference to "premium pay" in 5 CFR 550.186 will

be interpreted to refer to the applicable title 5 premium payments and to the corresponding modified provisions in this section. In addition, the reference to "limitation on premium pay" in 5 CFR 550.185(a)(2) will be construed to refer to the limitations under 5 U.S.C. 5547 and to the corresponding modified provision in paragraph (a) of this section.

(i) *Pay for duty involving physical hardship or hazard.* (1) An employee is covered by the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations, subject to the requirements and modifications described in paragraphs (i)(2) through (i)(6) of this section.

(2) In determining eligibility for hazardous duty pay, an authorized management official will apply occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in Subtitle B, Chapter XVII, of title 29, United States Code, or, in the absence of a permissible exposure limit issued by the Secretary of Labor, other applicable standard promulgated by the Secretary.

(3) Subject to § 9901.105, the Secretary may establish new categories of hazardous duty pay in addition to those found in Appendix A to Subpart I of 5 CFR part 550. Components may request a new category of hazardous duty pay be established and must submit, with their request, the information required in 5 CFR 550.903(b).

(4) Except as provided in paragraph (i)(5) and (i)(6) of this section, an employee is paid a hazard pay differential when he or she is assigned to and performs a duty specified in Appendix A to Subpart I of 5 CFR part 550 or as provided under paragraph (i)(3) of this section.

(5) An employee will be eligible to receive hazardous duty pay when an authorized management official determines—

(i) One or more of the conditions requisite for such payment exist; and

(ii) Safety precautions, protective or mechanical devices, protective or safety clothing, protective or safety equipment, or other preventive measures have not reduced the element of hazard below the permissible exposure limits promulgated by the Secretary of Labor or any applicable standard promulgated by the Secretary, consistent with paragraph (i)(2) of this section.

(6) Hazard pay differentials are not payable to employees in occupations or jobs in which unusual physical risk is

an inherent characteristic of the occupation or job, such as police officer, emergency medical technician, test pilot, ordnance/explosives/incendiary inspector, and engineering technician performing inspection functions inside fuel storage tanks, tunnels, or shafts. The classification of the employee's position (i.e., determination of pay band level) includes a consideration of the hazardous duty or physical hardship. For the purposes of this paragraph, the phrase "includes a consideration of the hazardous duty" means that the duty is one element considered in determining the pay band level of the position—i.e., the knowledge, complexities, skills and abilities required to perform that duty are considered in the classification of the position. Such consideration does not require the hazardous duty or physical hardship to be pay band controlling.

(j) *Compensatory time off for travel.*

(1) An employee is covered by the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations, subject to the requirements and modifications described in paragraphs (j)(2) through (j)(6) of this section.

(2) The term "official duty station" as defined in the related regulations is not applicable; instead, the term "official worksite" is used to determine an employee's entitlement to compensatory time off for travel. The term "official worksite" has the meaning given in 5 CFR 531.605.

(3)(i) Time spent commuting between an employee's residence and the workplace (official or temporary worksite), or between an employee's residence and a transportation terminal, is not creditable for the purpose of compensatory time off for travel, except as provided in paragraph (j)(3)(ii) of this section.

(ii) If an employee is required to travel to a temporary worksite and if the one-way commuting time exceeds the employee's normal one-way commuting time by more than 1 hour, the commuting time beyond 1 hour may be credited.

(4) An employee earns compensatory time off for time spent in a travel status away from the official worksite when such time is not otherwise compensable.

(5) Employees must file requests for credit of compensatory time off for travel within 10 workdays after returning to the official duty station, or within 10 workdays of returning from temporary duty (TDY) assignment or approved leave which immediately follows the TDY during which the compensatory time off for travel was earned, by submitting a travel itinerary,

or any other documentation acceptable to the employee's supervisor, in support of the request. If not submitted within 10 workdays, the employee will forfeit his or her claim to the compensatory time off for travel. Compensatory time off for travel will be credited in increments of 6 minutes or 15 minutes and will be tracked and managed separately from other forms of compensatory time off.

(6)(i) When an employee moves from an NSPS position to a non-NSPS position within the Department, in which the employee will be eligible for compensatory time off for travel under 5 CFR part 550, subpart N, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage in 5 CFR part 550, subpart N.

