

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF DEFENSE

### OFFICE OF PERSONNEL MANAGEMENT

#### 5 CFR Part 9901

RIN 3206-AL75

#### 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 a proposed regulation adding Subpart E, Staffing and Employment, to the National Security Personnel System (NSPS) regulation published in the **Federal Register** on September 26, 2008. NSPS is a human resources management system for DoD, originally authorized by the National Defense Authorization Act for Fiscal Year 2004, amended by the National Defense Authorization Act for Fiscal Year 2008, and the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. The proposed regulation governs staffing and employment under NSPS.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** You may submit comments identified by docket number NSPS-OPM-2008-0139 and/or Regulatory Information Number (RIN) 3206-AL75. Please arrange and identify your comments on the regulatory text by 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 add staffing and employment provisions to the regulation published in the **Federal Register** on September 26, 2008 (Volume 73, Number 188) [Rules and Regulations] [Pages 56344-56420]

pertaining to 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), amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181, January 28, 2008), and by section 1106 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417, October 14, 2008). The following information is intended to provide interested parties with relevant background material about, and a description of the staffing and employment subpart of the regulation.

#### 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. NSPS provided DoD with authority to deviate from Governmentwide regulations in the areas of labor relations, adverse actions and appeals, reduction in force, classification, compensation, staffing, and performance management. This new civilian personnel system was intended to cover most of the approximately 700,000 DoD civilian employees.

The original statute provided authority to the Secretary of Defense, notwithstanding 5 U.S.C. chapters 31, 33 and 35, to establish qualifications requirements for, recruit for and make appointments to NSPS positions; to establish methods of assigning, reassigning, detailing, transferring, or promoting employees; and to establish workforce shaping procedures that reduce disruption and place greater emphasis on performance as a factor in retention. These authorities enabled flexible processes to assign new or different work and to streamline hiring processes.

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 rules for labor-management relations, disciplinary actions and employee appeals of adverse actions, and 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.
- Revised the staffing and employment authorities authorized by NDAA 2004.

On October 14, 2008, section 1106 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 was enacted, which addressed staffing and employment authorities. Pursuant to this law, the following NSPS staffing and employment authorities have been retained under NSPS: Authority for the Secretary of Defense to waive 5 U.S.C. chapter 33 for the purpose of regulating methods of establishing qualification requirements for, recruitment for, and appointments to NSPS positions, as well as the methods of assigning, reassigning, detailing, transferring, or promoting employees. In so doing, the Secretary must comply with the provisions of 5 U.S.C. 2302(b)(11), regarding veterans' preference requirements and 5 U.S.C. chapter 71.

#### **Staffing and Employment—5 CFR 9901 Subpart E**

This subpart provides DoD with authority, pursuant to 5 U.S.C. 9902(i), to modify and replace certain provisions of title 5 pertaining to methods for recruitment for, and appointments to, NSPS positions and the methods for the assignment, reassignment, detail, transfer, and promotion of employees into and within NSPS. This subpart has been revised to (1) Reflect changes in the NSPS as a result of the amendments to 5 U.S.C. 9902 by the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) as further amended by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009; (2) provide specificity to the regulation based on existing implementation; (3) reflect changes in subparts A through D of the regulation as published on September 26, 2008, and (4) make technical changes and improvements.

In order to meet its critical mission requirements worldwide and respond to a dynamic national security environment, the Department needs greater flexibility to attract, recruit, assign and retain a high quality workforce. Although the current General Schedule personnel management system is based on important core principles, the General Schedule does not embody the flexibility needed by DoD to meet mission requirements. While preserving merit principles and veterans' preference requirements, subpart E of the proposed regulations helps to streamline hiring and placement processes and provides DoD with an expanded set of flexible hiring tools to respond effectively to continuing mission changes and priorities. Under the proposed regulations, DoD managers will have greater flexibility in acquiring, advancing, and assigning a workforce tailored to the Department's needs. The new staffing flexibilities, in conjunction with the NSPS compensation and classification flexibilities, provide DoD managers with a greater range of options to adapt their recruitment and hiring strategies to meet changing mission and organizational needs, including consideration of the nature and duration of work. The proposed regulations also address the need to compete for the best talent available by providing the Department with the ability to streamline and accelerate the recruitment process.

#### *Definitions*

The proposed regulations adopt, for staffing and employment purposes, the definitions for the terms "promotion" and "reassignment" defined in regulations published in the **Federal Register** on September 26, 2008 (Volume 73, Number 188) [Rules and Regulations] [pages 56391—56392], to fit the NSPS pay banding environment. In addition, the regulations adopt the term "reduction in band" as defined in the above referenced regulations. This term replaces "change to lower grade" which does not reflect the current NSPS classification architecture. Under pay banding, the GS grade structure is collapsed into fewer, broader salary ranges. Employees progress through those ranges based primarily on performance and job duties. Under NSPS, employees can also receive increased pay as a result of a reassignment within or to a comparable pay band, reduction to a lower pay band, or promotion to a higher pay band, as provided in subpart C of the regulations published on September 26, 2008.

#### *Appointing Authorities*

*Governmentwide Appointing Authorities.* Under the proposed regulations, the Department will continue to use excepted and competitive appointing authorities under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes. Individuals hired under those authorities will be designated as career, career conditional, term, temporary, or time-limited employees, as appropriate.

*Additional NSPS Appointing Authorities.* Under the proposed regulations, the Secretary and the Director may additionally establish new excepted and competitive appointing authorities for positions covered by NSPS. For any appointing authority that may result in entry into the competitive service, including excepted service appointments that may lead to a subsequent noncompetitive appointment to the competitive service, DoD and OPM will jointly publish advance notice, and request comment, in the **Federal Register** whenever it establishes such an authority. In addition, DoD and OPM may establish excepted appointing authorities for positions that are not in the competitive service without specific notice in the **Federal Register**. The proposed authority to establish new appointing authorities provides flexibility to tailor appointments to the many unique DoD missions and employment requirements. The proposed regulations require DoD to publish annually a list of appointing authorities created under this authority which remain in effect. DoD will prescribe appropriate implementing issuances to administer a new authority.

