

Rules and Regulations

Federal Register

Vol. 69, No. 233

Monday, December 6, 2004

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 317, 352, 359, 451, 530, 531, 534, and 575

RIN 3206-AK34

Senior Executive Service Pay and Performance Awards; Aggregate Limitation on Pay

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to establish a performance-based pay system for the Senior Executive Service (SES) and a higher aggregate limitation on pay for SES members and employees in senior-level and scientific or professional positions. These regulations prescribe the criteria for the administration of rates of basic pay and performance awards under the SES performance-based pay system and the rules for applying the aggregate limitation on pay.

DATES: The regulations are effective on December 6, 2004.

FOR FURTHER INFORMATION CONTACT: Jo Ann Perrini by telephone at (202) 606-2858; by FAX at (202) 606-0824; or by e-mail at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing final regulations to establish a performance-based pay system for the Senior Executive Service (SES) and a higher aggregate limitation on pay for SES members and employees in senior-level (SL) and scientific or professional (ST) positions. In these regulations, we interchangeably use the terms "SES members" and "senior executives" to mean members of the Senior Executive Service. In addition, we refer to SL/ST employees as "senior professionals."

The new SES pay system assures a clear and direct linkage between performance and pay, a cornerstone of the President's Management Agenda. For those agencies with senior executive performance appraisal systems certified under 5 CFR part 430, subpart D, the new SES pay band provides a broad range of rates (a minimum rate of \$104,927 and a maximum rate of \$158,100 in 2004) within which agencies may set pay based on the senior executive's individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance management system. In addition, agencies with applicable certified performance appraisal systems may apply a higher aggregate limitation on pay up to the Vice President's salary (\$203,000 in 2004) for their senior executives and senior professionals.

On January 13, 2004, OPM issued interim regulations to establish the new SES performance-based pay system (69 FR 2048). The interim regulations are available at <http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=764393445783+15+0+0&WAISaction=retrieve>. In those interim regulations, OPM established the structure of the SES rate range, rules for conversion to the new pay system, and the criteria for providing pay adjustments to SES members on or after the first pay period beginning on or after January 1, 2004 (January 11, 2004). The 60-day comment period ended on March 15, 2004. We received comments from two agencies, one individual, and an executive association.

On July 29, 2004, OPM issued proposed regulations to prescribe rules for establishing and adjusting SES rates of basic pay, paying performance awards to senior executives, and applying the aggregate limitation on pay if an agency receives certification of an applicable performance appraisal system under 5 U.S.C. 5307(d) (69 FR 45536). The proposed regulations are available at <http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=764180215293+2+0+0&WAISaction=retrieve>. The 30-day comment period ended on August 30, 2004. We received comments from a Member of Congress, six Federal agencies, two individuals, and an executive association.

In this final rule document, OPM will address the comments received on both the interim regulations on conversion to the SES pay system and the proposed regulations on the administration of SES pay and performance awards. We received no comments on the proposed changes in the regulations on the aggregate limitation on pay (5 CFR part 531, subpart B).

Minimum SES Rate of Basic Pay

Under § 534.406(a) of the interim regulations (and § 534.403(a) of the proposed regulations), OPM established the minimum rate of basic pay in the SES rate range at an amount equal to the minimum rate of basic pay under 5 U.S.C. 5376 for senior-level positions (excluding locality-based comparability payments under 5 U.S.C. 5304). One commenter recommended that OPM establish a higher minimum rate of basic pay in the SES rate range, since the current minimum rate (\$104,927) is less than the rate for GS-15, step 3 (including locality pay), in the Washington, DC, area. The commenter is concerned that the current minimum SES rate of basic pay does not take into account that SES members are no longer entitled to locality pay. In addition, the commenter suggested that setting the minimum rate at this low rate does not give an agency the latitude it needs to set pay upon appointment to the SES at a level that is commensurate with the duties and responsibilities of an SES position. Under 5 U.S.C. 5382, the minimum rate of basic pay for 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. In establishing the new SES open-range pay band, OPM determined that it would be most beneficial to agencies and employees to ensure the widest rate range possible under the new performance-based pay system. Agencies may choose to consider the applicable locality payment when setting the rate of basic pay of a senior executive upon initial appointment to the SES.

Prohibition on Reducing an SES Member's Rate of Basic Pay for 1 Year

Consistent with section 1125(c)(2) of the National Defense Authorization Act for Fiscal year 2004 (Public Law 108-136, November 24, 2003), § 534.406(b)(2) of the interim

regulations (and § 534.406(b) of the proposed regulations) prohibits 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). A commenter believes OPM's regulations establish a more restrictive limitation on reductions in SES rates of pay than does the controlling statute. The commenter believes section 1125(c)(2) prohibited only reductions in the discrete SES pay levels (ES-1, ES-2, *etc.*) and applicable locality payments, but did not prohibit reductions in pay based on performance or conduct. We disagree. Section 1125(c)(2) specifically prohibits any reduction in pay resulting from the amendments made by section 1125(a), which establishes the minimum and maximum rates of the SES rate range and requires each senior executive to be paid at one of the rates within that rate range. Section 1125(c)(2) provides that the rates of pay for senior executives under the new performance-based SES pay system, which became effective on January 11, 2004, may not be reduced for 1 year after that date.

Conversion to New SES Pay System

Section 534.406(b)(3) of the interim regulations (and § 534.406(c) of the proposed regulations) states that only certain SES members in positions that have geographic mobility requirements and who are assigned outside the contiguous 48 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 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. Any pay increase resulting from conversion to the new SES pay system for these SES members is not considered a pay adjustment under § 534.404(c) for the purpose of limiting an agency's flexibility to adjust pay more than once during a 12-month period.

Two commenters requested that OPM revise § 534.406(b)(3) to remove the limitation that only certain SES members subject to a geographic mobility requirement may receive this entitlement to a pay increase upon

reassignment to the 48 contiguous States or the District of Columbia. The commenters believe the limitation unfairly penalizes employees who accepted an assignment outside the 48 contiguous States without a geographic mobility requirement, since all SES members, by definition, must be mobile and accept reassignment upon management request. We agree and have revised § 534.406(b)(3) (now § 534.406(c)), accordingly. Since this rule applies to any reassignment to the 48 contiguous States effective on the first day of the first pay period beginning on or after January 1, 2004 (January 11, 2004), agencies may need to correct the rate of basic pay for those SES members who were reassigned to the 48 contiguous States after January 11, 2004, and before the effective date of these final SES pay regulations.

We also have revised § 534.406(c) to clarify that the conversion rule applies only for the senior executive's initial reassignment to the 48 contiguous States, not for each subsequent reassignment to the 48 States, and we have deleted an unnecessary reference to § 534.403(a)(2).

Adjusting SES Rates of Pay

Several commenters recommended that OPM revise the regulations to ensure that those senior executives performing at the fully successful or higher level receive a periodic increase in pay to account for their good performance and to protect their salaries against inflation. The commenters noted that the removal of locality pay for senior executives eliminated any ability to account for market forces or comparability as part of the pay-setting process for senior executives. The commenters fully support the notion that the highest performers should receive the highest salaries, but believe the new SES pay system must include consideration of economic realities to allow employees who are successfully meeting their performance expectations to maintain their relative position in the rate range.

To address these concerns, we have added a new § 534.404(b)(4) to allow an agency to increase the rate of basic pay of a senior executive who meets or exceeds his or her performance expectations on the effective date of an increase in the minimum or maximum rate of basic pay of the SES rate range by an amount that does not exceed the amount necessary to maintain the senior executive's relative position in the SES rate range, with the following two exceptions. First, a pay increase may not be provided to a senior executive whose rate of basic pay is at or below the rate

for level III of the Executive Schedule if such an increase would cause the senior executive's rate of basic pay to exceed the rate for level III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee approves the increase. Second, a pay increase may not be provided to a senior executive whose rate of basic pay is above the rate for level III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee approves the increase. However, in the case of a senior executive whose rate of basic pay is above the rate for level III of the Executive Schedule and who has been rated below outstanding, but above fully successful, for the most recently completed appraisal period, the agency head or designee may approve such a pay increase in limited circumstances, such as for an exceptionally meritorious accomplishment. A pay increase made to allow a senior executive to maintain his or her relative position in the rate range is not an entitlement and is not considered a pay adjustment for the purpose of applying the 12-month rule in § 534.404(c).