(ii) When an employee moves from a non-NSPS position to an NSPS position within the Department, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage established under 5 CFR 550.1407.

(k) *Compensatory time off for religious observances.* An employee is covered by the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations, subject to the following requirements and modifications:

(1) An employee's request for time off should not be granted without simultaneously scheduling the hours during which the employee will work to make up the time (unless the employee earned the needed hours in advance); and

(2) An employee may not receive payment for any unused compensatory time off for religious observances under any circumstances. This prohibition against payment applies to surviving beneficiaries in the event of the individual's death.

(l) *Air traffic controller differential.* (1) The air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for subsections (a)(1) and (d) of that section.

(2) An employee is covered by the air traffic controller differential provisions in subsections (a)(1) and (d) of 5 U.S.C. 5546a(a), subject to the modification described in paragraph (l)(3) of this section.

(3) The reference to the grade levels of GS-9 and GS-11 in 5 U.S.C. 5546a(a)(1) must be construed to mean a comparable level of work as determined under the NSPS classification structure.

§ 9901.363 Premium pay for health care personnel.

(a) *Coverage.* (1) This section applies to DoD health care personnel covered under NSPS who may be eligible for premium pay, as described in paragraphs (b), (c), and (d) of this section. For the purpose of this section, *health care personnel* means employees providing direct patient care services or services incident to direct patient care services. Examples include employees in the following occupations: nurse, biomedical engineer, dietitian, dental hygienist, psychologist, and medical records technician.

(2) Premium pay under this section is not considered part of basic pay for any purpose, nor is it used in computing a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(b) *On-call premium pay.* (1) When health care personnel are not otherwise compensated for on-call time, heads of DoD Components may authorize on-call premium pay under this section for officially scheduled "on-call" time which requires these employees to restrict their activities sufficiently to be available to return to the worksite promptly when it is necessary.

(2) To be paid on-call premium pay, an employee must be officially scheduled to be on-call outside their regular duty hours or during hours on a holiday when the employee is excused from regular duty.

(3) An employee may not be scheduled to be on-call unless it is essential for the employee to be immediately available to return to the worksite.

(4) An employee officially scheduled to be on-call will be paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status.

(5) An employee may not receive on-call pay during periods of actual work. When an employee on-call is required to return to work status, on-call pay will be suspended. When released from the requirement to perform actual work, the employee will return to the remaining scheduled on-call status.

(6) An employee may not be charged leave during periods of regularly scheduled on-call duty; nor may such an employee receive on-call premium pay when, because of leave or other authorized absence, the employee is not expected to be able to return to the worksite immediately.

(c) *Night pay for health care personnel.* (1) Health care personnel working a tour of duty, any part of which falls between 6 p.m. and 6 a.m., with 4 or more hours falling between 6 p.m. and 6 a.m., will be paid additional pay for each hour of work on such tour. When fewer than 4 hours of work fall between 6 p.m. and 6 a.m., health care personnel will be paid additional pay for each hour of work performed between 6 p.m. and 6 a.m. Night pay for health care personnel is 10 percent of the employee's hourly rate of adjusted salary. An employee receiving night pay under this section may not also receive night pay under § 9901.362(c).

(2) Health care personnel are entitled to pay for night duty for a period of paid absence only for a period of court leave, military leave, time off awards under 5 U.S.C. 4502(e), or compensatory time off for religious observances.

(3) When excused from work because of a holiday or in-lieu-of holiday, health care personnel are entitled to the night pay that would have applied had they not been excused from work.

(d) *Pay for weekend duty for health care personnel.* (1) Health care personnel who work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday, will be paid additional pay for each hour of work during such tour. Health care personnel who have two separate tours of duty, each of which qualify as weekend duty, will be paid additional pay for each hour of both tours. Additional pay for weekend duty is 25 percent of the employee's hourly rate of adjusted salary. An employee receiving pay for weekend duty may not also receive pay for Sunday work under § 9901.362(d).

(2) When on court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off for religious observances, health care personnel are entitled to pay for weekend duty they otherwise would have received.

§ 9901.364 Foreign language proficiency pay.

(a) *General provisions.* (1) This section applies to employees who may be paid Foreign Language Proficiency Pay (FLPP) if they are certified as proficient in a foreign language the Secretary has determined to be necessary for national security interests, and if they are not receiving FLPP as provided in 10 U.S.C. 1596 and 10 U.S.C. 1596a.

