



# Federal Register

---

Thursday,  
July 29, 2004

---

**Part VII**

**Office of Personnel  
Management**

---

**Office of  
Management and  
Budget**

---

**5 CFR Parts 430 and 1330  
Executive Performance and  
Accountability; Interim Rule**

**OFFICE OF PERSONNEL  
MANAGEMENT****5 CFR Part 430****OFFICE OF MANAGEMENT AND  
BUDGET****5 CFR Part 1330**

RIN 3206-AJ86

**Executive Performance and  
Accountability**

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

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

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim regulations jointly with the Office of Management and Budget (OMB) to implement a statutory provision that strengthens the relationship between the performance and pay of senior employees of the Federal Government. These regulations establish rigorous conditions regarding an agency's performance appraisal systems for senior employees which, if met, would allow its appraisal systems to be certified. These regulations set forth the criteria and procedural requirements for such certification.

**DATES:** *Effective Date:* The regulations are effective on July 29, 2004.

*Comment Date:* Comments must be received by OPM on or before August 30, 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:** Barbara Colchao by telephone at (202) 606-2720; by FAX at (202) 606-2395; or by e-mail at *pay-performance-policy@opm.gov*.

**SUPPLEMENTARY INFORMATION:** The President holds the head of each agency accountable for the performance of that agency. Because an agency's success depends in large part on the effective leadership provided by its senior executives and senior professionals, the President also holds each agency head accountable for effectively managing the performance of those key members of the agency's top management team. The Office of Personnel Management (OPM) is issuing interim regulations jointly with the Office of Management and

Budget (OMB) to implement section 1322 of the Chief Human Capital Officers Act of 2002 (Title XIII of Public Law 107-296, the Homeland Security Act of 2002; November 25, 2002). This new statutory provision, as implemented by the regulations set forth below, will assist an agency head in assuring that the agency's senior employee performance management systems make meaningful distinctions based on relative performance for an agency's Senior Executive Service (SES), senior-level (SL), and scientific or professional (ST) employees, thereby strengthening the linkage between their performance and their pay.

Section 1322 of the Chief Human Capital Officers Act of 2002, added a new paragraph (d) to 5 U.S.C. 5307 establishing conditions that, if met, would permit an agency to apply a higher aggregate limitation on pay, equivalent to the rate payable to the Vice President, for certain SES members who are paid under 5 U.S.C. 5383 and employees in senior-level and scientific or professional positions paid under 5 U.S.C. 5376. However, in order to apply this higher aggregate pay limitation, the statute requires that an agency first demonstrate that it has developed and implemented performance appraisal systems for these employees that make meaningful distinctions based on relative performance, as certified by OPM, with OMB concurrence.

As a separate but related matter, OPM is issuing under separate cover regulations to implement section 1125 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136, November 24, 2003) which (1) amends 5 U.S.C. 5382 and 5383 by replacing a six-level pay system for SES members with a single, open-range "payband" with only the minimum and maximum rates of pay set by law and (2) requires certification under 5 U.S.C. 5307 to allow an increase in the maximum rate of basic pay, from level III to level II of the Executive Schedule, for SES members.

In these regulations, we provide the criteria an agency must meet and the procedures it must follow to obtain certification of its appraisal system(s). These regulations refer to SES members as "senior executives" and SL and ST employees as "senior professionals." When a distinction between executives and professionals is irrelevant or unnecessary, the regulations refer to them as "senior employees."

**Certification of Performance Appraisal Systems**

These regulations establish a new subpart D in part 430 of title 5, Code of

Federal Regulations, and a new subpart D in a newly established part 1330 of title 5, Code of Federal Regulations. This new subpart includes the criteria and procedural requirements for certifying an agency's performance appraisal system(s). Agencies may seek certification of their OPM-approved appraisal systems for their senior employees. Note that under subchapters I and II of 5 U.S.C. chapter 43, an agency must establish separate performance appraisal systems for its senior professionals and its senior executives. However, such systems are subject to the same certification criteria, and an agency may choose to establish systems for these groups of employees that are essentially identical.