A commenter recommended that OPM allow agencies to delegate throughout the organization (*e.g.*, to bureau heads) the authority to approve rates of basic pay higher than the rate for level III of the Executive Schedule and to make exceptions to the 12-month rule. We disagree. We believe it is necessary to ensure that the agency official who is held responsible for the assessment of an agency's performance and oversight of an agency's senior executive appraisal process, as prescribed in 5 CFR 430.404(a)(5) and (6), should also be held responsible for ensuring that pay determinations reflect and recognize both individual and organizational performance.

Additional Increases in Rates for the Executive Schedule

In the Preamble to the proposed regulations, OPM solicited the views of commenters on a proposal to allow an additional pay increase during a 12-month period to address situations where the rates of pay for levels II and III of the Executive Schedule are increased after an agency has already granted pay increases to its senior executives following the SES performance appraisal period. Agencies would be permitted, at their discretion, to grant an additional pay increase to a

senior executive whose rate of basic pay is equivalent to the maximum rate for the applicable SES rate range (*i.e.*, level II or level III of the Executive Schedule) when the applicable maximum rate is increased, and the pay increase would not be considered a pay adjustment for the purpose of applying the 12-month rule. Seven commenters fully supported this proposal. One commenter objected to this proposal because it did not promote pay differentiation based on performance. We disagree with this objection since the proposed additional pay increase is directly associated with the initial pay increase, which was based on performance. We have added a new § 534.404(f)(2) to allow an agency to provide an additional pay increase to a senior executive whose rate of basic pay is equal to the rate for level II or III when the applicable maximum rate is increased and becomes effective after an agency has already granted a pay increase to the senior executive.

Federal agencies recommended that OPM clarify and simplify the rules for increasing a senior executive's rate of basic pay as a result of increases in the rates of pay for the Executive Schedule. If an agency believes an additional pay increase is warranted for a senior executive as a result of an increase in the rates of pay for the Executive Schedule under § 534.404(f)(1) (when there is an additional increase in the rates for the Executive Schedule in a calendar year and that increase becomes effective on the same date as prescribed in 5 U.S.C. 5318) and § 534.404(f)(2) (when there is an increase in the rates of pay for the Executive Schedule after an agency has already granted pay increases to its senior executives following the performance appraisal period), the agency may grant such a pay increase without regard to whether the employee had received a pay adjustment during the previous 12-month period. We have revised § 534.404(c)(3) to state that any determination to provide an additional pay increase under § 534.404(f) is not considered a pay adjustment for the purpose of applying the 12-month rule in § 534.404(c).

Setting Pay Upon Initial Appointment to the SES

One commenter recommended that agencies be required to provide senior executives with a pay increase upon initial appointment to the SES. The commenter believes that entry into the SES is a distinct honor and should guarantee a pay raise for those joining this elite group of civil servants. We believe OPM's regulations provide agencies with broad discretionary

authority to set pay upon initial appointment to the SES. Under § 534.404(a), an agency may set the rate of basic pay of a newly appointed SES member at any rate within the SES rate range, subject to the limitation on setting pay above the rate for level III of the Executive Schedule. The agency must determine the appropriate rate of pay based on the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the requirements of the SES position, as well as the individual's current responsibilities.

Setting Pay Upon a Break in Service

Under § 534.404(i)(1) of the proposed regulations, if a former SES member has had a break in service of 30 days or less, the employing agency must set his or her rate of basic pay upon reappointment to the SES at a rate at least equal to the employee's former SES rate of basic pay. Two commenters opposed this requirement because it unduly limits an agency's discretion to set pay based on the scope and level of responsibility of the new position. We agree. We have revised § 534.404(i)(1) to state that if there has been a break in SES service of 30 days or less, the senior executive's rate of basic pay may be set at any rate within the SES rate range (without regard to whether the employee received a pay adjustment during the previous 12-month period), but not higher than the employee's former SES rate of basic pay. Where there has been a break in service of 30 days or less, the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) (including the Inspector General, where applicable) may approve a higher rate than the senior executive's former rate of basic pay, if warranted.

Under § 534.404(i)(2) of the proposed regulations, we address the reinstatement of an individual who was serving under a Presidential appointment requiring Senate confirmation. In the final regulations, we are clarifying this paragraph to state that if the individual elected to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be adjusted upon reinstatement to the SES, whether in the agency where the individual held the Presidential appointment or in another agency, if at least 12 months have elapsed since the employee's last SES pay adjustment. If fewer than 12 months have elapsed since the employee's last SES pay adjustment, an authorized agency official may approve an additional pay increase under § 534.404(c)(4) if the

additional pay increase is warranted. Any pay adjustment must be made in accordance with paragraphs (b), (d), and (e) of § 534.404 and the agency's plan for adjusting SES rates of pay established under paragraph (g) of that section.

Setting Pay Upon Reassignment or Transfer

Under § 534.404(c)(4)(ii) of the proposed regulations, an authorized agency official may approve an additional increase in pay during a 12-month period if the agency head or designee determines that the increase is needed because the senior executive is being reassigned to a position with substantially greater scope and responsibility. A commenter recommended that OPM broaden this exception to include situations where an additional pay increase is needed to recruit a senior executive from a position in another agency. We agree and have revised § 534.404(c)(4)(ii) to permit an agency to provide an additional pay increase during a 12-month period if the agency head or designee determines that a pay increase is needed to recruit a senior executive with superior leadership or other competencies from a position in another agency.

Section 534.404(c)(4)(iii) permits an agency to provide an additional pay adjustment during a 12-month period to a senior executive who is critical to the mission of the agency and is likely to leave the agency in the absence of a pay increase. A commenter recommended that OPM require an agency to document the justification for an additional pay increase. We agree and have revised § 534.404(c)(5) to require an agency to provide written documentation approving any exception to the 12-month rule under § 534.404(c)(4).

Agency Plan for Setting and Adjusting SES Rates

Federal agencies requested additional guidance on the criteria they should establish to ensure that decisions on setting and adjusting SES rates of basic pay are based on individual performance and/or contributions to the agency's performance. To address these concerns, we have revised § 534.404(g)(1) to require agency plans to specify the criteria that will be used to set and adjust a senior executive's rate of basic pay to ensure that individual pay rates or pay adjustments, as well as their overall distribution within the SES rate range, reflect meaningful distinctions within a single performance rating level (*e.g.*, the higher

the employee's relative performance within a rating level, the higher the pay adjustment) and/or between performance rating levels (e.g., the higher the rating level, the higher the pay adjustment). In addition, we suggest that agencies may wish to consider the senior executive's broad scope of authority and level of responsibility and his or her personal accountability for the success (or failure) of an agency's programs.

A commenter requested that OPM's regulations require agencies to provide for transparency in the processes for making pay decisions and disclose information about the operation of the SES performance management system. We have revised § 534.404(g) to require transparency in the processes for making pay decisions, while assuring confidentiality. The commenter also recommended that OPM require agencies to provide summary information concerning performance ratings and annual salary adjustments for senior executives, the percentage of senior executives who received bonuses, and the range of bonus awards granted. We do not believe this additional reporting requirement is needed, since under 5 CFR 430.405(g), agencies with certified performance appraisal systems are required to provide this information annually to OPM.

Section 5382 of title 5, United States Code, requires that an SES member will be paid at one of the rates within the SES rate range, based on individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance management system. Federal agencies requested guidance on the difference between individual performance and contribution to agency performance, since individual performance directly leads to contributing to an agency's performance. We believe the intent of the legislation is that a senior executive's pay rate may be determined based on an accomplishment that he or she attained through individual performance and/or an accomplishment attained through the management of his or her staff which contributes to the agency's performance.