*Direct Hire Authority.* The proposed regulations authorize DoD to exercise direct hire authority, subject to existing legal and regulatory standards without approval by OPM. The removal of this additional time consuming step enables DoD to streamline this hiring process while retaining the same legal and regulatory standards that exist under the General Schedule.

*Non-permanent Appointing Authorities.* DoD may continue to use existing temporary, term, and time-limited appointing authorities; however, the proposed regulations provide for modified duration of such appointments as well as modified advertising requirements, examining procedures, and the appropriate uses of time-limited employees. Most significantly, non-permanent appointments under NSPS may be extended for longer time periods providing flexibility and tools to

respond to a larger variety of DoD missions requirements and environments. The use of non-permanent employees in DoD assures continuity of operations in response to temporary surges in workload, extended absences due to military or civilian deployment, Base Realignment and Closure (BRAC) actions, and the mission-driven activities at Defense installations worldwide. The continuing dynamic employment and national security environment within DoD requires that DoD meet mission requirements using DoD civilian employees when an active duty service member or contractor is not the best fit by providing more agile non-permanent hiring authority. These proposed regulations further streamline hiring practices and enhance flexibility by establishing criteria under which term and temporary employees who were hired via the competitive examining process may be converted without further competition to a career or career conditional appointment in the competitive service.

*Recruitment and Competitive Examining.* In order to increase the efficiency of the recruiting and hiring process without compromising merit principles, the proposed regulations allow DoD to target its recruiting strategy. DoD will provide public notice for all vacancies in the competitive service and accept applications from all sources; however, if there are sufficient qualified candidates in the local commuting area and other targeted sources, consideration may be limited to those applicants. If there are insufficient qualified candidates in the local commuting area, DoD may consider applicants from outside that area. Permitting limited consideration under competitive examining to qualified applicants in a commuting area instead of considering potentially hundreds or thousands of applications from across the country, facilitates mission accomplishment by streamlining the hiring process and significantly reducing the amount of time a position remains vacant. The proposed regulations further streamlines hiring

processes by extending examining authority to DoD, to be exercised in accordance with chapters 31 and 33 of title 5, U.S. Code. To exercise this authority, DoD will develop and coordinate examining procedures which will remain subject to OPM oversight. Examining procedures will adhere to the core values of merit system principles in 5 U.S.C. 2301 and veterans' preference requirements set forth in 5 U.S.C. 3309 through 3320, as applicable, and will be available in writing for applicants to review.

*Alternative Promotion Procedures*

The proposed regulations establish and provide authority to use several alternative forms of competition for merit promotion purposes. These alternative promotion procedures continue to require an analysis of the job to be filled to identify knowledges, skills, abilities, and/or competencies required. The alternative promotion procedures also require notification to potential candidates; an evaluation to determine highly qualified candidates; and consideration of registrants in the DoD Priority Placement Program or Reemployment Priority List. However, these promotion procedures do not require advertisement via the standard vacancy announcement procedures. These alternative forms of competition include the use of assessment boards, alternate certification procedures, and selection for promotion from among qualified employees with exceptional (i.e., role model) performance ratings. The alternative promotion procedures help to streamline internal recruitment processes thereby reducing the time period a position remains vacant.

Additional key changes to this subpart include (1) Adding detailed rules regarding non-permanent appointing authorities for competitive and excepted service positions (including periods of time for which appointments may be made or extended and other conditions); (2) establishment of time limits on initial and supervisory probationary periods to align with time periods governing application of Governmentwide adverse action

procedures; (3) establishment of specific rules on initial and supervisory probationary periods, crediting service and termination processes; (4) establishment of specific rules describing the competitive examining process; (5) establishment of specific rules for internal placement (including the NSPS Merit Promotion Program); and, (6) establishment of a career conditional appointment and redefinition of career appointments under NSPS to reflect coverage of NSPS employees under Governmentwide workforce shaping rules as a result of Public Law 110-181.

Modifications to this subpart reflect changes in law and regulation while continuing to reflect the Department's commitment to provide constructive and effective ways to attract, recruit, and retain employees; enhance management's flexibilities to respond more competitively to changing labor markets; facilitate movement into and within NSPS; and provide the flexibility the Department needs to streamline the hiring process and adapt quickly to critical and changing mission needs and priorities while preserving merit system principles and veterans' preference in every aspect of the system's design. DoD managers will have greater flexibility in acquiring and advancing a workforce tailored to the Department's needs. The flexibilities provide DoD managers with a greater range of options to adapt their recruitment and hiring strategies to meet changing mission and organizational needs including consideration of the nature and duration of work. Finally, the proposed regulations also address the need to compete for the best talent available and reduce the period of time a position remains vacant by providing the Department with the ability to streamline and accelerate the recruitment process.

The following table lists, by specific regulatory section, a brief description of each significant change to subpart E of section 9901 of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201-66203].

	Description of proposed change
§ 9901.502 .....	<i>Scope of authority.</i> This section specifies the provisions of Federal statute waived under the staffing and employment rules for NSPS. This section has been modified to reflect coverage of 5 U.S.C. 3321(a)(2) with respect to this subpart and to delete reference to waiver of 5 U.S.C. 5112(a) pertaining to the general authority of the Office of Personnel Management concerning position classification and the development of qualification requirements for a position. This latter provision has already been waived via waiver of 5 U.S.C. chapter 51 under § 9901.203 and provisions for identification and establishment of qualification requirements are outlined in § 9901.212(d).