In some agencies, the performance appraisal system(s) covers employees in many organizations and/or components, and their ability to meet the criteria required by these regulations may vary significantly. In such cases, an agency, at its discretion, may establish separate performance appraisal systems for these distinct organizations and/or components to ensure timely certification of their performance appraisal system(s) for those organizations or components that meet the criteria. New appraisal systems established for this purpose must be approved by OPM. However, when an agency establishes a new appraisal system specifically for the purpose of seeking certification under these regulations, the agency may submit that system for certification even if it has not yet been approved by OPM. OPM, with OMB concurrence, will certify only those systems that OPM approves under subpart B or C of 5 CFR part 430. In addition, when an agency with a certified appraisal system(s) fails to maintain such system approval or is subjected to OPM-mandated corrective action relating to its application of the provisions of 5 U.S.C. chapter 43 or 5 CFR part 430, its system certification under these regulations is suspended automatically without the need for further action by OPM or OMB.

An agency that has not received appraisal system certification may adjust the rate of basic pay for its SES members only up to the rate for level III of the Executive Schedule and must apply an aggregate limitation on pay of level I of the Executive Schedule to its senior employees. Section 5307(d) of title 5, United States Code, requires that agencies design and apply performance appraisal systems for their senior executives and senior professionals that "make meaningful distinctions based on relative performance" in order to receive appraisal system certification.

As provided below, an agency's appraisal system(s) for its senior executives and senior professionals, as applicable, will be certified only if the agency meets the certification criteria and procedures for certifying appraisal systems set forth in these regulations. (Note that agencies not subject to the provisions and requirements of 5 U.S.C. chapter 43 and 5 CFR part 430 must still meet these criteria and procedural requirements to obtain certification of their appraisal systems.)

**Certification Criteria.** The following nine certification criteria constitute broad principles designed to guide agencies in the strategic use of their senior employee performance appraisal system(s) to support the development of a strong performance culture and the attainment of the agency's mission, goals, and objectives. The criteria place requirements on the design and application of agency appraisal systems that must be met to be certified. Although we have specified one particular criterion that derives from 5 U.S.C. chapter 43 (*i.e.*, consultation), all other requirements of chapter 43 must also be met by agencies subject to its provisions. Agency systems will differ in how they are designed and implemented and in how they meet these criteria. In applying these guidelines, agencies must rate performance in accordance with performance expectations, as appropriate and as defined and provided for in these regulations. The regulations define performance expectations as the critical and other performance elements and performance requirements established for senior executives, the performance elements and standards established for senior professionals, and other appropriate means authorized under performance appraisal systems not covered by chapter 43 for communicating work requirements to senior employees.

- **Alignment**—Performance expectations are linked to or derived from the agency's mission, strategic goals, program/policy objectives, and/or annual performance plan.

- **Consultation**—Performance expectations are based on senior employee involvement and input that are communicated at the beginning of the appraisal period and appropriate times thereafter, consistent with 5 CFR part 430, subparts B and C.

- **Results**—Performance expectations for senior employees apply to their respective areas of responsibility; reflect expected agency or organizational performance; clearly describe performance that is measurable, demonstrable, or observable; and focus

on tangible outputs, outcomes, milestones, or other deliverables.

- **Balance**—Performance expectations for senior employees include appropriate measures or indicators of results; customer/stakeholder feedback; quality, quantity, timeliness, and cost effectiveness, as applicable; and competencies or behaviors that contribute to and are necessary to distinguish outstanding performance.