Reductions in Pay

A commenter opposed the proposed rule in § 534.404(j), which would allow an agency to reduce a career SES member's rate of basic pay by up to 10 percent based on performance or conduct. The commenter stated that one of the purposes of the SES is to help maintain consistency of the civil service during political change and that the

authority to reduce a senior executive's rate of basic pay by up to 10 percent may be misused to affect or influence a desired politically motivated decision. The commenter is concerned that the authority to reduce pay by 10 percent may violate the merit systems principle that employees be protected against arbitrary action or coercion for partisan political purpose under 5 U.S.C. 2301(b)(8)(A)). The commenter noted that while the reduction procedure has elements of due process within an agency, no appeal outside the agency, such as to the Merit Systems Protection Board (MSPB), is allowed. The commenter recommended that OPM reduce the maximum reduction in pay to 5 percent, comparable to the former regulatory limitation on reductions in pay of one SES pay level, which worked successfully prior to implementation of the new SES pay system.

The commenter believes that if a senior executive deserves a pay reduction of 10 percent, he or she can be removed from the SES, with the limited protections provided by law. The commenter recommends that if OPM truly believes a 10 percent reduction in pay is necessary to manage the SES, OPM should make any reduction in pay greater than 5 percent fully appealable to MSPB or delay an agency's authority to reduce pay for SES members for 1 year following issuance of OPM's final rule, consistent with Congress' prohibition against reducing the pay of an SES member for the first year after the effective date of the new SES pay system. The commenter believes that before senior executives experience the threat or possibility of a 10 percent pay reduction, they should be under new performance plans and the new performance management system for a full year.

The new SES pay system provides greater opportunities for higher rates of basic pay and larger pay adjustments, and with these opportunities come greater risks. We believe it is necessary to provide agencies with the authority to reduce basic pay up to 10 percent. Therefore, we made no changes in the regulations.

A commenter recommended that we add a statement to § 534.404(j)(2) that a reduction in pay is not an appealable action under 5 U.S.C. 7543 (removal and suspensions for more than 14 days for misconduct, negligence of duty, malfeasance, or failure to accept a directed reassignment). We agree and have added the statement to § 534.404(j)(2).

Pay Increase To Prevent Falling Below Minimum SES Rate

Under § 534.406(a) of the interim regulations (and § 534.403(a) of the proposed regulations), an SES member may not receive a rate of basic pay that is less than the minimum rate of the SES rate range. To preclude the possibility that an SES member's pay might fall below the minimum rate of the SES rate range, we have revised the regulations at § 534.404(c)(3) to provide that an increase in pay necessary to ensure that an SES member's rate of basic pay remains within the SES rate range is not considered a pay adjustment for the purpose of applying the 12-month rule in § 534.404(c).

Involuntary Removal From the SES

Federal agencies requested guidance on how to set pay for a career SES member who is receiving a rate of basic pay equivalent to the rate for level III of the Executive Schedule (\$145,600 in 2004) and who is *involuntarily* removed from the SES based on a less than fully successful performance rating. Under 5 U.S.C. 3594 and 5 CFR part 359, subpart G, a career SES employee who is *involuntarily* placed in a position outside of the SES at the GS-15 or equivalent level as the result of removal for less than fully successful performance is entitled to receive basic pay at the highest of—(1) the rate of basic pay in effect for the position in which he or she is being placed, (2) the rate of basic pay currently in effect for the position the appointee held in the civil service immediately before being appointed to the SES, or (3) the rate of basic pay in effect for the appointee immediately before removal from the SES. An employee who is placed in a General Schedule (GS) position under the provisions of 5 U.S.C. 3594 and 5 CFR part 359, subpart G, is not subject to the GS basic pay limitation of level V of the Executive Schedule, as provided in 5 U.S.C. 5303(f). Upon appointment to a GS position, the employee is entitled to receive a locality payment at the rate applicable in the locality pay area in which the employee's GS position is located, subject to 5 U.S.C. 5304(g)(1), which limits GS basic pay plus locality pay to the rate for level IV of the Executive Schedule.

In the case of an employee whose SES rate of pay was equal to the rate for level III of the Executive Schedule, his or her current SES rate of basic pay of \$145,600 is the highest applicable rate, and he or she is entitled to that saved rate. Since the employee's rate of basic pay exceeds the limitation on GS basic

pay plus locality pay (level IV of the Executive Schedule), he or she may not receive a locality payment. Under 5 U.S.C. 3594, the employee also is entitled to 50 percent of any increase in the maximum rate of basic pay for the GS grade to which he or she is placed until the saved rate is equal to or lower than the maximum rate of pay for that grade, at which time the employee's pay is set at that maximum rate.

If the saved pay provisions under 5 U.S.C. 3594 are not applicable, the agency may exercise the use of pay retention as provided in 5 U.S.C. 5363 and 5 CFR part 536 in situations where an SES member moves to a GS position and the movement is caused or influenced by a management action.

Additional Payments

In the Preamble to the proposed regulations, OPM advised agencies to review any determination to provide additional payments (e.g., retention allowances) to senior executives based on the senior executive's rate of basic pay, since a senior executive's rate of basic pay now includes locality payments. We remind agencies that under 5 U.S.C. 5754 and OPM's regulations at 5 CFR 575.306(a), retention allowances are expressed as a percentage of basic pay. If an employee's rate of basic pay is increased (e.g., as a result of including a locality payment in the senior executive's rate of basic pay upon conversion to the new SES pay system), the dollar amount of his or her retention allowance will automatically increase unless the agency takes action to reduce the retention allowance percentage in order to retain the previous dollar value. An agency must process an SF-50 (810 action) each time the percentage of a retention allowance changes.

Executive Level Positions in Temporary Organizations

Under 5 U.S.C. 3161(d), the rate of basic pay for executive positions appointed to temporary organizations may not exceed the maximum rate of basic pay established for the SES, including any locality-based comparability payment provided under 5 U.S.C. 5304. Under 5 U.S.C. 5382, the maximum rate of basic pay for SES members is the rate for level III of the Executive Schedule, unless the employee is covered by a certified performance appraisal system as provided in 5 U.S.C. 5307(d), in which case the maximum rate of basic pay is the rate for level II of the Executive Schedule. Since senior executives in temporary organizations are not covered by the SES performance appraisal

certification provision in 5 U.S.C. 5307(d), these executives do not have access to a rate higher than the rate for level III of the Executive Schedule. Therefore, we have revised §§ 534.303 and 534.304 to state that the maximum rate of basic pay for executives and certain senior staff in temporary organizations is the rate for level III of the Executive Schedule. Executives in temporary organizations are not entitled to locality pay, since SES members are no longer eligible for locality-based comparability payments as a result of the amendments made to 5 U.S.C. 5304(h).

Miscellaneous

We have added definitions of *relative performance* and *performance expectations* in § 534.402, consistent with the definitions in § 430.402; we have indicated throughout the regulations in part 534, as appropriate, the authority of an agency's Inspector General for setting and adjusting rates of pay for senior executives in the Office of the Inspector General; and we have removed subpart C of 5 CFR part 359 (Removal from the Senior Executive Service), since section 1321 of the Homeland Security Act repealed SES recertification requirements and subpart C is no longer needed.

Pay Adjustments for SES Members Without Supervisors

A commenter recommended that OPM develop a new pay system to allow a higher maximum rate of basic pay for senior executives who do not have a superior within their agencies who can evaluate their performance (e.g., senior executives in small agencies where political appointments have not occurred) and for Inspectors General. This recommendation is beyond the scope of these regulations. Legislation would be needed to provide a higher maximum rate of basic pay to these employees.

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.

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, 359, 451, 530, 531, 534, and 575

Administrative practice and procedure, Decorations, medals, awards, Government employees, Law

enforcement officers, Reporting and recordkeeping requirements, Hospitals, Students, and Wages.

Office of Personnel Management.

Kay Coles James,

Director.

■ The interim rule published January 13, 2004, at 69 FR 2048 is adopted as final with the changes set forth below, and OPM further amends 5 CFR chapter I as follows:

PART 359—REMOVAL FROM THE SENIOR EXECUTIVE SERVICE; GUARANTEED PLACEMENT IN OTHER PERSONNEL SYSTEMS

■ 1. The authority citation for part 359 continues to read as follows:

Authority: 5 U.S.C. 1302 and 3596, unless otherwise noted.