	Description of proposed change
§ 9901.504 .....	<i>Definitions.</i> This section provides definitions of terms specific to subpart E. This revision adds definitions for the terms <i>detail</i> , <i>initial probationary period</i> , <i>local commuting area</i> , and <i>supervisory probationary period</i> . The definition for a career employee is modified and a definition for a career conditional employee is added. Also added is the term <i>competencies</i> with a cross reference to § 9901.103 where the term is defined. The revised regulation slightly modifies the definition of <i>temporary employee</i> to clarify application to both the competitive and excepted service and to add a cross reference. Additionally, the definition of <i>term employee</i> is revised to pertain to an employee in the competitive service and the definition of <i>time-limited employee</i> is also revised to pertain to an employee in the excepted service.
§ 9901.511(c) .....	<i>Paragraph (c), Severe shortage/critical need hiring authority</i> of this section of the rule published in the <b>Federal Register</b> dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] is modified. Specifically, paragraph (c)(1) is modified to provide that the Secretary must make the determination that a severe shortage/critical hiring need exists and may make this determination on his/her own or in response to a written request from the Head of a DoD Component. Adds a new paragraph (c)(3) to this section authorizing the Secretary to extend a direct hire authority which is due to expire when he/she determines that there is or will continue to be severe shortage/critical hiring need.
§ 9901.511(d)(1) .....	Renumbers paragraphs (c)(3) and (c)(4) as (c)(4) and (c)(5), respectively. <i>Non-permanent appointing authorities.</i> This paragraph retains the Secretary's authority to prescribe a duration of appointment for temporary, term, and time-limited appointments that is different than that prescribed in Governmentwide rules. However, this paragraph of the rule published in the <b>Federal Register</b> dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] is modified to specify the procedures for appointing employees under temporary, term, and time-limited appointments in the competitive and excepted service.
§ 9901.511(d)(1)(i) .....	<i>Temporary appointments.</i> A new paragraph is added describing the purpose of temporary appointments, establishing specific time limits for temporary appointments, and providing for reassigning employees on temporary appointments to another temporary position provided the total combined service does not exceed the maximum 3-year limitation. New paragraphs (d)(1)(i)(A) and (d)(1)(i)(B) are added to this section to clarify that temporary appointments may be made to both competitive and excepted service positions using applicable appointment procedures.
§ 9901.511(d)(1)(ii) .....	<i>Term appointments in the competitive service.</i> A new paragraph (d)(1)(ii)(A) is added to specify procedures for the use of term appointments. These procedures describe the purpose of term appointments, establish time limits for term appointments, and provide for the ability to promote, reassign, or reduce in band employees on term appointments. These procedures preclude the use of employees on term appointments in positions that should be filled on a permanent basis except when necessary to accomplish permanent work in circumstances where the position cannot be filled permanently. A new paragraph (d)(1)(ii)(B) is added to specify that these appointments may be made competitively or noncompetitively using applicable procedures.
§ 9901.511(d)(1)(iii) .....	<i>Time-limited appointments in the excepted service.</i> A new paragraph is added to authorize non-permanent appointments in the excepted service for more than 1 year, but does not place a limit on the duration of the appointment, consistent with these types of appointments under OPM regulations. The new paragraph specifies that these appointments may be made using procedures at 5 CFR part 302 and provides for reassigning these employees to other time-limited positions in the excepted service as long as the employee meets the qualification requirements for the position.
§ 9901.511(d)(2)(iv) .....	<i>Conversion to career conditional or career appointment.</i> Adds a new paragraph to specify a non-permanent employee may be noncompetitively converted to a career conditional or career appointment provided that the position he or she is converted to is in the same pay schedule and band for which hired on the non-permanent appointment.
§ 9901.511(e) .....	<i>Tenure group.</i> Adds new paragraph specifying that assignment of tenure group codes for reduction in force purposes is based on tenure group definitions in 5 CFR 351.501(b) for competitive service and 5 CFR 351.502(b) for excepted service.
§ 9901.512 .....	<i>Probationary periods.</i> Revises language formerly found in § 9901.512 of the rule published in the <b>Federal Register</b> dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to prescribe conditions of probationary periods to include types of probationary periods, creditable service, failure to complete a probationary period, conditions for termination of probationers, appeal rights, and relationship of probationary periods to other actions.
§ 9901.512(a)(1)–(a)(3) .....	<i>Initial probationary period.</i> Revises paragraph (a) of this section in the rule published in the <b>Federal Register</b> dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to state employment situations that require an initial probationary period and identifies applicable time limits.
§ 9901.512(a)(4) .....	<i>Crediting service.</i> Adds new paragraph to describe how time served under an appointment is credited toward completion of the initial probationary period.
§ 9901.512(a)(5) .....	<i>Termination of probationers for unsatisfactory performance and/or conduct.</i> Adds new paragraph to require termination of employees during an initial probationary period for performance and/or conduct to follow Governmentwide regulations at 5 CFR 315.804.
§ 9901.512(a)(6) .....	<i>Termination of probationers for conditions arising before appointment.</i> Adds a new paragraph to require termination of employees during an initial probationary period for reasons based in whole or in part on conditions arising before the employee's appointment to follow Governmentwide regulations at 5 CFR 315.805.

