



# Federal Register

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**Tuesday,  
January 13, 2004**

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## **Part II**

### **Office of Personnel Management**

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**5 CFR Parts 317, 352, 531, and 534  
Senior Executive Service Pay and  
Performance Awards; Interim Final Rule**

**OFFICE OF PERSONNEL  
MANAGEMENT**
**5 CFR Parts 317, 352, 531, and 534**
**RIN 3206-AK32**
**Senior Executive Service Pay and  
Performance Awards**
**AGENCY:** Office of Personnel  
Management.

**ACTION:** Interim rule with request for  
comments.

**SUMMARY:** The Office of Personnel Management is issuing interim regulations to establish a new pay-for-performance system for the Senior Executive Service (SES). The new SES pay system replaces the current six-level system with an open-range "payband" and allows a higher annual maximum rate of basic pay. These regulations set forth the requirements for converting SES members to the new pay system and adjusting SES rates of basic pay.

**DATES:** *Effective Date:* The regulations are effective on January 1, 2004.

*Applicability Date:* The regulations apply on the first day of the first applicable pay period beginning on or after January 1, 2004.

*Comment Date:* Comments must be received by OPM on or before March 15, 2004.

**ADDRESSES:** Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; by FAX at (202) 606-0824; or by e-mail at *pay-performance-policy@opm.gov*.

**FOR FURTHER INFORMATION CONTACT:** For information, please contact Jo Ann Perrini by telephone at (202) 606-2858; by FAX at (202) 606-0824; or by email at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** Section 1125 of the "National Defense Authorization Act for Fiscal Year 2004" (Public Law 108-136, November 24, 2003) (the "Act") amends 5 U.S.C. 5382 to replace the current six-level pay system for the Senior Executive Service (SES) with a single, open-range "payband" that has only its minimum and maximum rates of basic pay fixed by statute. The minimum rate of basic pay in the SES rate range may not be less than the minimum rate of basic pay (excluding locality pay) payable under 5 U.S.C. 5376 for senior-level positions (\$103,700 in 2004), and the maximum rate of basic pay in the SES rate range may not exceed the rate for level III of the Executive Schedule (\$144,600 in 2004). The new section 5382 also allows

the maximum rate of basic pay to be set at level III of the Executive Schedule for a position in a system equivalent to the SES as determined by the President's Pay Agent (*i.e.*, the Secretary of Labor and the Directors of the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM)).

The new section 5382 will allow an agency to establish a higher maximum rate of basic pay in the SES rate range up to the rate for level II of the Executive Schedule (\$157,000 in 2004) if the agency obtains the certification specified in 5 U.S.C. 5307(d). In addition, agencies that obtain such certification will be allowed to apply to their SES members a higher aggregate limitation on pay under 5 U.S.C. 5307(d) that is equivalent to the total annual compensation payable to the Vice President (\$201,600 in 2004). Section 1322 of the Homeland Security Act of 2002 (Public Law 107-296, November 25, 2002) added a new paragraph (d) to 5 U.S.C. 5307 to allow those agencies that are granted such certification to apply a higher aggregate limitation on pay equivalent to the total compensation payable to the Vice President. Under 5 U.S.C. 5307(d)(3)(A), the regulations prescribing the substantive and procedural requirements that an agency must meet to receive such certification for these purposes must be issued jointly by OPM and OMB. Consequently, those regulations will be promulgated separately. Those regulations also will address the requirements for setting a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule.

The new section 5382 provides that, subject to regulations prescribed by OPM, there shall be established a range of rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates within the range, based on individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance management system. In promulgating these regulations, OPM interprets this provision as permitting agencies to consider any unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's mission, as well as the individual's current responsibilities.

OPM has added a new § 534.406 to establish the structure of the new SES pay system, as well as the rules for conversion to the new pay system. In addition, new § 534.406 provides criteria for providing a pay adjustment

to eligible senior executives on or after the first day of the first applicable pay period beginning on or after January 1, 2004. In these regulations, we refer to SES members as "senior executives."

As a general matter, senior executives paid above the minimum rate will no longer receive an automatic annual across-the-board pay adjustment. The minimum rate of basic pay in the SES rate range will increase consistent with any increase in the minimum rate of basic pay for senior-level positions under 5 U.S.C. 5376 and the maximum rate of basic pay in the SES rate range will increase with any increase in the rate for level III of the Executive Schedule.