Subpart C—[Removed and Reserved]

■ 2. Subpart C (§§ 359.301—359.304) is removed and reserved.

PART 451—EMPLOYEE AWARDS

Subpart A—Agency Awards

■ 3. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 12828.

■ 4. In § 451.101 paragraph (d), remove the reference “534.403” and add the reference “534.405” in its place, and add a new paragraph (e) to read as follows:

§ 451.101 Authority and coverage.

* * * * *

(e) An agency may grant performance-based cash awards (i.e., on the basis of a rating of record) under the authority of 5 U.S.C. 4505a and the provisions of this part to eligible non-GS employees who are covered by 5 U.S.C. chapter 45 and this part, and who are not otherwise covered by an explicit statutory authority for the payment of such awards, including 5 U.S.C. 5384 (SES performance awards).

■ 5. In § 451.104(a)(3), remove the reference “534.403” and add the reference “534.405” in its place.

PART 530—PAY RATES AND SYSTEMS (GENERAL)

■ 6. The authority citation is revised to read as follows:

Authority: 5 U.S.C. 5305 and 5307; E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316.

Subpart B also issued under secs. 302(c) and 404(c) of the Federal Employees Pay Comparability Act of 1990, Public Law 101–509, 104 Stat. 1462 and 1466, respectively.

Subpart C also issued under sec. 4 of the Performance Management and Recognition System Termination Act of 1993, Public Law 103-89, 107 Stat. 981; and sec. 1322 of the Chief Human Capital Officers Act of 2002, Public Law 107-296, 116 Stat. 2297 (5 U.S.C. 5307).

■ 7. Revise subpart B to read as follows:

Subpart B—Aggregate Limitation on Pay

| | |
|---------|--|
| Sec. | |
| 530.201 | Purpose. |
| 530.202 | Definitions. |
| 530.203 | Administration of aggregate limitation on pay. |
| 530.204 | Payment of excess amounts. |
| 530.205 | Records. |

Subpart B—Aggregate Limitation on Pay

§ 530.201 Purpose.

This subpart establishes regulations for limiting an employee's aggregate annual compensation. An employee's aggregate compensation received in any given calendar year may not exceed the rate of pay for level I of the Executive Schedule or the rate payable to the Vice President at the end of the calendar year, whichever is applicable to the employee based on the certification status under 5 CFR part 430, subpart D, of the performance appraisal system covering that employee. These regulations must be applied in conjunction with 5 U.S.C. 5307.

§ 530.202 Definitions.

In this subpart:

Agency means an executive agency as defined at 5 U.S.C. 105.

Aggregate compensation means the total of—

- (1) Basic pay received as an employee of the executive branch or as an employee outside the executive branch to whom the General Schedule applies;
- (2) Locality payments under 5 U.S.C. 5304; continued rate adjustments under 5 CFR part 531, subpart G; or special pay adjustments for law enforcement officers under section 404 of the Federal Employees Pay Comparability Act of 1990 (Public Law 101-509);
- (3) Premium pay under 5 U.S.C. chapter 53, subchapter IV;
- (4) Premium pay under 5 U.S.C. chapter 55, subchapter V;
- (5) Incentive awards and performance-based cash awards under 5 U.S.C. chapters 45 and 53;
- (6) Recruitment and relocation bonuses under 5 U.S.C. 5753;
- (7) Retention allowances under 5 U.S.C. 5754 and extended assignment incentives under 5 U.S.C. 5757;
- (8) Supervisory differentials under 5 U.S.C. 5755;

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

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

(11) Post differentials based on environmental conditions for employees stationed in nonforeign areas under 5 U.S.C. 5941(a)(2);

(12) Physicians' comparability allowances under 5 U.S.C. 5948;

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

(14) Lump-sum payments in excess of the aggregate limitation on pay as required by § 530.204; and

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

(i) Overtime pay under the Fair Labor Standards Act of 1938, as amended, and 5 CFR part 551;

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

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

(iv) Back pay awarded to an employee under 5 U.S.C. 5596 because of an unjustified personnel action;

(v) Student loan repayments under 5 U.S.C. 5379; and

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

Aggregate limitation means the limitation on aggregate compensation received in any given calendar year as established by 5 U.S.C. 5307. For an executive branch employee (including employees in Senior Executive Service positions paid under 5 U.S.C. 5383 and employees in senior-level or scientific or professional positions paid under 5 U.S.C. 5376), a General Schedule employee in the legislative branch, or General Schedule employee in the judicial branch (excluding those paid under 28 U.S.C. 332(f), 603, and 604), the limitation on aggregate compensation is equal to the rate for level I of the Executive Schedule in effect at the end of the applicable calendar year. For an employee in a Senior Executive Service position paid under 5 U.S.C. 5383 and an employee in a senior-level or scientific or professional position paid under 5 U.S.C. 5376 covered by an applicable performance appraisal system that has been certified under 5 CFR part 430, subpart D, the limitation on aggregate compensation is equal to the total annual compensation payable to the Vice President under 3 U.S.C. 104 at the end of a calendar year.

Basic pay means the total amount of pay received at a rate fixed by law or administrative action for the position held by an employee, before any

deductions. Basic pay includes night and environmental differentials for prevailing rate employees under 5 U.S.C. 5343(f) and 5 CFR 532.511. Basic pay excludes additional pay of any other kind, including locality payments under 5 U.S.C. 5304.

Discretionary payment means a payment an agency has discretion to make or not to make to an employee. A retention allowance under 5 U.S.C. 5754 and an extended assignment incentive under 5 U.S.C. 5757 are discretionary payments. However, other payments that are preauthorized to be made to an employee at a regular fixed rate each pay period are not discretionary payments.

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

Estimated aggregate compensation means the agency's projection of the aggregate compensation an employee actually would receive during a calendar year but for application of the aggregate limitation to future payments. This projection must be based upon known factors. Estimated aggregate compensation includes—

(1) The total amount of basic pay the employee will receive during the calendar year;

(2) Any lump-sum payment of excess amounts from a previous calendar year, as described in § 530.204;

(3) The total amount of nondiscretionary payments the employee would be entitled to receive during the calendar year; and

(4) The total amount of discretionary payments the employee would be authorized to receive during the calendar year.

§ 530.203 Administration of aggregate limitation on pay.

(a) Except as provided in paragraph (b) of this section, no executive branch employee or General Schedule employee in the legislative branch (or General Schedule employee in the judicial branch, excluding those paid under 28 U.S.C. 332(f), 603, and 604), may receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic pay (whether received under title 5, United States Code, or otherwise), would cause the employee's aggregate compensation to exceed the rate for level I of the Executive Schedule on the last day of that calendar year (*i.e.*, the aggregate limitation).

(b)(1) Subject to paragraph (b)(2) of this section, an employee in a Senior Executive Service position paid under 5 U.S.C. 5383 and an employee in a

senior-level or scientific or professional position paid under 5 U.S.C. 5376 may not receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic pay, would cause the employee's aggregate compensation to exceed the rate of pay for level I of the Executive Schedule.

(2) An employee covered by a performance appraisal system that has been certified under 5 CFR part 430, subpart D, may not receive any allowance, differential, bonus, award, or other similar cash payment under title 5, United States Code, in any calendar year which, in combination with the employee's basic pay, would cause the employee's aggregate compensation to exceed the total annual compensation payable to the Vice President under 3 U.S.C. 104 on the last day of that calendar year (*i.e.*, the aggregate limitation).

(3) An agency must make corrective actions as provided in paragraphs (g) and (h) of this section if the agency underestimated or overestimated an employee's aggregate compensation in a calendar year as a result of receiving or losing certification of its applicable performance appraisal system under 5 CFR part 430, subpart D.

(c) The aggregate limitations described in paragraphs (a) and (b) of this section apply to the aggregate compensation an employee actually received during the calendar year without regard to when the compensation was earned.

(d) When an agency authorizes a discretionary payment for an employee, the agency must defer any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the employee's aggregate compensation during the calendar year to exceed the applicable aggregate limitation. Any portion of a discretionary payment deferred under this paragraph must be available for payment as provided in § 530.204.