(2) The Secretary is authorized to publish an annual list of foreign languages necessary for national security interests and to establish

overall policy for administration of the Defense Language Program.

(3) Employees may be certified as proficient in a necessary foreign language using criteria and procedures established by the Secretary and receive FLPP.

(b) *Approval procedures.* An authorized management official delegated the authority for approving payment must document that an employee meets eligibility criteria before authorizing FLPP. The documentation includes—

(1) Certification within the last 12 months of the employee's proficiency in a foreign language the Secretary has determined necessary for national security interests;

(2) Affirmation that the employee does not currently receive comparable pay under 10 U.S.C. 1596 or 1596a;

(3) Certification of the employee's foreign language proficiency level renewed annually; and

(4) Certification based on an annual test that is part of the Defense Language Proficiency Test System.

(c) *Amount and method of payment.* The decision to grant FLPP, including the amount, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the DoD Component, unless there is no official at a higher level in the organization. The amount of FLPP received by the employee, not to exceed \$500 per pay period, will be determined based on the following considerations:

(1) The employee's measured proficiency level in the necessary language;

(2) The need for the employee's particular language skills;

(3) The difficulty of recruiting or retaining employees with the same proficiencies;

(4) The extent to which the employee performs tasks requiring proficiency;

(5) The number of necessary languages in which the employee is proficient; and

(6) Other considerations authorized by the Secretary.

(d) *Treatment for other purposes.* FLPP is not considered part of basic pay for any purpose and does not count towards retirement, insurance, or any other benefit related to basic pay. FLPP is not pay for purposes of a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(e) *Termination.* The authorized management official as determined by the Component may reduce or terminate FLPP at any time when the official determines—(1) The need for the

employee's language capability has been reduced or eliminated; or

(2) The employee no longer meets the certification requirements.

(f) *Miscellaneous.* (1) The minimum qualifying level may not be less than Interagency Language Roundtable Level 2 proficiency in at least two skills (listening, reading, speaking, or writing, as required).

(2) FLPP may be paid for proficiency in multiple languages; however, the total amount may not exceed \$500 per pay period.

Conversion Provisions

§ 9901.371 Conversion into NSPS pay system.

(a) *Introduction.* This section describes the pay-setting provisions that apply when DoD employees are converted into the NSPS pay system established under this subpart. (See § 9901.231 for conversion rules related to determining an employee's career group, pay schedule, and band.) An affected employee may convert from the GS system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this part (except § 9901.372), the terms “convert,” “converted,” “converting,” and “conversion” refer to employees who become covered by the NSPS pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these conversion provisions.

(c) *Bar on pay reduction.* Subject to paragraph (e) of this section, employees will be converted into the NSPS pay system without a reduction in their adjusted salary rate. (As defined in § 9901.304, the term “adjusted salary” means base salary plus any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.)

(d) *Rate comparison.* For the purpose of determining whether conversion into NSPS constitutes an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality

payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. The rate of basic pay immediately before conversion must be adjusted as described in paragraph (e) of this section before comparing that rate of basic pay to the initial NSPS rate of basic pay.

(e) *Simultaneous actions.* If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, the other action will be processed under the rules pertaining to the employee's former system before processing the conversion action.

(f) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion (as provided in § 9901.231(c)), and pay will be set consistent with the pay-setting rules of the pay system that applies prior to conversion. For GS employees, pay in the permanent position of record must be reconstructed to reflect any increase that would have otherwise occurred if the employee had not been temporarily promoted, as provided in GS pay-setting regulations. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system. (See also paragraph (k) of this section.)

(g) *Grade retention prior to conversion.* An employee on grade retention immediately before conversion must be converted to a pay band based on the grade of his or her assigned permanent position of record (not the retained grade), as provided in § 9901.231(d), but the employee's base and adjusted salary while in grade retention status will be used in applying this section (e.g., in setting the initial NSPS base and adjusted salary and in determining the amount of any within-grade increase adjustment). After conversion and any within-grade increase adjustment under paragraph (j) of this section, if the employee's base salary exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(h) *Pay retention prior to conversion.* For an employee on pay retention under 5 U.S.C. 5363 immediately before conversion, the employee's pay will be realigned so that the employee's NSPS adjusted salary (consisting of base salary plus any applicable local market

supplement) equals the employee's retained rate before conversion. If the employee's base salary (after realignment) exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(i) *Conversion adjustments.* The only NSPS base salary adjustments that may be made in conjunction with an employee's conversion into NSPS are those identified in paragraphs (j) through (m) of this section.