Under the new SES pay system, individual SES members will no longer receive locality-based comparability payments. Section 5 U.S.C. 5304(h) has been amended to remove the SES pay system, as well as the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES pay system from the list of positions for which locality-based comparability payments may be extended. In addition, revised 5 U.S.C. 5304(h) prohibits other positions under a system equivalent to the SES pay system, as determined by the President's Pay Agent, from receiving locality-based comparability payments. We have made conforming amendments in 5 CFR part 531 to reflect the changes made by 5 U.S.C. 5304(h).

**New SES Performance-Based Pay  
System**

*Conversion to the new SES pay system.* Section 534.406 of OPM's interim regulations requires agencies to convert SES members to the new SES pay system on the first day of the first applicable pay period beginning on or after January 1, 2004. The senior executive's converted rate of basic pay is the employee's rate of basic pay, plus any applicable locality pay, in effect immediately prior to the first day of the first applicable pay period beginning on or after January 1, 2004. The newly converted SES rate will become the SES member's rate of basic pay for all pay computation purposes, and the existing pay plan code "ES" for SES members will be retained. Conversion to a new SES rate of basic pay is not considered a pay adjustment under § 534.401(c)(1) for the purpose of limiting an agency's flexibility to adjust pay more than once during a 12-month period.

*Prohibition on reducing pay for 12 months.* Consistent with section 1125(c)(2) of the Act, the interim regulations prohibit agencies from reducing a senior executive's rate of basic pay, including any applicable

locality payment, below the rate that was in effect on November 24, 2003, for 12 months following the effective date of the new SES pay system (January 11, 2004, for most employees).

**FBI and DEA SES.** Under 5 U.S.C. 3151, the Attorney General may provide rates of basic pay for the FBI and DEA SES that are not less than nor greater than the rates of basic pay established for the SES under 5 U.S.C. 5382, and the Attorney General may adjust the rates of basic pay for the FBI and DEA SES "at the same time and to the same extent as rates of basic pay for the [SES] are adjusted." As a result, the new minimum and maximum rates of basic pay for the SES under 5 U.S.C. 5382 also will apply to the FBI and DEA SES. In addition, on the first day of the first applicable pay period beginning on or after January 1, 2004, affected agencies are authorized to convert the rates of basic pay for FBI and DEA senior executives to include any applicable locality payment in effect for the employee immediately before that date. The newly converted rate of basic pay will become the individual's rate of basic pay for all pay computation purposes. Since the rates of basic pay for the FBI/DEA SES are adjusted "at the same time and to the same extent" as rates of basic pay for the SES are adjusted, conversion to a new rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

**Geographic assignments outside the 48 contiguous States and the District of Columbia.** Certain members of the SES may be in positions that have geographic mobility requirements and are expected to serve abroad for portions of their careers. On the first day of the first applicable pay period beginning on or after January 1, 2004, these senior executives may be on assignment outside the 48 contiguous States or the District of Columbia to a position overseas or in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or other U.S. territories and possessions where locality pay is not authorized. While these senior executives will convert to the new SES pay system at their rate of basic pay (exclusive of any locality rate of pay) on the first day of the first applicable pay period beginning on or after January 1, 2004, their converted rate of basic pay must be adjusted upon reassignment to a locality pay area. The adjustment will be equal to the amount of locality pay authorized for the applicable locality pay area upon reassignment. The adjustment will be prospective, not retroactive, and it will not be considered

a pay adjustment for the purpose of applying § 534.401(c)(1).

**SES Law Enforcement Officers.** On the first day of the first applicable pay period beginning on or after January 1, 2004, a law enforcement officer (LEO) who is a member of the SES (including LEOs in the FBI and DEA SES) will continue to receive his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509) that he or she was entitled immediately before that date. Currently, a special geographic pay adjustment (16 percent) applies only to LEOs in the Boston-Worcester-Lawrence, MA-NH-ME-CT Consolidated Metropolitan Statistical Area (CMSA). When the special geographic pay adjustment for LEOs in Boston no longer applies (because a higher locality pay percentage becomes applicable to employees in the Boston locality pay area), the senior executive's rate of basic pay will be converted to his or her rate of basic pay, plus the special geographic pay adjustment for LEOs, in effect immediately before the effective date of the higher locality-based comparability payment. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

#### **Adjustments in Pay Prior to Any Certification Pursuant to 5 U.S.C. 5307(d)**

The new § 534.406(c) authorizes agencies to increase a senior executive's converted rate of basic pay on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter. Prior to obtaining certification under 5 U.S.C. 5307(d), such increases may be made only up to the new rate for level III of the Executive Schedule, and only upon a determination that the senior executive's performance and/or contributions so warrant and that the senior executive is otherwise eligible for such a pay adjustment (*i.e.*, he or she has not received a pay adjustment in the previous 12-month period.)