- **Assessments and guidelines**—The agency head, or an individual specifically designated for such purpose, provides assessments of performance of the agency overall, as well as each of its major program and functional areas, such as reports of the agency's Government Performance and Results Act (GPRA) goals and other program performance measures and indicators, and evaluation guidelines based, in part, upon those assessments to senior employees, appropriate senior employee rating and reviewing officials, and Performance Review Board members. These assessments and guidelines are to be provided at the conclusion of the appraisal period but before ratings are recommended, so that they may serve as a basis for individual performance evaluations, as appropriate. The guidance provided may not take the form of quantitative limitations on the number of ratings at any given rating level, and must conform to subpart B or C of 5 CFR part 430, as applicable.

- **Oversight**—Rigorous oversight of the appraisal process is provided by the agency head or designee, who certifies that (1) The senior employee appraisal process makes meaningful distinctions based on relative performance; (2) the results of that process take into account, as appropriate, the agency's assessment of its performance against program performance measures; and (3) pay adjustments, cash awards, and levels of pay accurately reflect and recognize both individual and organizational performance. The agency head or designee need not perform these duties personally, but does bear responsibility for seeing to it that they are done. Furthermore, the organizational performance assessment described in this criterion need not be a separate assessment done for the purposes of these interim final regulations, but may be any official or formal organizational assessment done for the purpose of determining how well the agency and its individual components have performed during the appraisal period.

- **Accountability**—Senior employee ratings (as well as subordinate employees' performance expectations and ratings for those with supervisory

responsibilities) appropriately reflect the employee's performance expectations, relevant program performance measures, and any other relevant factors.

- **Performance Differentiation**—(1) The appraisal system includes a rating level that reflects outstanding performance or, for equivalent systems that do not use summary ratings, provides for clear differentiation of outstanding performance, as defined in these regulations; and (2) the appraisal process results in meaningful distinctions in relative performance based on senior employees' actual performance against rigorous performance expectations. "Relative performance" in this context has the meaning given that term in §§ 430.402 and 1330.402. It does not require ranking senior employees against each other. Indeed, such ranking is prohibited for the purpose of determining performance ratings. For the agency's senior executives covered by 5 CFR part 430 subpart C, appraisal systems must include at least four, but not more than five, summary rating levels—an outstanding level, a fully successful level, an optional level between outstanding and fully successful, a minimally satisfactory level, and an unacceptable level. For the agency's senior professionals covered by 5 CFR part 430 subpart B, appraisal systems must include at least three, but not more than five, summary rating levels—an outstanding level, a fully successful level, an optional level between outstanding and fully successful, an unacceptable level, and an optional level between fully successful and unacceptable.

- **Pay Differentiation**—Individual pay rates and pay adjustments, as well as their overall distribution, reflect meaningful distinctions among executives based on their relative contribution to agency performance. An agency's highest performing senior employees should receive the largest pay adjustments and/or highest pay levels (including both basic pay and performance awards), particularly above the rate for level III of the Executive Schedule. Agencies must provide for transparency in the processes for making pay decisions. For example, agencies should consider communicating the overall results of performance management decisions to senior employees, if individual confidentiality can be assured.

**Certification Procedures.** To receive appraisal system certification, an agency must provide documentation, including its performance ratings history where summary ratings are used, to

demonstrate that its appraisal system(s) meets the criteria and procedural requirements of the regulations. Based on that documentation and any additional information that OPM and OMB deem necessary, OPM, with OMB concurrence, may grant the agency's system(s) full certification for 2 calendar years.

Alternatively, in the case of an agency that has designed, but not yet fully implemented an appraisal system(s) for its senior executives and/or senior professionals, as applicable, and which may not have a history of performance ratings that meets the certification criteria and procedural requirements, OPM, with OMB concurrence, may grant provisional certification for 1 calendar year. OPM may extend provisional certification into the following calendar year in order to permit an agency to take any actions needed to adjust pay based on annual summary ratings, ratings of record, or other performance appraisal results determined during the calendar year for which the system was certified.

Agencies with fully or provisionally certified systems may set a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule, consistent with 5 CFR part 534, subpart D, as and when such subpart is put into effect. In addition, such agencies' senior employees who are covered by a fully or provisionally certified appraisal system may receive aggregate compensation in a calendar year up to an amount equivalent to the total annual compensation payable to the Vice President (consistent with 5 CFR part 530, subpart B, as and when regulations relevant to the higher aggregate limitation on pay are put into effect).