(j) *Within-grade increase (WGI) adjustment.* (1) Upon conversion to NSPS, a General Schedule (GS) employee (regardless of work schedule) who would otherwise be eligible for a within-grade increase (WGI), and who is paid below the maximum rate for their grade, will receive a prorated WGI adjustment to his or her NSPS base salary rate to account for the time (measured in calendar days) since the employee's last equivalent pay increase.

(2) The WGI adjustment is calculated based on the number of calendar days between the effective date of the employee's last equivalent increase and the date of conversion into NSPS, regardless of the number of days in a non-pay status (if any). The maximum adjustment may not exceed a full WGI.

(3) For an employee on a temporary promotion immediately before conversion, the employee's GS pay entitlements must be determined as provided in paragraph (f) of this section before calculating the WGI adjustment.

(4) For an employee entitled to grade retention immediately before conversion, the WGI adjustment is determined using the employee's retained grade and step.

(5) The WGI adjustment is not applicable to an employee entitled to pay retention immediately before conversion.

(6) The WGI adjustment is not applicable to an employee whose performance has been determined to be below an acceptable level of competence under 5 CFR part 531, subpart D.

(7) The WGI adjustment is a one-time adjustment that is effective on the date of conversion. An employee who leaves NSPS and is subsequently again subject to the conversion process may not receive an additional WGI adjustment under this provision; however, such an employee may be eligible for a WGI adjustment equivalent in accordance with § 9901.351(c).

(k) *Special increase for employees on temporary promotion prior to conversion.* (1) *General.* If an employee had a temporary promotion immediately before conversion, and if the position to

which the employee was temporarily promoted becomes covered by NSPS, an authorized management official may temporarily reassign or temporarily promote the employee back to that position, subject to the same terms and conditions as the initial temporary promotion (e.g., if the temporary promotion was not to exceed 5 years and the action is a temporary reassignment under NSPS, the temporary reassignment may not exceed 5 years). When the employee is temporarily placed back into the position immediately after conversion, the pay-setting rules in paragraphs (k)(2) and (k)(3) of this section apply.

(2) *Temporary reassignment.* If the post-conversion action would be a temporary reassignment, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) in lieu of setting pay under the reassignment rules under § 9901.353. This is a one-time exception to the limitations on reassignment increases imposed under § 9901.353. Upon expiration of the temporary reassignment, pay will be set as specified in § 9901.353(g) or paragraph (k)(4) of this section, as applicable.

(3) *Temporary promotion.* (i) If the post-conversion action would be a temporary promotion, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) or may set pay according to the promotion rules under § 9901.354 to provide a greater increase. Upon expiration of the temporary promotion, pay will be set as specified in § 9901.354(c) or paragraph (k)(4) of this section, as applicable.

(ii) The increase described in paragraph (k)(3)(i) of this section may also apply to an employee who is on a temporary promotion at the time that temporary promotion position converts to NSPS, even if the employee's permanent position of record has not yet converted. In this case, upon expiration of the temporary promotion, pay will be set under the rules of the applicable pay system.

(4) *Temporary placement becomes permanent.* If a temporary reassignment or promotion to an NSPS position under this paragraph (k) becomes permanent with no break, the employee's base salary will not change, but will continue at the rate received at the end of the temporary reassignment or promotion.

(l) *Special increases equivalent to GS promotion increase.* (1) During the first 12 months following conversion, employees who are not eligible for the Accelerated Compensation for Developmental Positions (ACDP) under § 9901.345 are eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to a noncompetitive promotion increase the employee would have received but for conversion to NSPS. This paragraph may be applied only when the grade level of the promotion is encompassed within the same pay band, the employee's performance warrants the pay increase, and the promotion would have otherwise occurred during that period.