In assessing an individual's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses and their significance to the agency's mission, as well as the individual's current responsibilities. Any such adjustment will be considered a pay adjustment for the purpose of applying § 534.401(c)(1) and will be reviewed for the purpose of granting certification under 5 U.S.C.

5307(d). If there is an additional increase in the rate for level III of the Executive Schedule in 2004, and if that increase becomes effective as of the first day of the first applicable pay period beginning on or after January 1, 2004, an agency may review the previous determination to increase the pay of a senior executive to determine whether, and to what extent, an additional pay increase may be warranted based on the same criteria used for the previous determination to increase pay. If the agency determines that an additional pay increase is warranted, that increase must be made effective as of the effective date of the previous increase.

In addition, new § 534.401(c)(2) allows an agency to request an exception from the Director of OPM to the rule that limits an agency's authority to adjust a senior executive's rate of basic pay more than once during a 12-month period.

#### **Miscellaneous Changes**

Section 1321 of the Homeland Security Act repealed the SES recertification requirements in 5 U.S.C. 3393a. As a result, OPM's regulations in § 317.504 are no longer needed and have been removed. In addition, we have made changes in 5 CFR parts 317 and 352 to remove references to the former six levels of SES pay.

#### **Regulatory Flexibility Act**

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

#### **Waiver of Notice of Proposed Rulemaking**

Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These regulations implement Public Law 108-136, which became effective on November 24, 2003. The waiver of the requirements for proposed rulemaking and a delay in the effective date is necessary to ensure timely implementation of the law as intended by Congress.

#### **E.O. 12866, Regulatory Review**

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

List of Subjects in 5 CFR Parts 317, 352, 531, and 534

Decorations, Medals, Awards, Government employees, Law enforcement officers, Reporting and recordkeeping requirements, Wages, Hospitals, and Students.

Office of Personnel Management.

Kay Coles James, Director.

Accordingly, OPM is amending parts 317, 352, 531, and 534 as follows:

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

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

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

Subpart C—Conversion to the Senior Executive Service

2. In § 317.302, paragraphs (a)(2), (b)(3), and (d)(2) are revised to read as follows:

§ 317.302 Conversion procedures.

(a) \* \* \*

(2) Pay. Upon conversion to the Senior Executive Service, an employee's SES rate will be determined under 5 CFR part 534, subpart D.

\* \* \* \* \*

(b) \* \* \*

(3) Pay. An employee's SES rate will be determined under 5 CFR part 534, subpart D.

\* \* \* \* \*

(d) \* \* \*

(2) Pay. An employee's SES rate will be determined under 5 CFR part 534, subpart D.

\* \* \* \* \*

Subpart E—Career Appointments

§ 317.504 [Removed and Reserved]

3. Section 317.504 is removed and reserved.

Subpart H—Retention of SES Provisions

§ 317.801 [Amended]

4. In § 317.801, paragraph (b)(3) is removed.

PART 352—REEMPLOYMENT RIGHTS

5. The authority citation for subpart B of part 352 continues to read as follows:

Authority: 5 U.S.C. 3101 note, 3301, 3131 et seq. 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; sec. 352. 209 also issued under 5 U.S.C. 7701, et seq.

6. In part 352, remove the phrase "SES pay level" and add in its place "SES rate

of basic pay as determined under 5 CFR part 534, subpart D" wherever it occurs.

PART 531—PAY UNDER THE GENERAL SCHEDULE

7. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2); Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101-509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102-378, 106 Stat. 1356; Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 1306, 63 FR 68151, 3 CFR, 1998 Comp., p. 224; Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the FEPCA, Pub. L. 101-509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

8. In § 531.302, paragraph (c) is revised to read as follows:

§ 531.302 Determining special law enforcement adjusted rates of pay.