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) and 1330.405(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, and part 1330, subpart D.

Agencies with provisionally certified appraisal systems must reapply for certification in order to continue setting the rate of basic pay for senior executives up to the rate for level II of

the Executive Schedule and applying the higher aggregate limitation on pay to its senior employees. OPM expects that most agencies granted provisional certification for 2 consecutive years will qualify for full certification. However, these agencies must request full certification by following the procedures contained in these regulations. OPM, with OMB concurrence, also may suspend (with appropriate advance notice) an agency's appraisal system certification if it determines that the agency is not in compliance with applicable certification requirements.

#### Regulatory Flexibility Act

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

#### Waiver of Notice of Proposed Rulemaking and Delayed Effective Date

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 rule making. 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 section 1322 of the Chief Human Capital Officers Act, which became effective on January 25, 2003, and permits the application of higher pay rates for members of the Senior Executive Service up to the rate for level II of the Executive Schedule as well as access to a higher aggregate limitation on pay up to the salary of the Vice President for certain employees. The waiver of the requirements for proposed rulemaking and a delay in the effective date are necessary to ensure timely implementation of the law as intended by Congress and to activate an important tool for the retention of high-performing senior executives that provides some relief for pay compression and provides for paying executives based on their individual performance and contribution to agency performance.

#### 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 Part 430 and 5 CFR Part 1330

Government employees.

Office of Management and Budget.

**Joshua B. Bolten,**

*Director.*

Office of Personnel Management.

**Kay Coles James,**

*Director.*

■ Accordingly, OPM and OMB are amending title 5 of the Code of Federal Regulations as follows:

#### 5 CFR Chapter I—Office of Personnel Management

#### PART 430—PERFORMANCE MANAGEMENT

■ 1. The authority citation for part 430 is revised to read as follows:

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

■ 2. In part 430, a new subpart D is added to read as follows. The text of the subpart is the same as the common rule text set out at the end of this document.

#### Subpart D—Performance Appraisal Certification for Pay Purposes

Sec.

430.401 Purpose.

430.402 Definitions.

430.403 System certification.

430.404 Certification criteria.

430.405 Procedures for certifying agency appraisal systems.

■ 3. The text of the new subpart is the same as the common rule text set out at the end of this document, with the following amendments:

■ a. In § 430.403, the references to “§ \_\_\_\_.402,” “§ \_\_\_\_.404,” and “§ \_\_\_\_.405” are revised to read “§ 430.402,” “§ 430.404,” and “§ 430.405,” respectively.

■ b. In § 430.404, the reference to “§ \_\_\_\_.402” is revised to read “§ 430.402.”

■ c. In § 430.405, the references to “§ \_\_\_\_.402,” “§ \_\_\_\_.403,” and “§ \_\_\_\_.404” are revised to read “§ 430.402,” “§ 430.403,” and “§ 430.404,” respectively.

■ d. Add the following note to subpart D:

**Note to Subpart D:** Regulations identical to this subpart appear at 5 CFR part 1330, subpart D.

#### 5 CFR Chapter III—Office of Management and Budget

■ 1. 5 CFR chapter III is amended by establishing a new subchapter C consisting of part 1330, subpart D, to read as follows:

**Subchapter C—Joint Regulations with the Office of Personnel Management****PART 1330—HUMAN RESOURCES MANAGEMENT****Subparts A—C [Reserved]****Subpart D—Performance Appraisal Certification for Pay Purposes**

Sec.

- 1330.401 Purpose.  
 1330.402 Definitions.  
 1330.403 System certification.  
 1330.404 Certification criteria.  
 1330.405 Procedures for certifying agency appraisal systems.