	Description of proposed change
§ 9901.512(a)(7) .....	<i>Appeals.</i> Adds a new paragraph to afford competitive service employees who are terminated during the initial probationary period limited appeal rights to the Merit Systems Protection Board in accordance with 5 CFR 315.806.
§ 9901.512(b) and (b)(1) .....	<i>Supervisory probationary period.</i> Revises paragraph (b) of this section of the rule published in the <b>Federal Register</b> dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to establish a supervisory probationary period and limits such periods to 1 year. Adds paragraph (b)(1) to this section describing how service is credited toward completion of the supervisory probationary period.
§ 9901.512(b)(2) .....	<i>Failure to complete the supervisory probationary period.</i> Adds new paragraph to include and expand language at § 9901.512(b) to explain placement options for employees who fail the supervisory probationary period. Adds paragraph (b)(iii) requiring that an employee be notified in writing when reassigned for failure to complete the supervisory probationary period.
§ 9901.512(b)(2)(iv) .....	<i>Appeals.</i> Adds new paragraph (A) to state that an employee who is placed in a non-supervisory position for failure to successfully complete a supervisory probationary period has no appeal right. Adds new paragraph (B) to permit employee alleging partisan political affiliation or marital status as the reason for failure of the supervisory probationary period to appeal to the Merit Systems Protection Board under 5 CFR 315.908(b).
§ 9901.512(b)(2)(v) .....	<i>Relationship to other actions.</i> Adds two new paragraphs. Paragraph (A) requires that when an initial probationary period and a supervisory probationary period are served concurrently, the former takes precedence. Paragraph (B) requires application of 5 CFR 752 when an employee is demoted to a lower pay band than the one he/she left to accept the supervisory position if demoted for other than supervisory performance.
§ 9901.513 .....	Removes material formerly found in this section addressing Qualification standards. Authority for establishing NSPS-unique qualification standards or modifying OPM qualification standards for NSPS positions is found at §§ 9901.211 and 9901.212.
§ 9901.514 .....	<i>Non-citizen hiring.</i> Revises paragraph to specify that non-citizens may be hired to permanent, temporary, or time-limited appointments in the excepted service when an absence of qualified U.S. citizens is demonstrated. New language also prevents movement to other positions unless a qualified U.S. citizen is unavailable.
§ 9901.515(a)(1) .....	<i>Competitive examining procedures.</i> Revises paragraph (a) and (a)(1) to state that competitive examining procedures may be used to make career, career conditional, term, and temporary appointments in the competitive service. Includes language authorizing the use of numerical rating and ranking or category ranking and selection procedures, but specifies that the decision on which method to use must be made prior to issuing a vacancy announcement.
§ 9901.515(a)(2) .....	New language provides that the Secretary will issue uniform policies, procedures, and guidance for competitive examining consistent with Governmentwide procedures prescribed in 5 CFR part 332 and provides that the authority to conduct competitive examining for NSPS positions may be delegated in writing.
§ 9901.515(b) .....	<i>Public notice.</i> Replaces material in paragraph (b) with information previously found in § 9901.515(a)(1), (2), (3), and (4). This new language specifies area of consideration and public announcement for positions filled using competitive examining procedures.
§ 9901.515(c) .....	<i>Numerical rating and ranking procedures.</i> Revises paragraph to specify procedures to be used when filling positions using numerical rating and ranking approach and to clarify that preference eligible applicants may not be passed over to select a non-preference eligible, unless procedures for passing over a preference eligible are followed.
§ 9901.515(d) .....	<i>Alternative rating and selection procedures (category rating).</i> Replaces material at paragraph (c) to specify procedures to be used when filling positions using the category rating and selection method of competitive examining.
§ 9901.515(e) .....	<i>Passing over preference eligibles.</i> Adds new paragraph confirming OPM retains authority to grant or deny a request to pass over a preference eligible with a compensable service-connected disability of 30% or more and to make medical qualifications determinations pertaining to preference eligibles.
§ 9901.516 .....	<i>Internal placement.</i> This section is revised to codify current application of NSPS regulations with regard to internal placement.
§ 9901.516(a) .....	<i>Determining levels of work and movement within and across career groups.</i> Adds paragraph to state that the definitions found in § 9901.103 for the terms promotion, reassignment, and reduction in band must be applied when determining whether an action does or does not require competition and in applying pay administration procedures.
§ 9901.516(b) .....	<i>Eligibility for promotion to full performance band.</i> Adds paragraph to require rating of record at Level 3 or above (or determination by authorized management official that performance meets this level) before an employee in a career ladder position may be promoted to the full performance band.
§ 9901.516(c) .....	<i>Time after competitive appointment restriction.</i> Adds paragraph that indicates that the restrictions on movement of an employee immediately after initial appointment are not applicable to NSPS positions.
§ 9901.516(d) .....	<i>Details.</i> Adds paragraph to prescribe that details may be made without a time limit and that an official personnel action is only required in certain situations.

	Description of proposed change
§ 9901.516(e) .....	<i>NSPS Merit Promotion Program.</i> Adds paragraphs (e)(1) through (e)(5) that, in conjunction with requirements at 5 CFR part 335, establish the NSPS Merit Promotion Program. Prescribes that all actions must be taken in accordance with merit system principles. Requires employees who are absent for legitimate reasons to receive consideration for vacancies. Requires applicants to meet minimum qualification standards. Requires a job analysis to identify the basic duties and responsibilities of the position to be filled and the knowledge, skills, and abilities and/or competencies necessary to successfully perform the work of the position. Prescribes management's right to select or not select from among any group of highly qualified candidates and from appropriate sources of candidates. Requires maintenance of records for a specified period documenting how each competitive service position is filled through internal competitive procedures to allow reconstruction of the placement action if necessary.
§ 9901.516(e)(6) .....	<i>Competitive actions.</i> Adds paragraph to specify which promotion actions require the application of competitive procedures (e.g., promotion to a higher pay band, temporary promotion or temporary detail to a higher pay band for more than 180 days, <i>et al.</i> ).
§ 9901.516(e)(7) .....	<i>Exceptions to competition.</i> Adds paragraph to specify which promotion actions do not require competitive procedures (e.g., promotion to a full performance band when competition previously occurred, promotion when position is reclassified as a result of the issuance of a new classification standard, promotion when position is reclassified because of additional duties and responsibilities, <i>et al.</i> ).
§ 9901.516(e)(8) .....	<i>Alternative promotion procedures.</i> Adds new paragraph describing alternative forms of competition that do not require a vacancy announcement, to include assessment boards, alternative certification, and exceptional performance promotion. Employees must be made aware that these flexibilities may be used; notice may be given via newsletters, bulletin boards, Web sites, or other common methods of employee communication.
§ 9901.516(e)(9) .....	<i>Grievances.</i> Adds new paragraph providing for employee right to file a complaint relating to a promotion action via appropriate grievance procedures. Although there is no right of appeal to OPM, OPM may conduct investigations of substantial violations of OPM requirements.

## 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.

### 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 was presented in the supplementary information published with the rule on September 26, 2008 (Volume 73, Number 188) on page 56389.

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.

**Michael W. Hager,**

*Acting Director, Office of Personnel Management.*

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 add subpart E to part 9901 of title 5, Code of Federal Regulations to read as follows:

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

**Subpart E—Staffing and Employment**

Sec.

**General**

- 9901.501 Purpose.
- 9901.502 Scope of authority.
- 9901.503 Coverage.
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**External Recruitment and Internal Placement**

- 9901.511 Appointing authorities.
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- 9901.514 Non-citizen hiring.
- 9901.515 Competitive examining procedures.
- 9901.516 Internal placement.