(2) An employee who is selected for a non-NSPS position that subsequently becomes covered by NSPS before the effective date of the employee's placement in the position is eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to the increase the employee would have received had the placement been effected prior to the position becoming covered by NSPS. This paragraph may be applied only when the employee is not already in an NSPS-covered position on the effective date of the placement, and the effective date is within 12 months of the position becoming covered by NSPS. An employee who receives an increase under this paragraph is not eligible for the WGI adjustment described in paragraph (j) of this section.

(m) *Adjustment for physicians and dentists.* For a GS physician or dentist who was regularly receiving a physicians' comparability allowance or premium pay, the Component may increase the base salary after conversion to NSPS to account for the loss of such allowance or premium pay (since such payments are not authorized for physicians and dentists under NSPS). The Component must also consider the additional pay represented by any applicable targeted local market supplement in determining the rate at which the base salary should be set under this paragraph.

§ 9901.372 Conversion or movement out of NSPS pay system.

(a) *General.* (1) This section applies to the conversion or movement of employees out of the NSPS pay system to a different pay system. Under this section, when an NSPS employee is converted or moved to a GS position, a GS virtual grade and rate is established for the NSPS employee so that the employee may be treated as a GS

employee in applying GS pay-setting rules.

(2) For the purpose of this section (unless otherwise specified)—

(i) The terms “convert,” “converted,” “converting,” and “conversion” refer to NSPS employees who become covered by a different pay system without a change in position (as a result of a determination made by the Secretary under § 9901.102(e) or as otherwise provided by law); and

(ii) The terms “move,” “moved,” “moving,” and “movement” refer to NSPS employees who become covered by a different pay system through a change in position, rather than by conversion.

(b) *Classification of converted position.* Prior to converting an employee out of NSPS, an authorized management official, as defined by the Component, will review the duties of the employee's current permanent position of record and classify the position's duties in accordance with Office of Personnel Management (OPM) classification guidance and/or other appropriate criteria to determine the appropriate title, series, and grade or pay band of the position in the new pay system. Employees occupying positions classified to DoD-unique occupational series at the time of conversion out cannot be retained in those series, but must be assigned to the series that most closely represents the employee's current duties.

(c) *Determining pay under new pay system.* When converting or moving an employee out of NSPS to another pay system, the pay-setting rules of the gaining system will apply. For the purpose of applying those rules, the employee's final pay under NSPS is determined based on the employee's NSPS permanent position of record, band, and pay as of the day immediately before the date of conversion or movement out of NSPS. An employee on a temporary reassignment or temporary promotion will be returned to his or her permanent position of record prior to conversion or movement. No personnel or pay action that, but for the conversion or movement out of NSPS, would have occurred under NSPS on the date of conversion or movement may be considered. Any personnel or pay action occurring on the date of conversion or movement must be processed under the rules of the gaining system. In the case of a conversion or movement to the General Schedule (GS) pay system, the supplemental rules in paragraph (d) of this section must be followed to determine a virtual GS grade and rate (as of the date before the employee's conversion or movement out

of NSPS) that will be used in applying GS pay-setting rules.

(d) *Virtual GS grade and rate.* (1) *Virtual GS grade.* (i) Before an employee converts or moves out of NSPS under this paragraph, a virtual GS grade will be established for the purpose of applying GS pay-setting rules (e.g., a promotion increase if the actual GS grade is higher than the virtual GS grade). This virtual GS grade will be based on a comparison of the NSPS employee's current adjusted salary to the highest applicable GS rate range that would apply to the employee's NSPS permanent position of record considering only those GS grade levels and associated range ranges that are included in the employee's assigned NSPS pay band. For the purpose of this section, a highest applicable GS rate range includes the following rate ranges: the GS locality rate schedule for the locality pay area in which the employee's NSPS official worksite is located; the special rate schedule based on the employee's position of record, official worksite, or other established conditions; the law enforcement officer special base rate schedule; or the GS base pay schedule. The grade-band conversion tables established in DoD's NSPS implementing issuances for the purpose of converting employees into NSPS must be used in determining which GS grades are covered by the employee's assigned NSPS pay band.

(ii) If the employee's pay band covers one GS grade, the employee's virtual grade will be that grade.

(iii) For an employee in a pay band encompassing more than one GS grade, if the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for the highest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be that grade. If the employee's adjusted salary is lower than the step 4 rate, the adjusted salary is compared with the step 4 rate of the highest applicable GS rate range for the second highest GS grade encompassed within the employee's pay band. If the employee's adjusted salary equals or exceeds the step 4 rate of the second highest grade, the employee's virtual grade will be that grade. This process is repeated for each successively lower grade encompassed within the assigned band until a grade is found at which the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for that grade.