\* \* \* \* \*

(c) The special law enforcement adjusted rate of pay for an employee in a position described in 5 U.S.C. 5304(h)(1)(A)-(C), in a senior executive position covered under 5 U.S.C. 3132, or in a senior executive position covered under 5 U.S.C. 3151 may not exceed the rate for level III of the Executive Schedule.

Subpart F—Locality-Based Comparability Payments

9. In § 531.602, the definition of employee is revised and the definition of scheduled annual rate of pay is amended by revising paragraph (4) to read as follows:

§ 531.602 Definitions.

\* \* \* \* \*

Employee means—

(1) An employee in a position to which 5 U.S.C. chapter 53, subchapter III, applies and whose official duty station is located in a locality pay area within the continental United States, including a GM employee (as defined in § 531.202); and

(2) An employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)-(D) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2) and whose

official duty station is located in a locality pay area.

\* \* \* \* \*

Scheduled annual rate of pay means—

\* \* \* \* \*

(4) For an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)-(D) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2), the rate of basic pay fixed by law or administrative action, exclusive of any locality-based adjustments (including adjustments equivalent to local special rate adjustments under 5 U.S.C. 5305) or other additional pay of any kind.

\* \* \* \* \*

10. In § 531.604, paragraph (c)(1) and the introductory language in paragraph (c)(2) are revised to read as follows:

§ 531.604 Determining locality rates of pay.

\* \* \* \* \*

(c)(1) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(A)-(C) may not exceed the rate for level III of the Executive Schedule.

(2) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(D) may not exceed—

\* \* \* \* \*

§ 531.606 [Amended]

11. In § 531.606, paragraph (b)(6) is removed.

PART 534—PAY UNDER OTHER SYSTEMS

12. The authority citation for part 534 is revised to read as follows:

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125 of the "National Defense Authorization Act for FY 2004," Pub. L. 108-136.

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

13. In § 534.401: A. In paragraph (a), the definition of ES rate is removed and new definitions of authorized agency official, SES or ES rate, and SES or ES rate range are added in alphabetical order.

B. Paragraph (c) is revised.

The added and revised text reads as follows:

**§ 534.401 Definitions and setting individual basic pay.**(a) *Definitions.* \* \* \*

\* \* \* \* \*

*Authorized agency official* means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

\* \* \* \* \*

*SES or ES rate* means a rate of basic pay within the SES or ES rate range assigned to a member of the SES under § 534.406(a).

*SES or ES rate range* means the range of rates of basic pay established for the SES under 5 U.S.C. 5382 and § 534.406(a).

\* \* \* \* \*

(c) *Adjusting pay while in the SES.* (1) An authorized agency official may adjust (*i.e.*, increase or reduce) the rate of basic pay of a senior executive not more than once in any 12-month period.

(i) The following pay actions are considered pay adjustments for this purpose:

(A) The setting of an individual's rate of basic pay upon initial appointment to the SES;

(B) The change from one SES rate of basic pay to another while employed in the SES;

(C) The assignment of an SES rate of basic pay upon reappointment to the SES following a break in SES service if the new SES rate of basic pay is different from the senior executive's former rate or if the break in service exceeds 12 months;

(D) An adjustment in pay granted in 2004 prior to any certification pursuant to 5 U.S.C. 5307(d), as provided in § 534.406(c)(i); and

(E) A determination by an authorized agency official to make a zero adjustment in pay or a reduction in pay for a senior executive, except as provided in paragraph (c)(1)(ii)(B) of this section.

(ii) The following pay actions are not considered pay adjustments for this purpose:

(A) Conversion of senior executives to the new SES pay system under § 534.406(b) and the conversion of other employees to equivalent senior executive positions; and

(B) A zero adjustment in pay during the 12-month period preceding the first day of the first applicable pay period beginning on or after January 1, 2004, caused by the former limitation on basic pay plus locality-based comparability payments under 5 U.S.C. 5304(g)(2) for a senior executive who was granted an increase in his or her rate of basic pay that did not result in an actual increase in pay.

(2) An authorized agency official may request an exception from the Director of OPM to the prohibition in paragraph (c)(1) of this section on adjusting a senior executive's rate of basic pay not more than once in any 12-month period.

(3) An authorized agency official may increase or reduce the rate of basic pay for a senior executive, consistent with the SES performance management requirements set forth in 5 CFR part 430, subpart C. Restrictions on reducing the rate of basic pay of a career senior executive are found in paragraph (f) of this section and in § 534.406(b)(2).