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

■ 2. The text of the new subpart is the same as the common rule text set out at the end of this document, with the following amendments:

■ a. In § 1330.403, the references to “§ \_\_\_\_.402,” “§ \_\_\_\_.404,” and “§ \_\_\_\_.405” are revised to read “§ 1330.402,” “§ 1330.404,” and “§ 1330.405,” respectively.

■ b. In § 1330.404, the reference to “§ \_\_\_\_.402” is revised to read “§ 1330.402.”

■ c. In § 1330.405, the references to “§ \_\_\_\_.402,” “§ \_\_\_\_.403,” and “§ \_\_\_\_.404” are revised to read “§ 1330.402,” “§ 1330.403,” and “§ 1330.404,” respectively.

■ d. Add the following note to subpart D:

**Note to Subpart D:** Regulations identical to this subpart appear at 5 CFR part 430, subpart D.

**Text of the Common Rule**

The text of the common rule for 5 CFR part 430, subpart D, and 5 CFR part 1330, subpart D, adopted as set forth above, reads as follows:

**Subpart D—Performance Appraisal Certification for Pay Purposes**

Sec.

- \_\_\_\_.401 Purpose.  
 \_\_\_\_\_.402 Definitions.  
 \_\_\_\_\_.403 System certification.  
 \_\_\_\_\_.404 Certification criteria.  
 \_\_\_\_\_.405 Procedures for certifying agency appraisal systems.

**§ \_\_\_\_.401 Purpose.**

(a) This subpart implements 5 U.S.C. 5307(d), as added by section 1322 of the Chief Human Capital Officers Act of 2002 (Title XIII of Public Law 107–296, the Homeland Security Act of 2002; November 25, 2002), which provides a higher aggregate limitation on pay for certain members of the Senior Executive Service (SES) under 5 U.S.C. 5382 and 5383 and employees in senior-level (SL) and scientific or professional (ST) positions paid under 5 U.S.C. 5376. In

addition, this subpart is necessary to administer rates of basic pay for members of the SES under 5 U.S.C. 5382, as amended by section 1125 of the National Defense Authorization Act for Fiscal Year 2004. The regulations in this subpart strengthen the application of pay-for-performance principles to senior executives and senior professionals. Specifically, the statutory provisions authorize an agency to apply a higher maximum rate of basic pay for senior executives (consistent with 5 CFR part 534, subpart D, when effective) and apply a higher aggregate limitation on pay (consistent with 5 CFR part 530, subpart B) to its senior employees, but only after OPM, with OMB concurrence, has certified that the design and application of the agency’s appraisal systems for these employees make meaningful distinctions based on relative performance. This subpart establishes the certification criteria and procedures that OPM will apply in considering agency requests for such certification.

(b) Senior executives generally may receive an annual rate of basic pay up to the rate for level III of the Executive Schedule under 5 U.S.C. 5382 and 5 CFR part 534, subpart D, when effective. Senior employees generally may receive total compensation in a calendar year up to the rate for level I of the Executive Schedule under 5 U.S.C. 5307(a) and 5 CFR 530.203(a). Only employees covered by an appraisal system that OPM, with OMB concurrence, certifies under this subpart are eligible for a maximum annual rate of basic pay for senior executives up to the rate for level II of the Executive Schedule (consistent with 5 U.S.C. 5382 and 5 CFR part 534, subpart D, when effective) and a higher aggregate pay limitation equivalent to the total annual compensation payable to the Vice President (consistent with 5 U.S.C. 5307(d) and 5 CFR 530.203(b)).

**§ \_\_\_\_.402s Definitions.**

In this subpart—

*Appraisal system* means the policies, practices, and procedures an agency establishes under 5 U.S.C. chapter 43 and 5 CFR part 430, subparts B and C, or other applicable legal authority, for planning, monitoring, developing, evaluating, and rewarding employee performance. This includes appraisal systems and appraisal programs as defined at § 430.203 and performance management systems as defined at § 430.303.

*GPRA* means the Government Performance and Results Act of 1993.

*OMB* means the Office of Management and Budget.