(iv) Notwithstanding paragraph (d)(1)(iii) of this section, if the employee's adjusted salary exceeds the maximum rate of the highest applicable

GS rate range for the assigned GS grade determined under paragraph (d)(1)(iii) of this section but is a rate within the highest applicable GS rate range for the next higher applicable grade encompassed by the employee's pay band, then the employee's virtual GS grade will be that higher grade (even though the rate is below the applicable step 4 rate for that higher grade).

(v) Notwithstanding paragraph (d)(1)(iii) of this section, an employee's virtual GS grade may not be less than the permanently assigned GS grade the employee held upon conversion into NSPS (for an employee who was converted as described in § 9901.371), unless, since that time, the employee has undergone—

(A) a voluntary reduction in band or reduction in base salary;

(B) an involuntary reduction in band or reduction in base salary based on unacceptable performance and/or conduct; or

(C) a reduction in band based on a reduction in force (RIF) or classification action.

(vi) If the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the highest grade encompassed by his or her assigned pay band, the employee's virtual grade will be that highest GS grade.

(vii) If the employee's adjusted salary is less than the step 4 rate of the highest applicable GS rate range for the lowest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be the lowest GS grade in the band.

(2) *Virtual GS rate.* (i) Once a virtual GS grade has been established, a virtual GS rate will be set (before any pay-related action that would take effect on the date of the employee's conversion or movement out of NSPS). As of the day before the date of conversion or movement out of NSPS, the employee's NSPS adjusted salary will be compared to the highest applicable GS rate range for the established virtual grade. If the employee's adjusted salary falls between two steps of the highest applicable GS rate range for the virtual GS grade, the virtual rate will be set at the higher step rate. If an employee's adjusted salary is less than the minimum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the minimum step rate. If the employee's adjusted salary is greater than the maximum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the maximum step rate or at a retained rate set using GS pay retention rules in 5 CFR part 536 (if the employee

is eligible for pay retention under those rules).

(ii) If the virtual step rate derived under paragraph (d)(2)(i) of this section is an adjusted salary rate, an employee's virtual GS base salary rate will be derived based on that adjusted salary rate (i.e., GS base salary rate for the same step position).

(iii) The virtual GS grade and rates established under this paragraph (d) will be used in applying GS pay administration rules in setting pay in the new GS position (e.g., the GS promotion rules, pay retention rules, and the maximum payable rate rule). (Since the NSPS system did not continue coverage under the grade retention provision in 5 U.S.C. 5362, grade retention is not applicable to NSPS employees who convert or move to a GS position.) As required by paragraph (c) of this section, any pay action effective on the date of conversion or movement from NSPS to the GS pay system will be processed under GS pay administration rules.

(e) *GS within-grade increases.* Service under NSPS is creditable for within-grade increase purposes upon conversion or movement to a GS position under this section to the extent provided under 5 CFR part 531, subpart D.

(f) *Comparison of rates of basic pay.* For the purpose of determining whether the conversion or movement out of NSPS under this section is an adverse action for reduction of pay under 5 U.S.C. Chapter 75, Subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. This comparison is made before any pay-related action (e.g., geographic movement) under the gaining system that takes effect on the date of conversion or movement.

Subpart D—Performance Management

§ 9901.401 Purpose.

(a) This subpart establishes a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture. The implementation and operation of the system will provide for the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance and provide an equitable method for appraising and compensating employees.

§ 9901.402 Coverage.

(a) This subpart applies to eligible employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102.

(b) The following employees and positions in organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by 5 U.S.C. Chapter 43;

(2) Employees and positions excluded from Chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) Except as provided in § 9901.408, this subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as described in § 9901.407) during a single 12-month period.

§ 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system established under this subpart, the provisions of 5 U.S.C. Chapter 43 are

waived with respect to that category of employees.

§ 9901.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period has the meaning given that term in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Minimum period means the period of time during which an employee will perform under one or more approved performance plans before receiving a rating of record.

Pay-for-performance evaluation system means the performance management system established under this subpart to link individual pay to performance and provide an equitable method for evaluating performance and compensating employees.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance expectations means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates and operationalizes the elements set forth in § 9901.401(b).