**Authority:** 5 U.S.C. 9902.

**Subpart E—Staffing and Employment**

**General**

**§ 9901.501 Purpose.**

(a) This subpart sets forth policies and procedures for the recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (i).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(i).

**§ 9901.502 Scope of authority.**

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321 (except 3321(a)(2)), 3324, 3325, 3327, 3330, and 3341 are modified or waived and replaced with respect to that category except as

otherwise specified in this subpart. In accordance with § 9901.101, the Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

**§ 9901.503 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).

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

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as authorized under 5 U.S.C. 9902.

**§ 9901.504 Definitions.**

In this subpart—

*Career conditional employee* means an individual appointed without time limit to a competitive service position in NSPS who does not meet the definition of a career employee.

*Career employee* means an individual appointed without time limit to a competitive service position in NSPS who has served 3 years of substantially continuous service as described in 5 CFR 315.201(b).

*Competencies* has the meaning given that term in § 9901.103.

*Detail* means the temporary assignment, other than temporary reassignment or temporary promotion, of an employee to another position with the expectation that the employee will return to the permanent position of record upon expiration of the assignment. For pay and benefit purposes, an employee continues to encumber the position from which the employee was detailed.

*Initial probationary period* means the initial period of service immediately following an employee's appointment to the competitive or excepted service, as specified in § 9901.512, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Local commuting area* is the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual place of employment.

*Promotion* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103. For the purpose of part 351 of this title, an official position does not include a position to which an employee is reassigned on a temporary or time-limited basis.

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

*Supervisory probationary period* means the first year of service immediately following an employee's initial appointment or placement in a supervisory position, as provided in 5 U.S.C. 3321(a)(2), during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Temporary employee* means an individual in the competitive or excepted service who is employed for a limited period of time not to exceed 1 year. The individual's appointment may be extended, up to a maximum established under § 9901.511(d), to perform the work of a position that does not require an additional permanent employee.

*Term employee* means an individual in the competitive service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

*Time-limited employee* means an individual in the excepted service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

**External Recruitment and Internal Placement**

**§ 9901.511 Appointing authorities.**

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities under chapter 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals appointed under these authorities will be given career, career conditional, term or temporary appointments in the competitive service or permanent, time-limited, or temporary appointments in the excepted service, as appropriate. The competitive appointing authorities under this paragraph are subject to the procedures in part 330 of this title, except for 5 CFR 330.208 and 330.501.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and

excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2) DoD and OPM will jointly publish a notice, and request comments, in the **Federal Register** when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive service position.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the **Federal Register**.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary will determine when a severe shortage of candidates or a critical hiring need exists, as defined in 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations. The Secretary may decide that such a shortage or critical need exists, or may make this decision in response to a written request from the Head of a DoD Component. These authorities may be used without regard to competitive examination requirements described in § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary may extend a direct hire authority if the Secretary determines there is or will continue to be a severe shortage of candidates or a critical hiring need for a particular position(s) as of the date the authority is due to expire.

(4) The Secretary will terminate or modify a specific authority to make appointments under this section when it is determined that the severe shortage or critical need upon which the authority was based no longer exists.

(5) The Secretary will notify OPM of determinations made under this paragraph (c).

(d) *Non-permanent appointing authorities.* (1) The Secretary may authorize appointments with time limits in the competitive or excepted service, as appropriate, when the need for an employee's services is not permanent. These appointments will be either temporary, term, or time-limited as defined below:

(i) *Temporary appointments.* Temporary appointments are for a specified period not to exceed 1 year and may be made in either the competitive or the excepted service. A temporary appointment may be extended for 2 additional years, in increments not to exceed 1 year, to a maximum of 3 years. Temporary appointments may be made and extended to positions involving intermittent or seasonal work without regard to the maximum time limits. The circumstances under which a temporary appointment is appropriate include, but are not limited to: Filling a position to address a temporary workload peak or to complete a project; meeting a staffing need that is anticipated not to exceed a one-year timeframe for reasons such as abolishment, reorganization, or contracting out of a function; anticipated reduction in funding; filling positions temporarily because the positions are expected to be needed for placement of permanent employees who would otherwise be displaced; or when the incumbent will be out of the position for a temporary period of time, but is expected to return. A temporary employee may be reassigned to another temporary position provided the total combined service under the temporary appointment does not exceed the maximum three-year time limitation, the employee meets the qualification requirements of the position, and provided the conditions specific to the employee's appointing authority are met. Temporary appointments are made as follows:

(A) *Competitive service.* Temporary appointments to positions in the competitive service may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337, as appropriate. Temporary appointments to positions in the competitive service also may be made noncompetitively consistent with 5 CFR part 316, or by any noncompetitive appointing authorities granted to or by the Secretary.

(B) *Excepted service.* Temporary appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302.

(ii) *Term appointments in the competitive service.* (A) Term appointments are in the competitive service and will be for a period of more than 1 year, but not to exceed 5 years. The term appointment may be extended by an authorized management official for 1 additional year to a maximum of

6 years. The circumstances under which a term appointment is appropriate include, but are not limited to, project work, extraordinary workload, uncertainty of future funding, scheduled contracting out or abolishment of a function, the need to maintain permanent positions for placement of potential surplus employees, or when the incumbent will be out of the position for a significant period of time, but is expected to return. A term employee may be promoted, reassigned or reduced in band to another term position provided the total combined service under the term appointment does not exceed the maximum six-year time limitation and the employee meets the qualification requirements of the position.

(B) Term appointments may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337, as appropriate. Term appointments also may be made noncompetitively consistent with 5 CFR part 316 or by any noncompetitive appointing authorities granted to or by the Secretary.

(iii) *Time-limited appointments in the excepted service.* Time-limited appointments are in the excepted service and will be for a period of more than 1 year. Time-limited appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302. A time-limited employee may be reassigned to another time-limited position in the excepted service provided the employee meets the qualification requirements of the position and the conditions specific to the appointing authority applicable to the employee.