■ 14. In § 534.403, paragraph (a)(2)(i) is revised to read as follows:

(a) \* \* \*

(2) \* \* \*

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the salary of the individual is higher than the maximum rate of basic pay for the SES rate range, the maximum rate of the SES rate range is used for crediting the agency award pool under paragraph (b) of this section and the amount the individual may receive under paragraph (c) of this section.

\* \* \* \* \*

■ 15. A new section 534.406 is added to subpart D to read as follows:

**§ 534.406 Establishment of and conversion to SES pay system.**

(a) *SES rate range.* On the first day of the first applicable pay period beginning on or after January 1, 2004, the minimum rate of basic pay of the SES rate range is set at an amount equal to the minimum rate of basic pay under 5 U.S.C. 5376 for senior-level positions (excluding any locality-based comparability payment under 5 U.S.C. 5304). An SES member may not receive less than the minimum rate of the SES rate range. The maximum rate of basic pay of the SES rate range is set at the rate for level III of the Executive Schedule. An SES member's rate of basic pay must be set at one of the rates within the SES rate range based on the senior executive's performance and/or contribution to the agency's performance. In assessing an individual's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses and their significance to the agency's mission, as well as the senior executive's current responsibilities.

(b) *Establishing an SES rate of basic pay upon conversion to the new SES pay system.*

(1) On the first day of the first applicable pay period beginning on or after January 1, 2004, agencies must convert an existing SES rate of pay for a senior executive to an SES rate of basic pay that is equal to the employee's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 which the senior executive was receiving immediately before that date. The newly converted rate is the senior executive's SES rate of basic pay. An agency's establishment of an SES rate of basic pay for a senior executive under this paragraph is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(2) An SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, may not be reduced for 1 year from the first day of the first applicable pay period beginning on or after January 1, 2004.

(3) Certain SES members in positions that have geographic mobility requirements and who are assigned outside the 48 contiguous States and the District of Columbia to a position overseas or in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or other U.S. territories and possessions as of the first day of the first applicable pay period beginning on or after January 1, 2004, will be converted to a new rate of basic pay that equals their current rate of basic pay, plus the amount of locality pay authorized for the applicable locality pay area upon reassignment to a position in the 48 contiguous States or the District of Columbia. The adjustment will be prospective, not retroactive, and it will not be considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(4) On the first day of the first applicable pay period beginning on or after January 1, 2004, a law enforcement officer (LEO), as defined in 5 CFR 531.301, who is a member of the SES will continue to receive his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509) to which he or she was entitled immediately before that date. When the special geographic pay adjustment for LEOs no longer applies (because a higher locality pay percentage applies to employees in the locality pay area), the senior executive's rate of basic pay will be converted to his or her rate of basic pay, plus the special geographic pay adjustment for LEOs to which he or she

was entitled immediately before the effective date of the higher locality-based comparability payments. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(c) *Adjustments in pay prior to any certification pursuant to 5 U.S.C. 5307(d).*

(1) An agency may increase a senior executive's rate of basic pay converted under paragraph (b) of this section on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter prior to obtaining certification under 5 U.S.C. 5307(d), but only up to the rate for level III of the Executive Schedule. An agency may provide such an increase only upon a determination that the senior executive's individual performance and/

or contributions to agency performance so warrant and that the senior executive is otherwise eligible for such a pay adjustment (*i.e.*, he or she has not received a pay adjustment under § 534.402(c)(1)(i)(B) in the previous 12-month period). In assessing a senior executive's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's mission, as well as the senior executive's current responsibilities. An adjustment in pay made under this paragraph will be considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(2) If there is an additional increase in the rate for level III of the Executive Schedule in 2004, and if that increase

becomes effective as of the effective date prescribed in 5 U.S.C. 5318, an agency may review any determination made under paragraph (c)(1) of this section to determine whether, and to what extent, an additional pay increase may be warranted for a senior executive based on the same criteria used for the determination made under paragraph (c)(1) of this section. If the agency determines that an additional pay increase is warranted, that increase must be made effective as of the effective date of the increase made under paragraph (c)(1) of this section.

(3) Any adjustments in pay made under paragraphs (c)(1) and (2) of this section will be reviewed for the purpose of certification under 5 U.S.C. 5307(d).

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