Performance Review Authority has the meaning given that term in § 9901.103.

Rating of record has the meaning given that term in § 9901.103.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.405 Performance management system requirements.

(a) The Secretary may issue implementing issuances further defining a performance management system for NSPS employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system—

(1) Provides for the appraisal of the performance of each employee annually;

(2) Holds supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(3) Specifies procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance;

(4) Specifies the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances; and

(5) Provides for multiple rating levels as follows:

Rating of record	Rating of record descriptor
Level 5	Role Model.
Level 4	Exceeds Expectations.
Level 3	Valued Performer.
Level 2	Fair.
Level 1	Unacceptable.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers will—

(1) Clearly communicate performance expectations and hold employees responsible for accomplishing them;

(2) Make meaningful distinctions among employees based on performance and contribution;

(3) Foster and reward excellent performance;

(4) Address poor performance; and

(5) Assure that employees are assigned a rating of record.

§ 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated to the employee—

(1) In writing, including those that may affect an employee's retention in the job, and

(2) Prior to holding the employee accountable for them.

(c) Notwithstanding the requirements in paragraphs (d) through (g) of this section, employees are accountable for demonstrating professionalism and appropriate standards of conduct and behavior, such as civility and respect for others.

(d) Performance expectations for supervisors and managers will include assessment and measurement of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(e) Performance expectations include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(f) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such characteristics). Such assignments and instructions need not be in writing.

(g) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

(h) Performance expectations are subject to higher- or second-level review to ensure consistency and fairness within and across organizations.

(i) Performance expectations that comprise a performance plan are considered to be approved when the supervisor has communicated the performance plan to the employee in writing.

§ 9901.407 Minimum period of performance.

(a) Only employees who have completed the minimum period under one or more approved performance plans may be issued a rating of record in accordance with the procedures prescribed by this subpart.

(b) The minimum period of performance is 90 calendar days.

(1) Periods during which an employee is in a leave status may not be applied toward the 90-day minimum.

(2) Unless an employee meets criteria specified in § 9901.342(i) through (l), if there is a break in NSPS-covered service (e.g., due to job change, resignation), the service performed prior to the break may not be used to satisfy the 90-day minimum period.

(c) Employees who have not completed the minimum period of performance during the applicable appraisal period will not be rated and will not be eligible for a performance payout unless otherwise provided in this part.

§ 9901.408 Employees on time limited appointments.

Employees who are appointed for less than 90 days—

(a) Will be given performance expectations that are linked to the organization's strategic plan, and

(b) May receive an evaluation which—

(1) Consists of a narrative description at the end of the appointment of employee performance, accomplishments and contributions during that appointment; and

(2) May serve as documentation and justification for recognition under 5 U.S.C. chapter 45.

§ 9901.409 Monitoring and developing performance.

(a) In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(1) Monitor the performance of their employees and their contribution to the organization;

(2) Provide ongoing (i.e., regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period; and

(3) Document at least one interim performance review. Documented interim reviews are not required for periods of performance of less than 180 days.

(b) Developing performance is integrated with the performance management process and is a shared responsibility of management and employees. Developing performance includes—

(1) Coaching and mentoring employees;

(2) Reinforcing strengths and addressing weaknesses; and

(3) Discussing employee development opportunities.

§ 9901.410 Addressing performance that does not meet expectations.

(a) If at any time during the appraisal period a supervisor determines that an employee's performance is not meeting expectations, the supervisor will—

(1) Identify and communicate to the employee the specific performance deficiencies that require improvement;

(2) Consider the range of options available to address the performance deficiency, including remedial training, improvement periods, reassignment, oral warnings, letters of counseling, written reprimands, or adverse action (including a reduction in rate of basic pay or pay band or a removal); and

(3) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(b) Adverse actions taken based on unacceptable performance and/or conduct will be taken in accordance with the provisions in 5 U.S.C. Chapter 75 or other appropriate procedures if not covered by Chapter 75, such as procedures for National Guard Technicians under 32 U.S.C. 709(f).

§ 9901.411 Appraisal period.

(a) Except as provided in paragraphs (a)(1) through (3) of this section, the appraisal period will be October 1 to September 30.