(2) *Conversion to career conditional or career appointment.* A non-permanent employee serving in a competitive service position may be converted without further competition to a permanent position (i.e., career or career-conditional) if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a permanent position (i.e., career or career-conditional) at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c);

(iii) The employee completed at least 2 years of continuous service at Level 3 (Valued Performer) or better; and

(iv) The employee is converted to a career conditional or career position in



the same pay schedule and band for which hired.

(e) *Tenure group.* For reduction in force purposes, NSPS employees appointed to the competitive service are placed in one of the tenure groups defined in 5 CFR 351.501(b) or, if appointed to the excepted service, one of the tenure groups defined in 5 CFR 351.502(b).

#### § 9901.512 Probationary periods.

(a) *Initial probationary period.* (1) An employee who is given a career, career conditional, or term appointment in the competitive service or a permanent or time-limited appointment in the excepted service under this part is required to complete a probationary period when the employee:

(i) Is appointed from a competitive list of eligibles established under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337; or

(ii) Is appointed to the competitive service either by special authority or by conversion under subparts F or G of 5 CFR part 315, unless specifically exempt from probation by the authority itself; or

(iii) Is reinstated, unless, during any period of service which affords a current basis for reinstatement, the employee completed an initial probationary period; or

(iv) Is appointed to a position in the excepted service under the procedures prescribed in part 302 of this title.

(2) An employee serving an initial probationary period at the time his or her permanent position is converted into NSPS, or at the time he or she is assigned from a non-NSPS position to an NSPS position, or at the time he or she is reappointed through the DoD Priority Placement Program or Reemployment Priority List established under part 330 of this title after being involuntarily separated through no fault of the employee, will continue the probationary period, i.e., the probationary period does not start over.

(3) The probationary period required by § 9901.512(a) is as follows:

(i) Competitive service—1 year.

(ii) Excepted service—2 years, except for preference eligibles who have appeal rights after 1 year under 5 CFR part 752.

(4) *Crediting Service.* (i) Time spent in a non-pay status in excess of one workday during the initial probationary period will extend the probationary period by an equal amount of time.

(ii) Service during an initial probationary period from which an employee is separated for performance

or conduct does not count toward completion of probation required under a subsequent NSPS appointment.

(iii) The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, i.e., those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as one day of credit toward the 260 days (actual “work days” in a year, excluding weekends) needed to complete the 1-year probationary period. The probationary period may not be completed in less than 1 year calendar time.

(iv) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration under part 353 of this title to Federal service. An employee serving a probationary period who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Services serves the remainder of the probationary period upon reinstatement provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

(5) *Termination of probationers for unsatisfactory performance and/or conduct.* When an authorized management official proposes to terminate an employee during his or her initial probationary period because his or her performance and/or conduct during this period fails to demonstrate his or her fitness or qualifications for continued employment, the official will follow procedures at 5 CFR 315.804.

(6) *Termination of probationers for conditions arising before appointment.* When an authorized management official proposes to terminate an employee during his or her initial probationary or trial period for reasons based in whole or in part on conditions arising before the employee’s appointment, the official will follow procedures at 5 CFR 315.805.

(7) *Appeals.* Under NSPS, a competitive service employee who is terminated during the initial probationary period will have limited appeal rights to the Merit Systems Protection Board (MSPB) under 5 CFR 315.806.

(b) *Supervisory probationary period.* Under NSPS, an employee is required to serve a probationary period upon initial appointment to a supervisory position. The supervisory probationary period is 1 year. An employee serving a supervisory probationary period at the time his or her permanent position is converted into NSPS will continue the probationary period in the new position;

i.e., the supervisory probationary period does not start over.

(1) *Crediting service toward completion of the supervisory probationary period.* (i) An employee who is reassigned, transferred, promoted or reduced in band from one supervisory position to another while serving a supervisory probationary period is subject to the probationary period prescribed for the new position. Service in the former position is credited toward completion of the probationary period in the new position.

(ii) Temporary service in a supervisory position prior to the supervisory probation when there is no break in service is creditable toward completion of a supervisory probationary period. This includes service on temporary promotion or reassignment to another supervisory position while serving a supervisory probation. Service in a nonsupervisory position is not creditable.

(iii) Time spent in a non-pay status in excess of one workday during the supervisory probationary period will extend the probationary period by an equal amount of time.

(iv) Service during a supervisory probationary period from which an employee was separated or demoted for performance and/or conduct does not count toward completion of a supervisory probationary period required under a subsequent appointment.

(v) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full toward completion of a supervisory probationary period upon restoration to Federal service under part 353 of this title.

(2) *Failure to complete the supervisory probationary period.* (i) Except as described in paragraph (b)(2)(ii) of this section, an employee who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be assigned to a position at a grade or pay band and pay no lower than that held before assignment to the supervisory position.

(ii) A nonsupervisory employee who is reduced in band into a position which requires a supervisory probationary period and who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be reassigned to a grade or pay band no lower than that held when serving the supervisory probation. The employee is eligible for repromotion in accordance with NSPS promotion rules under § 9901.516.

(iii) The agency must notify the employee in writing that he or she is being assigned for failure to complete the supervisory probationary period.

(iv) *Appeals.* (A) An employee, who, in accordance with the provisions of this section, is assigned to a nonsupervisory position, has no appeal right, except as provided in paragraph (b)(2)(iv)(B) of this section.

(B) An employee who alleges that a Component action under this section was based on partisan political affiliation or marital status may appeal to the MSPB under 5 CFR 315.908(b).

(v) *Relationship to other actions.* (A) If an employee is required to concurrently serve both a supervisory and an initial probationary period, the latter takes precedence.

(B) An action that demotes an employee to a pay band lower than the one the employee left to accept the supervisory position, for reasons other than supervisory performance, is governed by part 752 of this title.

#### § 9901.513 [Reserved]

#### § 9901.514 Non-citizen hiring.

The Secretary may establish procedures for appointing non-citizens to permanent, temporary, or time-limited positions in the excepted service, provided there is a demonstrated absence of qualified U.S. citizens and applicable immigration and security requirements are met. Non-citizens may not be promoted, reassigned, or reduced in band, except in situations where a qualified U.S. citizen is once again unavailable.