Special rules apply to the authorization and payment of a retention allowance, which may not be deferred. (*See* 5 CFR 575.306(b) and 575.307(a).) A retention allowance must be reduced or terminated before deferring any other type of discretionary payment, as long as the other discretionary payment is required to be paid within the current calendar year under a mandatory personnel policy or has been officially approved by an authorized agency official for payment within the current calendar year. When a discretionary

payment is authorized but not required to be paid in the current calendar year, an agency official's decision to set the payment date in the next calendar year is not considered a deferral under this paragraph.

(e) An agency may not defer or discontinue nondiscretionary payments for any period of time to make a discretionary payment that would otherwise cause an employee's pay to exceed the applicable aggregate limitation. An agency may not defer or discontinue basic pay under any circumstance.

(f) If, after an agency defers discretionary payments as required by paragraph (d) of this section, the estimated aggregate compensation to which an employee is entitled exceeds the applicable aggregate limitation, the agency must defer all nondiscretionary payments (other than basic pay) as necessary to avoid payments in excess of that limitation. An agency must defer all nondiscretionary payments at the time when otherwise continuing to pay such payments would cause an employee's estimated aggregate compensation for that calendar year to exceed the applicable aggregate limitation. An agency must pay any portion of a nondiscretionary payment deferred under this paragraph at a later date, as provided in § 530.204.

(g)(1) If an agency determines that it underestimated an employee's aggregate compensation at an earlier date in the calendar year, or the aggregate limitation applicable to the employee is reduced during the calendar year, the sum of the employee's remaining payments of basic pay may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable aggregate limitation. In such cases, the employee will become indebted to the Federal Government for any amount paid in excess of the applicable aggregate limitation. The head of the agency may waive the debt under 5 U.S.C. 5584, if warranted.

(2) To the extent that any excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, an agency must extinguish the excess amount on January 1 of the next calendar year. As part of the correction of the error, the agency must deem the excess amount to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment, as described in § 530.204, and must consider this deemed deferred excess payment to be

part of the employee's aggregate compensation for the new calendar year.

(3) To the extent that any excess amount is attributable to retention allowances that the agency inadvertently did not reduce or terminate under 5 CFR 575.307(a), the employee will become indebted to the Federal Government for any amount attributable to retention allowance payments that were paid in excess of the applicable aggregate limitation. The head of the agency may waive the debt under 5 U.S.C. 5584, if warranted.

(h) If an agency determines that it overestimated an employee's aggregate compensation at an earlier date in the calendar year, which caused the agency to defer payments unnecessarily under this section, or the aggregate limitation applicable to the employee is increased during the calendar year, the agency may make appropriate corrective payments to the employee during the calendar year, notwithstanding § 530.204.

§ 530.204 Payment of excess amounts.

(a) An agency must pay the amounts that were deferred because they were in excess of the aggregate limitation (as described in § 530.203) as a lump-sum payment at the beginning of the following calendar year, except as otherwise provided in this section. This payment is part of the employee's aggregate compensation for the new calendar year.

(b) If a lump-sum payment under paragraph (a) of this section causes an employee's estimated aggregate compensation to exceed the aggregate limitation in the current calendar year, an agency must consider only the employee's basic pay that is expected to be paid in the current year in determining the extent to which the lump-sum payment may be paid. An agency must defer all other payments, as provided in § 530.203, in order to pay as much of the lump-sum excess amount as possible. Any payments deferred under this paragraph, including any portion of the lump-sum excess amount that was not payable, are payable at the beginning of the next calendar year, as provided in paragraph (a) of this section.

(c) If an employee transfers to another agency, the gaining agency is responsible for making any lump-sum payment required by paragraph (a) of this section. The previous employing agency must provide the gaining agency with documentation regarding the employee's excess amount, as provided in § 530.205. The previous employing agency must provide a fund transfer equal to the total cost of the lump-sum

payment to the gaining agency through the Department of the Treasury's Intra-Governmental Payment and Collection System. If an employee leaves Federal service, the employing agency is responsible for making the lump-sum payment to the employee as provided in paragraph (d) of this section.

(d) An agency must pay any excess amount regardless of the calendar year limitation under the following conditions:

(1) If an employee dies, the employing agency must pay the entire excess amount as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(2) If an employee separates from Federal service, the employing agency must pay the entire excess amount following a 30-day break in service. If the individual is reemployed in the Federal service within the same calendar year as the separation, any previous payment of an excess amount must be considered part of that year's aggregate compensation for the purpose of applying the aggregate limitation for the remainder of the calendar year.

§ 530.205 Records.

An agency must maintain appropriate records to administer this subpart and must transfer such records to any agency to which an employee may transfer. An agency must make such records available to any agency that may employ the employee later during the same calendar year. An agency's records must document the source of any deferred excess amount remaining to the employee's credit at the time of separation from the agency. In the case of an employee who separates from Federal service for at least 30 days, the agency records also must document any payment of a deferred excess amount made by the agency after separation.

PART 534—PAY UNDER OTHER SYSTEMS

■ 8–9. 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, Public Law 108–136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207).

Subpart C—Basic Pay for Employees of Temporary Organizations

■ 10. Section 534.303 is revised to read as follows:

§ 534.303 Basic pay for executive level positions.

Rates of basic pay for executive level positions of temporary organizations may not exceed the rate for level III of the Executive Schedule.

■ 11. Section 534.304(c) is revised to read as follows:

§ 534.304 Basic pay for staff positions.

* * * * *

(c) Notwithstanding the limitations in paragraphs (a) and (b) of this section, the rate of basic pay and locality-adjusted rate of basic pay for a senior staff position of a temporary organization may, in a case determined by the head of a temporary organization to be exceptional, exceed the maximum rates established under those paragraphs. However, the higher payable rates may not exceed the rate for level III of the Executive Schedule.

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

■ 12. Section 534.401 is revised to read as follows:

§ 534.401 Purpose.

This subpart contains the rules for setting and adjusting rates of basic pay and granting performance awards for members of the Senior Executive Service (SES), as provided by 5 U.S.C. 5382, 5383, and 5384. An agency must set and adjust the rate of basic pay for an SES member on the basis of the employee's performance and/or contribution to the agency's performance, as determined by the agency through the administration of its performance management system(s) for senior executives. These regulations must be read in combination with applicable statutes and with the regulations for the approval of an SES performance management system under 5 CFR part 430, subpart C, and certification of an SES performance appraisal system under 5 CFR part 430, subpart D.

■ 13. Section 534.402 is revised to read as follows:

§ 534.402 Definitions.

In this subpart—

Agency means an executive agency or military department, as defined by 5 U.S.C. 105 and 102.

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. The agency's Inspector General is the *authorized agency official* for senior executive positions in the Office of the

Inspector General, consistent with the requirements in section 3(a) of the Inspector General Act of 1978.

Outstanding performance means performance that substantially exceeds the normally high performance expected of any senior executive, as evidenced by exceptional accomplishments or contributions to the agency's performance.

Performance expectations means the critical and other performance elements and performance requirements that constitute the senior executive performance plans (as defined in § 430.303).

PRB means Performance Review Board, as described in § 430.310.

Rate of basic pay means the rate of pay fixed by law or administrative action for the senior executive, within the established SES rate range or, in the case of a senior executive entitled to pay retention, the employee's retained rate of pay, excluding any applicable locality-based comparability payments under 5 U.S.C. 5304, but before any deductions and exclusive of additional pay of any other kind.

Relative performance means the performance of a senior executive with respect to the performance of other senior executives, including their contribution to agency performance, where appropriate, as determined by the application of a certified performance appraisal system under 5 CFR part 430, subpart D.

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

SES rate means a rate of basic pay within the SES rate range assigned to a member of the SES under § 534.403(a).

SES rate range means the range of rates of basic pay established for the SES under 5 U.S.C. 5382 and § 534.403(a).

§§ 534.403 and 534.405 [Redesignated as §§ 534.405 and 534.408]

■ 14. Redesignate §§ 534.403 and 534.405 as §§ 534.405 and 534.408, respectively.

■ 15. Add new § 534.403 to read as follows:

§ 534.403 SES rate range.