(1) The appraisal period may begin after October 1 and end after September 30 for newly converted groups of employees;

(2) The appraisal period may begin after October 1 for employees who move to an NSPS position from a non-NSPS position after that date; and

(3) The appraisal period may end between July 1 and September 30 for employees receiving early annual recommended ratings.

(b) If, by the end of the appraisal period, an employee has not met the minimum period of performance, management may extend the appraisal period provided such extensions do not—

(1) Delay the payout for the applicable pay pool; or

(2) Extend beyond the rating of record effective date.

(c) The effective date of ratings of record will be January 1, except for additional ratings of record as described in § 9901.412(b)(2).

§ 9901.412 Rating and rewarding performance.

(a) Forced distribution of ratings (setting pre-established limits for the percentage or number of ratings that may be assigned at any level) is prohibited.

(b) An appropriate rating official—

(1) Will prepare and issue a rating of record after the completion of the appraisal period; and

(2) May issue an additional rating of record following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record. The new rating would be effective on the first day of the month after it is final, as described in paragraph (e) of this section.

(c) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions.

(d) If an employee engages in work-related misconduct and the nature or severity of that misconduct has an impact on the execution of his or her duties, that of the team, and/or that of the organization, the impact may be reflected in the employee's rating of record.

(e) Consistent with the requirements of merit system principles and this part, the Pay Pool Manager is the approving authority for Pay Pool Panel

recommendations concerning ratings of record. A rating of record is considered final when issued to the employee with all appropriate reviews and signatures.

(f) An appropriate rating official will communicate the rating of record and number of shares to the employee.

(g) The rating of record of an employee may not be lowered based on an approved absence from work, including the absence of a disabled veteran to seek medical treatment as provided in Executive Order 5396.

(h) A rating of record issued under this subpart—

(1) Is an official rating of record for the purpose of any provision of this title, Code of Federal Regulations, for which an official rating of record is required;

(2) Will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances; and

(3) Will be used as a basis for—

(i) A pay determination under any applicable pay rules;

(ii) Determining reduction-in-force retention standing; and

(iii) Such other action that the Secretary considers appropriate, as specified in implementing issuances.

(i) Employees who change pay pools after the last day of the appraisal period and before the effective date of the payout will—

(1) Be evaluated and assigned a rating of record by the rating official, Pay Pool

Panel and Pay Pool Manager associated with the pay pool of record on the last day of the appraisal period; and

(2) Have their payout calculated and paid based on the pay pool funding and share valuation of the gaining pay pool whose Pay Pool Manager will also determine the share assignment and payout distribution between salary increase and bonus.

(j) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in implementing issuances (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

§ 9901.413 Reconsideration of ratings.

(a) *Nonbargaining unit employees.* (1) A rating of record or job objective rating may be challenged by a nonbargaining unit employee only through a reconsideration process specified in this subpart and implementing issuances. This process will be the sole and

exclusive agency administrative process for all nonbargaining unit employees to challenge a rating of record.

(2) Consistent with this part, Pay Pool Managers will decide job objective rating and rating of record reconsiderations.

(3) If the Pay Pool Manager decision is challenged, consistent with this part, the Performance Review Authority will make a final decision.

(4) A share assignment determination, payout distribution determination, or any other payout matter will not be subject to the reconsideration process or any other agency administrative grievance system.

(b) *Bargaining unit employees.* (1) Negotiated grievance procedures are the exclusive administrative procedures for bargaining unit employees to challenge a rating of record or job objective rating as provided for in 5 U.S.C. 7121.

(2) If a negotiated grievance procedure is not available to a bargaining unit employee or challenging a rating of record or job objective rating is outside

the scope of the employee's negotiated grievance procedure, a bargaining unit employee may challenge a rating of record or job objective rating in accordance with this subpart and implementing issuances.

(c) *Recalculation based on adjusted rating of record.* In the event a reconsideration or negotiated grievance decision results in an adjusted rating of record, the revised rating will be referred to the Pay Pool Manager for recalculation of the employee's general salary increase, adjustment to local market supplement, and the payout amount and distribution.

(1) Any adjustment to salary will be retroactive to the effective date of the performance payout.

(2) Decisions made through the reconsideration process or a negotiated grievance procedure will not result in recalculation of the payout made to other employees in the pay pool.

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