#### § 9901.515 Competitive examining procedures.

(a)(1) Under NSPS, competitive examining is authorized to appoint applicants to career, career conditional, term, and temporary appointments in the competitive service. In recruiting applicants from outside the civil service for competitive appointments to competitive service positions in NSPS, Components with examining authority may use either numerical rating and ranking or alternative ranking and selection procedures (i.e., category rating). Components must decide which procedures to use prior to issuing a vacancy announcement and include this information in the vacancy announcement.

(2) The Secretary will issue uniform policies, procedures, and guidance concerning competitive examining for NSPS within the Department and may delegate in writing authority for competitive examining for NSPS positions. These policies, procedures,

and guidance will be consistent with part 332, subparts A and C, of this title.

(b) *Public notice.* (1) Components will accept applications from all U.S. citizens, to include current Federal employees, and at a minimum, will consider applicants from the local commuting area. Components may concurrently consider applicants from other targeted recruitment sources, as specified in the vacancy announcement. If there are insufficient qualified candidates in both the local commuting area and targeted recruitment sources, Components may consider applicants from outside that area.

(2) When limiting consideration, the vacancy announcement will clearly state that consideration will be limited if sufficient qualified candidates are received from the local commuting area and other targeted recruitment sources. If sufficient candidates are not received from the local commuting area and other targeted recruitment sources, consideration will be expanded to all applicants; i.e., the area of consideration will not be expanded incrementally.

(3) No minimum announcement opening period is required. The open period will be based on the type of position being filled and the availability of qualified candidates in the labor market.

(c) *Numerical rating and ranking procedures.* When filling positions using numerical rating and ranking, the procedures issued by the Secretary will be followed. All qualified applicants may be referred and selection may be made from among any referred applicants except that a preference eligible will not be passed over to select a non-preference eligible, unless procedures under 5 U.S.C. 3318 for passing over a preference eligible are followed.

(d) *Alternative ranking and selection procedures (category rating).* When filling positions using category rating, procedures issued by the Secretary will be followed in lieu of the procedures in part 337, subpart C, except for § 337.304, of this title.

(e) *Passing over preference eligibles.* OPM retains the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more and to make medical qualifications determinations pertaining to preference eligibles. The Secretary has the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of less than 30 percent.

#### § 9901.516 Internal placement.

(a) *Determining levels of work and movement within and across career groups.* The determination of when an action is a promotion, reassignment, or reduction in band for competitive or noncompetitive movement and related pay administration purposes, either between NSPS positions or to an NSPS position from a non-NSPS position, must be made by applying the definitions of those terms at § 9901.103.

(b) *Eligibility for promotion to full performance band.* An employee with a rating of record of Level 1 or Level 2 is not eligible for promotion to the full performance band of the position until such time as the employee attains a rating of record of Level 3 or above. An employee who does not have an NSPS rating of record may be promoted to the full performance band of the position if an authorized management official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or above.

(c) *Time after competitive appointment restriction.* Restrictions on the movement of an employee immediately after the employee's initial appointment to Federal service as described in 5 CFR part 330, subpart E, are not applicable to NSPS positions.

(d) *Details.* There is no time limit on details or any requirement to extend them incrementally. An official personnel action is not required to document a detail unless the detail exceeds one year, crosses Component and/or Agency lines or assigns an employee from NSPS to another pay system within the Component, e.g., NSPS to General Schedule, or documents developmental rotational assignments or deployment.

(e) *NSPS Merit Promotion Program.* In accordance with the Secretary's authority to prescribe regulations for the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS, the procedures below, in conjunction with the merit promotion requirements in part 335 of this title constitute the NSPS Merit Promotion Program. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures.

(1) All actions taken under the NSPS Merit Promotion Program, whether involving the identification, qualification, evaluation, or selection of candidates, will be made without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status or other prohibited criteria

and will be based solely on job-related factors.

(2) Vacancy announcements will identify areas of consideration that are sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Employees within the area of consideration who are absent for legitimate reason, e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments, must receive appropriate consideration for promotion if they apply for a vacant position; i.e., they cannot be excluded from consideration because they are absent. Employees who are unable to apply for vacant positions while they are away may also make other appropriate arrangements for consideration.

(3) To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by either OPM or the Department, as appropriate. Prior to the recruitment process, authorized management officials will identify through job analysis the job-related criteria that will be used to evaluate and determine the best qualified candidates for referral. The job analysis will identify the basic duties and responsibilities of the position being filled; the knowledge, skills, abilities, and/or competencies required to perform the duties and responsibilities; and the factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics. Candidate evaluation will give due weight to performance appraisals and incentive awards. When evaluating a candidate's performance appraisals, consideration may be given to the differences in performance appraisal systems. Job analysis requirements will conform to the Uniform Guidelines on Employee Selection Procedures in 29 CFR part 1607, and 5 CFR part 300, subpart A.

(4) Management has the right to select or not select from among a group of highly qualified candidates and to select from appropriate sources of candidates.

(5) Components will maintain a temporary record of each promotion to a competitive service position filled through internal competitive procedures to allow reconstruction of the placement action, including documentation on how candidates were rated, ranked, and referred. These records may be destroyed after 2 years or after the program has been formally evaluated by

OPM (whichever occurs first) if the time limit for grievance has lapsed and destruction would otherwise be consistent with the Department's Priority Placement Program requirements.