(a) *SES rate range.* (1) 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). The minimum rate of basic pay for 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. An SES member may not receive less than the minimum rate of the SES rate range. Except as provided in paragraph (a)(2) of this section, 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.

(2) The maximum rate of basic pay of the SES rate range is set at the rate for level II of the Executive Schedule for senior executives in an agency who are covered by a performance appraisal system that makes meaningful distinctions based on relative performance, as certified by the Office of Personnel Management (OPM), with concurrence by the Office of Management and Budget (OMB), under 5 U.S.C. 5307(d) and 5 CFR part 430, subpart D. A senior executive's rate of basic pay may not exceed the maximum rate of the applicable SES rate range, except as provided in § 534.404(h)(2). The applicable maximum rate of basic pay for the SES rate range will increase with any increase in the rate for levels II or III of the Executive Schedule under 5 U.S.C. 5318.

(3) Rates of basic pay higher than the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally are reserved for those senior executives who have demonstrated the highest levels of individual performance and/or made the greatest contributions to the agency's performance, as determined by the agency through the administration of its performance appraisal system for senior executives, or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, consistent with the agency's strategic human capital plan.

(b) *Suspension of certification of performance appraisal system.* A senior executive whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay because his or her agency's applicable performance appraisal system certification is suspended under 5 CFR 430.405(h). The senior executive will continue to receive his or her current SES rate and is not eligible for a pay adjustment until the senior executive is assigned to a position that would allow the employee to receive a pay adjustment or until

certification of the employing agency's applicable performance appraisal system is reinstated under 5 CFR part 430, subpart D. The SES rate of pay is not considered a retained rate of pay for the purpose of applying 5 U.S.C. 3594 and 5 CFR part 359, subpart G, or 5 U.S.C. 5363 and 5 CFR 536.104.

■ 16. Section 534.404 is revised to read as follows:

§ 534.404 Setting and adjusting pay for senior executives.

(a) *Setting pay upon initial appointment to the SES.* An authorized agency official may set the rate of basic pay of an individual at any rate within the SES rate range upon initial appointment to the SES, subject to the limitation on the maximum rate of basic pay in § 534.403(a). Rates of basic pay above the rate for level III of the Executive Schedule but less than or equal to the rate for level II of the Executive Schedule generally are reserved for those newly appointed senior executives who possess superior leadership or other competencies, as determined by the agency as part of its strategic human capital plan. In setting a new senior executive's rate of basic pay, an agency must consider the nature and quality of the individual's experience, qualifications, and accomplishments as they relate to the requirements of the SES position, as well as the individual's current responsibilities.

(b) *Adjusting the pay of SES members.*
(1) An authorized agency official may adjust (increase or reduce) the rate of basic pay of a senior executive consistent with the agency's plan for setting and adjusting SES rates of basic pay under paragraph (g) of this section.

(2) A senior executive who receives an annual summary rating of outstanding performance must be considered for an annual pay increase, subject to the limitation on the maximum rate of basic pay in § 534.403(a).

(3) An agency may provide a pay increase to allow a senior executive to advance his or her relative position within the SES rate range only upon a determination by the authorized agency official that the senior executive's individual performance and/or contributions to agency performance so warrant. In assessing a senior executive's performance and/or contribution to the agency's performance, the authorized agency official may consider such things as unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's performance, as well as the

senior executive's current responsibilities. Senior executives who demonstrate the highest levels of individual performance and/or make the greatest contributions to the agency's performance, as determined by the agency through the administration of its performance appraisal system, or, in the case of newly-appointed senior executives, those who possess superior leadership or other competencies, as determined by the agency as part of its strategic human capital plan, must receive the highest rates of basic pay or pay adjustments.

(4)(i) On the effective date of an increase in the minimum or maximum rate of basic pay of the SES rate range under § 534.403(a)(1) or (2), an authorized agency official may increase the rate of basic pay of a senior executive who meets or exceeds his or her performance expectations by an amount that does not exceed the amount necessary to maintain the senior executive's relative position in the SES rate range, except as provided in paragraph (b)(4)(ii) and (b)(4)(iii) of this section. A pay increase made under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c).

(ii) A pay increase under paragraph (b)(4)(i) of this section may not be provided to a senior executive whose rate of basic pay is at or below the rate for level III of the Executive Schedule if such an increase would cause the senior executive's rate of basic pay to exceed the rate for level III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) has approved the increase in pay.

(iii) A pay increase under paragraph (b)(4)(i) of this section may not be provided to a senior executive whose rate of basic pay is above the rate for level III of the Executive Schedule unless the senior executive has received an annual summary rating of outstanding for the most recently completed appraisal period and the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) has approved the increase in pay. However, in the case of a senior executive whose rate of basic pay is above the rate for level III of the Executive Schedule and who has been rated below outstanding, but above fully successful, for the most recently

completed appraisal period, the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) may approve such a pay increase in limited circumstances, such as for an exceptionally meritorious accomplishment.

(5) A senior executive who receives a summary rating of less than fully successful may not receive an increase in pay for the current appraisal period.

(6) An authorized agency official may reduce the rate of basic pay of a senior executive for performance and/or disciplinary reasons, consistent with the restrictions on reducing the rate of basic pay of a career senior executive in paragraph (j) of this section and in § 534.406(b).

(c) *12-month rule.* (1) An authorized agency official may adjust (*i.e.*, increase or reduce) the rate of basic pay of a senior executive not more than once during any 12-month period. However, an agency may make a determination to provide an additional pay increase under certain conditions as prescribed in paragraph (c)(3) and (4) of this section without regard to whether the senior executive has received a pay adjustment during the previous 12-month period.

(2) The following pay actions are considered pay adjustments for the purpose of applying this paragraph:

(i) The setting of an individual's rate of basic pay upon initial appointment or reappointment to the SES under paragraphs (a) and (i)(1) of this section and upon reinstatement to the SES under paragraph (i)(2)(ii) of this section; and

(ii) Any adjustment (increase or reduction) in an SES rate of basic pay granted to a senior executive, except as provided in paragraph (c)(3) of this section.

(3) The following pay actions are not considered pay adjustments for the purpose of applying this paragraph:

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

(ii) A determination by an authorized agency official to make a zero adjustment in pay after reviewing a senior executive's annual summary rating;

(iii) A zero adjustment in pay made 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;

(iv) A determination to provide an additional pay increase under paragraph (f) of this section when there is an increase in Executive Schedule rates of pay;

(v) A determination to provide a pay increase under paragraph (b)(4) of this section to allow a senior executive to maintain his or her relative position in the SES rate range; and

(vi) An increase in pay equivalent to the minimum amount necessary to ensure that a senior executive's rate of basic pay does not fall below the minimum rate of the SES rate range.

(4) An authorized agency official may approve increases in a senior executive's rate of basic pay more than once during a 12-month period if the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) or (6) (including the Inspector General, where applicable) determines that—

(i) The senior executive's exceptionally meritorious accomplishment significantly contributes to the agency's performance;

(ii) A pay increase is necessary to reassign a senior executive to a position with substantially greater scope and responsibility or to recruit a senior executive with superior leadership or other competencies from a position in another agency;

(iii) The retention of the senior executive is critical to the mission of the agency and the senior executive would be likely to leave the agency in the absence of a pay increase; or

(iv) Such action conforms to an otherwise applicable executive appraisal and pay adjustment cycle (*e.g.*, in the case of a senior executive who was appointed to an SES position within the past 12 months or a senior executive who was transferred to an SES position from an agency with a different senior executive appraisal and pay adjustment cycle within the past 12 months).

(5) An authorized agency official must provide written documentation approving an exception under paragraph (c)(4) of this section. Any pay adjustment made as a result of a determination under paragraph (c)(4) of this section is considered a pay adjustment for the purpose of applying § 534.404(c) and begins a new 12-month period.