(6) *Competitive actions.* (i) Except as provided in paragraph (e)(7) of this section, competitive procedures apply to promotion of an employee to a higher pay band (i.e., a higher level of work) and to the following actions:

(A) Temporary promotion or detail to a higher pay band for more than 180 days. Prior service during the preceding 12 months under noncompetitive temporary promotions or details to higher pay-banded positions counts toward the 180-day total. A temporary promotion may be made permanent without further competition, provided the temporary promotion was originally made under competitive procedures and the fact that the temporary promotion might lead to a permanent promotion was made known to all potential candidates;

(B) Reassignment or reduction in band to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction in force regulations at 5 CFR part 351);

(C) Transfer to a position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

(D) Reinstatement to a permanent, term, or temporary position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(7) *Exceptions to competition.* (i) Competitive procedures do not apply to:

(A) Promotion resulting from the upgrading of a position to a higher pay band level without significant change in the duties and responsibilities due to the issuance of a new NSPS classification standard or the correction of an initial classification error;

(B) Promotion resulting from an employee's position being classified at a higher pay band level because of additional duties and responsibilities;

(C) Promotion resulting from previous competitive selection for a position with

documented potential to a higher pay band;

(D) Temporary promotion or detail to a higher pay band or a position with known promotion potential for 180 days or less;

(E) Promotion to a higher pay band previously held on a permanent or term basis in the competitive service from which an employee was separated or demoted for other than performance or conduct reasons;

(F) Promotion, reassignment, reduction in band, transfer, or reinstatement to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an approved interchange agreement) and did not lose because of performance or conduct reasons;

(G) Consideration of a candidate not given proper consideration in a competitive promotion action;

(H) Placement resulting from reduction in force procedures under 5 CFR part 351; and

(I) The appointment of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any salary level, consistent with 5 CFR part 317, subpart G.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(8) *Alternative promotion procedures.* The Secretary may authorize the use of the following alternative procedures to fill NSPS positions. Use of these alternative procedures does not require the posting of vacancy announcements; however, employees must be made aware that these processes may be utilized via newsletters, bulletin boards, Web sites, or other common methods of employee communication. Use of these alternative procedures is subject to the requirements of the DoD Priority Placement Program and the Reemployment Priority List.

(i) *Assessment boards.* (A) Boards may convene to assess internal candidates for current and future advancement opportunities based on pre-established criteria. Pre-established criteria may include experience, training, awards, education, performance evaluation scores (ratings of record) or other appropriate

information consistent with merit system principles and the "Uniformed Guidelines on Employee Selection Procedures."

(B) Boards will categorize employees into specific levels of candidates to generate referral lists of ranked candidates for occupational groups. These referral lists are valid for one year from the date generated. Selection from the referral list should be further justified based on specific job-related factors unique to the actual vacancy.

(C) Boards, which should be comprised of senior level managers (subject matter experts for each particular occupational group), may be convened on an ad hoc basis or may be held annually in conjunction with the performance evaluation process.

(ii) *Alternate certification.* A selecting official may make a by-name request for an individual from any appropriate source of Department or Component employees. The employee may be selected if ranked within the highest quality group as determined by rating factors established for the position.

(iii) *Exceptional performance promotion.* (A) An employee whose most recent rating of record is a Level 5 performance rating may be promoted to a vacant position in a higher pay band when the vacant position has the same occupational series (or related interdisciplinary/interoccupational series) and similar function as the position the employee held at the time he or she received the Level 5 rating.

(B) Selecting officials must determine and document the area of consideration, and must consider all employees in the area of consideration whose current Level 5 rating was based on performance in the same occupational series and similar function as the vacancy being filled.

(9) *Grievances.* Employees have the right to file a complaint relating to a promotion action. Such complaints will be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in 5 CFR part 300, subpart A. There is no right of appeal to OPM, but OPM may conduct investigations of substantial violations of OPM requirements.

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BILLING CODE 6325-39-P

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

#### 7 CFR Part 1487

RIN 0551-AA71

#### Technical Assistance for Specialty Crops

**AGENCY:** Foreign Agricultural Service and Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend the regulations used to administer the Technical Assistance for Specialty Crops (TASC) program by increasing the amount of funding per proposal to \$500,000 in a given year, extending the allowable length of an activity to 5 years; and by allowing up to five approved projects for any one TASC participant at any given time.

**DATES:** Comments concerning this proposed rule must be received by January 2, 2009 to be assured consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *E-Mail:* [ppsadmin@fas.usda.gov](mailto:ppsadmin@fas.usda.gov).

- *Fax:* (202) 720-9361.

- *Hand Delivery or Courier:* U.S.

Department of Agriculture, Foreign Agricultural Service, Program Policy Staff, Portals Office Building, Suite 400, 1250 Maryland Ave., SW., Washington, DC 20024.

- *U.S. Postal Delivery:* U.S.

Department of Agriculture, Foreign Agricultural Service, Program Policy Staff, Stop 1023, 1400 Independence Ave., SW., Washington, DC 20250-1042.

Comments may be inspected in Suite 400, Portals Building, 1250 Maryland Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this proposed rule is available through the FAS home page at <http://www.fas.usda.gov/mos/programs/TASC.asp>.

#### FOR FURTHER INFORMATION CONTACT:

Mark Slupek at (202) 720-4327, fax at (202) 720-9361, or by e-mail at: [ppsadmin@fas.usda.gov](mailto:ppsadmin@fas.usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

This proposed rule changes three existing TASC limitations. First, it increases the funding cap on individual

proposals from \$250,000 to \$500,000 per year. Second, it increases the maximum duration of an activity from 3 years to 5 years. Finally, it increases the number of approved projects from three to five that a TASC participant can have underway at any given time. These changes are consistent with the Administration's position regarding the TASC program.

#### Executive Order 12866

This proposed rule is issued in conformance with Executive Order 12866. It has been determined to be not significant for the purposes of Executive Order 12866 and was reviewed by the Office of Management and Budget (OMB). A cost-benefit assessment of this rule was not completed.

#### Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988. This rule would preempt State laws to the extent such laws are inconsistent with it. This rule would not be retroactive.

#### Executive Order 12372

This program is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because FAS is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

#### Environmental Assessment

FAS has determined that this proposed rule does not constitute a major State or Federal action that would significantly affect the human or natural environment consistent with the National Environmental Policy Act (NEPA), 40 CFR part 1502.4, Major Federal actions requiring the preparation of Environmental Impact Statements, and Compliance with NEPA implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500-1508. Therefore, no environmental assessment or environmental impact statement will be prepared.

#### Unfunded Mandates

Although CCC is publishing this as a proposed rule, Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule. CCC is not