(d) *Adjustments in pay prior to certification of applicable performance appraisal system.* An authorized agency official may adjust a senior executive's

rate of basic pay converted under § 534.406 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 CFR part 430, subpart D, but only up to the rate for level III of the Executive Schedule. The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and the senior executive is otherwise eligible for such an increase (*i.e.*, he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). An adjustment in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(e) *Adjustments in pay after certification of applicable performance appraisal system.* In the case of an agency that obtains certification of a performance appraisal system for senior executives under 5 CFR part 430, subpart D, an authorized agency official may increase a covered senior executive's rate of basic pay up to the rate for level II of the Executive Schedule, consistent with the limitation on increasing pay above the rate for level III of the Executive Schedule in § 534.403(a)(2). The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and the senior executive is otherwise eligible for such an increase (*i.e.*, he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). An adjustment in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(f) *Effect of increase in Executive Schedule rates of pay.* (1) If there is an additional increase in the rates for the Executive Schedule in a calendar year, and if that increase becomes effective on the first day of the first pay period beginning on or after January 1 (*i.e.*, the date prescribed in 5 U.S.C. 5318), an agency may review any previous determination to adjust the pay of a senior executive that was made effective on or after the effective date of the first increase in the rates for the Executive Schedule to determine whether, and to what extent, an additional pay increase may be warranted for senior executives based on the same criteria used for the previous determination. 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 pay increase and is not considered a pay

adjustment for the purpose of applying § 534.404(c).

(2) If there is an increase in the rates of pay for the Executive Schedule under 5 U.S.C. 5318 after an agency has already granted pay increases to its senior executives following the applicable performance appraisal period, an agency may review any previous determination to increase the pay of a senior executive whose rate of basic pay is equivalent to the rate for level II (if covered under a performance appraisal system that is certified) or level III (if covered under a performance appraisal system that is not certified) when the applicable maximum rate is increased to determine whether, and to what extent, an additional pay increase may be warranted for the senior executive based on the same criteria used for the previous determination. The determination to provide an additional pay increase must be approved and made effective as of the effective date of increases in the Executive Schedule under 5 U.S.C. 5318 (*i.e.*, the first day of the first pay period beginning on or after January 1). An additional pay increase under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c).

(g) *Agency plan for setting and adjusting SES rate of basic pay.* Each agency must establish a plan for setting and adjusting the rates of basic pay for SES members. Agencies must provide for transparency in the processes for making pay decisions, while assuring confidentiality. In developing its plan for setting and adjusting SES rates, an agency may consider the senior executive's broad scope of authority and level of responsibility and his or her personal accountability for the success (or failure) of an agency's programs. The agency's plan must require that any decisions to adjust pay must reflect meaningful distinctions among senior executives based on individual performance and/or contribution to agency performance and must include—

(1) The criteria that will be used to set and adjust a senior executive's rate of basic pay to ensure that individual pay rates or pay adjustments, as well as their overall distribution within the SES rate range, reflect meaningful distinctions within a single performance rating level (*e.g.*, the higher the employee's relative performance within a rating level, the higher the pay adjustment) and/or between performance rating levels (*e.g.*, the higher the rating level, the higher the pay adjustment);

(2) The criteria that will be used to set and adjust a senior executive's rate of

basic pay at a rate that exceeds the rate for level III of the Executive Schedule if the applicable agency performance appraisal system has been certified under 5 CFR part 430, subpart D;

(3) The designation of the authorized agency official who has authority to set and adjust SES rates of pay for individual senior executives, subject to the requirement that the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) (including the Inspector General, where applicable) must approve any determination to set a senior executive's rate of basic pay higher than the rate for level III of the Executive Schedule and must approve any determination to increase a senior executive's rate of basic pay more than once in any 12-month period; and

(4) The administrative and management controls that will be applied to ensure compliance with applicable statutes, OPM's regulations, the agency's plan, and, where applicable, the certification requirements set forth in 5 CFR 430, subpart D, and the limitation on the maximum rate of basic pay in § 534.403(a).

(h) *Setting pay upon transfer.* (1) An authorized agency official may set the pay of a senior executive transferring from another agency at any rate within the SES rate range, subject to the limitation on the maximum rate of basic pay in § 534.403(a) and the restrictions on reducing the pay of career senior executives in paragraph (h)(2) of this section (upon transfer to an agency whose applicable performance appraisal system is not certified) and in § 534.406(b) (for 12 months following the effective date of the new SES pay system). If pay is set at the same SES rate the senior executive received in his or her former agency, the action is not considered a pay adjustment for the purpose of applying § 534.404(c).

(2) A senior executive whose rate of basic pay is higher than the rate for level III of the Executive Schedule may not suffer a reduction in pay as a result of transferring to an agency where the maximum rate of basic pay for the applicable SES rate range is equal to the rate for level III of the Executive Schedule. The senior executive will continue to receive his or her current SES rate and is not eligible for a pay adjustment until the senior executive is assigned to a position that would allow the employee to receive a pay adjustment or the employing agency's applicable performance appraisal system is certified under 5 CFR part 430, subpart D. The SES rate of pay is not considered a retained rate of pay for

the purpose of applying 5 U.S.C. 3594 and 5 CFR part 359, subpart G, or 5 U.S.C. 5363 and 5 CFR 536.104.

(i) *Setting pay following a break in SES service.* (1) *General.* Upon reappointment to the SES, an authorized agency official may set the rate of basic pay of a former senior executive at any rate within the SES rate range, subject to the limitations in § 534.403(a), if there has been a break in SES service of more than 30 days. If there has been a break in SES service of 30 days or less, the senior executive's rate of basic pay may be set at any rate within the SES rate range (without regard to whether the employee received a pay adjustment during the previous 12-month period), but not higher than the senior executive's former SES rate of basic pay. Where there has been a break in service of 30 days or less, the agency head or designee who performs the functions described in 5 CFR 430.404(a)(5) and (6) (including the Inspector General, where applicable) may approve a higher rate than the senior executive's former rate of basic pay, if warranted. Setting a rate of basic pay upon reappointment to the SES is considered a pay adjustment under § 534.404(c).

(2) *Reinstatement from a Presidential appointment requiring Senate confirmation.* The following provisions apply to a former career senior executive who is reinstated under 5 CFR 317.703:

(i) If the individual elected to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be adjusted upon reinstatement to the SES, whether in the agency where the individual held the Presidential appointment or in another agency, if at least 12 months have elapsed since the employee's last SES pay adjustment. If fewer than 12 months have elapsed since the employee's last SES pay adjustment, an authorized agency official may approve an additional pay increase under § 534.404(c)(4) if the additional pay increase is warranted. Any pay adjustment must be made in accordance with paragraphs (b), (d), and (e) of this section and the agency's plan for adjusting SES rates of pay in paragraph (g) of this section.

(ii) If the individual did not elect to remain subject to the SES pay provisions while serving under a Presidential appointment, his or her SES rate may be set upon reinstatement to the SES at any rate within the SES rate range, subject to the limitations in § 534.403(a).

(iii) Setting a rate of basic pay upon reinstatement to the SES under paragraphs (i)(2)(i) and (ii) of this

section is considered a pay adjustment for the purpose of applying § 534.404(c).

(j) *Restrictions on reducing the pay of career senior executives.*

(1) An authorized agency official may reduce a career senior executive's SES rate of basic pay by not more than 10 percent for performance or disciplinary reasons, subject to the restriction on reducing the pay of career senior executives in § 534.406(b) or setting pay below the minimum rate of the SES rate range in § 534.403(a).

(2) The SES rate of basic pay of a career senior executive may be reduced without the employee's consent by the senior executive's agency or upon transfer of function to another agency only—

(i) If the senior executive has received a less than fully successful annual summary rating under 5 CFR part 430, subpart C, or has otherwise failed to meet the performance requirements for a critical element as defined in 5 CFR 430.303; or

(ii) As a disciplinary or adverse action resulting from conduct-related activity, including, but not limited to, misconduct, neglect of duty, or malfeasance.

(3) Prior to reducing a career senior executive's rate of basic pay, the agency must provide the senior executive with the following:

(i) Written notice of such reduction at least 15 days in advance of its effective date;

(ii) A reasonable period of time, but not less than 7 days, for the senior executive to respond to such notice orally and/or in writing and to furnish affidavits and other documentary evidence in support of that response;

(iii) An opportunity to be represented in the matter by an attorney or other representative;

(iv) A written decision and specific reasons for the pay reduction at the earliest practicable date after the senior executive's response, if any; and

(v) An opportunity to request, within 7 days after the date of that decision, reconsideration by the head of the agency, whose determination with respect to that request will be final and not subject to further review.

(4) Reductions in pay under paragraph (j) of this section are not appealable under 5 U.S.C. 7543.

■ 17. In newly redesignated § 534.405, revise paragraphs (a)(2)(i), (b), (c), and (f) to read as follows:

§ 534.405 Performance Awards.

(a) * * *

(2) * * *

(i) A former SES career appointee who elected to retain award eligibility under

5 CFR part 317, subpart H. If the rate of basic pay of the individual is higher than the maximum rate of basic pay for the applicable SES rate range, the maximum rate of that 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.

* * * * *

(b)(1) The total amount of performance awards paid during a fiscal year by an agency may not exceed the greater of—

(i) Ten percent of the aggregate career SES rates of basic pay for the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made; or

(ii) Twenty percent of the average annual rates of basic pay for career SES appointees of the agency as of the end of the fiscal year prior to the fiscal year in which the award payments are made.

(2) In determining the aggregate career SES rates of basic pay and the average annual rate of basic pay as of the end of FY 2003 for the purpose of applying paragraph (b) of this section, agencies must use the annual rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 or special geographic pay adjustment established for law enforcement officers under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), which the SES appointees were receiving at the end of FY 2003.

(c) The amount of a performance award paid to an individual career appointee may not be less than 5 percent nor more than 20 percent of the appointee's SES rate of basic pay as of the end of the performance appraisal period.

* * * * *

(f) Performance awards must be paid in a lump sum except in those instances when it is not possible to pay the full amount because of the applicable aggregate limitation on pay during a calendar year under 5 CFR part 530, subpart B. In that case, any amount in excess of the applicable aggregate limitation must be paid at the beginning of the following calendar year in accordance with 5 CFR part 530, subpart B. The full performance award, however, is charged against the agency bonus pool under § 534.405(b) for the fiscal year in which the initial payment was made.

■ 18. Section 534.406 is revised to read as follows:

§ 534.406 Conversion to the SES pay system.

(a) 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 basic 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, except as provided in paragraph (b) of this section. 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 § 534.404(c).

(b) 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 after the first day of the first applicable pay period beginning on or after January 1, 2004. If 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 23, 2003, is higher than the rate in effect immediately prior to the first day of the first applicable pay period beginning on or after January 1, 2004, the agency must use the higher rate for the purpose of converting SES members to the SES pay system.

(c) An SES member who is assigned to a position outside the 48 contiguous States and the District of Columbia to a position overseas or in Alaska, Hawaii, Guam or 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 the senior executive's current rate of basic pay, plus the amount of locality pay authorized under 5 U.S.C. 5304 for the applicable locality pay area upon the employee's initial 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 § 534.404(c). If the senior executive's rate of basic pay did not exceed the rate for level III of the Executive Schedule while assigned to a position outside the 48 contiguous States or the District of Columbia, upon initial reassignment to a locality pay

area the senior executive's converted rate of basic pay may not exceed the rate for level III of the Executive Schedule. The newly converted rate is the senior executive's SES rate of basic pay.

(d) 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 have 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 (Pub. L. 101-509) to which he or she was entitled immediately before that date, converted to a new SES rate of basic pay. The newly converted rate is the senior executive's SES rate of basic pay, and any pay adjustments approved on or after January 11, 2004, must be computed based on the senior executive's converted rate of basic pay. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.404(c).

■ 19. Section 534.407 is added to read as follows:

§ 534.407 Pay computation and aggregate compensation.

(a) Except as provided in paragraph (b) of this section, pay for members of the SES must be computed in accordance with 5 U.S.C. 5504(b).

(b) To determine the hourly rate of pay for members of the SES, divide the annual SES rate of basic pay by 2,087 and round to the nearest cent, counting one-half cent and over as a whole cent. To derive the biweekly rate, multiply the hourly rate by 80.

(c) Senior executives are subject to the applicable aggregate limitation on pay in 5 CFR part 530, subpart B.

■ 20. In newly redesignated § 534.408, in the last sentence of paragraph (b) remove the word "subject" and add in its place the word "subpart."

PART 575—RECRUITMENT AND RELOCATION BONUSES; RETENTION ALLOWANCES; SUPERVISORY DIFFERENTIALS

■ 21. The authority citation for part 575 continues to read as follows:

Authority: 5 U.S.C. 1104(a)(2), 5753, 5754, 5755 and 5757; Pub. L. 107-273, 116 Stat. 1780; secs. 302 and 404 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101-509), 104 Stat. 1462 and 1466, respectively; E.O. 12748, 3 CFR, 1992 Comp. p. 316.

Subpart C—Retention Allowances

■ 22. In § 575.306, paragraph (b) is revised to read as follows:

§ 575.306 Payment of retention allowance.

* * * * *

(b) The head of an agency may not authorize a retention allowance for an employee if or to the extent that such an allowance, when added to the employee's estimated aggregate compensation, as defined in 5 CFR 530.202, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the applicable aggregate limitation on pay under 5 CFR part 530, subpart B, at the end of the calendar year.

* * * * *

■ 23. In § 575.307, paragraph (a) is revised to read as follows:

§ 575.307 Reduction or termination of retention allowance.

(a) The agency must reduce or terminate the authorized amount of a retention allowance to the extent necessary to ensure that the employee's estimated aggregate compensation, as defined in 5 CFR 530.202, does not exceed the applicable aggregate limitation on pay under 5 CFR part 530, subpart B, at the end of the calendar year.

* * * * *

[FR Doc. 04-26728 Filed 12-1-04; 5:03 pm]

BILLING CODE 6325-39-P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1464

RIN 0560-AH13

Tobacco Loan Program—Removal of Requirement That Producers of Burley and Flue Cured Tobacco Designate Sales Locations

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule amends the regulations governing the tobacco price support program to remove the requirement that flue-cured tobacco farmers designate the auction warehouses where they will sell their tobacco and that burley tobacco farmers designate all locations where they will sell their tobacco. Currently price support is available only at designated auction warehouses on eligible tobacco.

DATES: *Effective Date:* December 3, 2004.

FOR FURTHER INFORMATION CONTACT: Ann Wortham, (202) 720-2715 or ann_wortham@wdc.usda.gov. Tobacco Division (TD), Farm Service Agency,

United States Department of Agriculture (USDA), STOP 0514, Room 5750-S, 1400 Independence Avenue, SW., Washington, DC 20250-0514.

SUPPLEMENTARY INFORMATION:

Background

The Farm Service Agency (FSA) published in the **Federal Register**, on June 22, 2004, (69 FR 34615) a proposed rule to rescind the price support eligibility provision that requires flue-cured and burley tobacco farmers to designate the locations where they will sell their tobacco. The proposed rule requested public comments, and the comment period ended on July 22, 2004. To the extent practicable, some comments that were received after that date were also considered.

Summary of Comments

FSA received 368 comments on the proposed rule. Two respondents asked that no change be made in the current designation requirement. This request was considered, however, weighing the requests to maintain the existing program against the prevalence of comments requesting elimination of the program, as was proposed, weigh heavily in favor of changing the current requirements.

Eighteen respondents asked that the designation program be eliminated entirely. Although FSA proposed rescinding the designation program in June when the Agency requested input from the public, the majority of the comments on the proposed rule did not favor total elimination of the program. In deference to the majority of the comments on the proposed rule, FSA will not entirely eliminate the designation program. Thus, the final rule still contains a limited designation requirement.

Three hundred and forty three comments suggested adjustments to the timing of the designation requirements. Of these, 101 respondents asked only that the waiting period for re-designation be reduced to five days or less, 13 respondents asked that the designation program proceed as it is currently outlined, 209 respondents asked that both designation and subsequent re-designation requirements be made more simple. Two hundred and twenty two of these same commentators requested that designations be made immediately effective, and that designations be suspended and not necessary after the first week of tobacco sales. These comments and suggestions are addressed below.

Twenty-five comments expressed concerns about the burley tobacco designation program. These respondents