*OPM* means the Office of Personnel Management.

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

*Performance evaluation* means the comparison of the actual performance of senior employees against their performance expectations and may take into account their contribution to agency performance, where appropriate.

*Performance expectations* means critical and other performance elements and performance requirements that constitute the senior executive performance plans (as defined in § 430.303) established for senior executives, the performance elements and standards that constitute the performance plans (as defined in § 430.203) established for senior professionals, or other appropriate means authorized under performance appraisal systems not covered by 5 U.S.C. chapter 43 for communicating what a senior employee is expected to do and the manner in which he/she is expected to do it, and may include contribution to agency performance, where appropriate.

*Program performance measures* means results-oriented measures of performance, whether at the agency, component, or function level, which include, for example, measures under the Government Performance and Results Act.

*PRB* means Performance Review Board, as described at § 430.310.

*Relative performance* means the performance of a senior employee with respect to the performance of other senior employees, including their contribution to agency performance, where appropriate, as determined by the application of a certified appraisal system.

*Senior employee* means a senior executive or a senior professional.

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

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

**§ \_\_\_\_.403 System certification.**

(a) The performance appraisal system(s) covering senior employees must be certified by OPM, with OMB concurrence, as making meaningful distinctions based on relative performance before an agency may apply a maximum annual rate of basic

pay for senior executives equal to the rate for level II of the Executive Schedule or apply an annual aggregate limitation on payments to senior employees equal to the salary of the Vice President under 5 U.S.C. 5307(d)). OPM, with OMB concurrence, will certify an agency's appraisal system(s) only when a review of that system's design, application, and administration reveals that the agency meets the certification criteria established in § \_\_\_\_ .404 and has followed the procedures for certifying agency appraisal systems in § \_\_\_\_ .405.

(b) Except as provided in paragraph (c) of this section, agencies subject to 5 U.S.C. chapter 43 and 5 CFR part 430 seeking certification of their appraisal systems must submit systems that have been approved by OPM under § 430.312 or § 430.210, as applicable. In some agencies, the performance appraisal system(s) covers employees in many organizations and/or components, and their ability to meet the certification criteria in § \_\_\_\_ .404 may vary significantly. In such cases, an agency may establish and/or submit separate performance appraisal systems for each of these distinct organizations and/or components to ensure timely certification of those performance appraisal system(s) that meet the criteria. New appraisal systems established under 5 CFR part 430, subpart B or C, as applicable based on the employees covered, must be approved by OPM.

(c) When an agency establishes a new appraisal system for the purpose of seeking certification under this subpart, the agency may submit that system for certification even if it has not yet been approved by OPM under § 430.312 or § 430.210, as applicable. OPM will certify, with OMB concurrence, only those systems that OPM determines meet the approval requirements of 5 CFR part 430, subpart B or C, as applicable.

(d) An agency must establish an appraisal system(s), as defined in § \_\_\_\_ .402, for its senior professionals that meets the requirements of 5 CFR part 430, subpart B, and is separate from the system(s) established to cover its SES members under 5 CFR part 430, subpart C. For the purpose of certification under this subpart, such senior professional appraisal system(s) must meet the certification criteria set forth in § \_\_\_\_ .404. At its discretion, an agency may include system features in its senior professional appraisal system(s) that are the same as, or similar to, the features of its SES appraisal system(s), as appropriate, including procedures that correspond to the

higher level review procedures under § 430.308(b) and PRB reviews of summary ratings under § 430.308(c).

(e) For agencies subject to 5 U.S.C. chapter 43 and 5 CFR part 430, OPM approval of the agency performance appraisal system(s) is a prerequisite to certification. Agencies not subject to the appraisal provisions of 5 U.S.C. chapter 43 and 5 CFR part 430 and which are seeking certification of their appraisal system(s) under this subpart must submit appropriate documentation to demonstrate that each system complies with the appropriate legal authority that governs the establishment, application, and administration of that system.

#### § \_\_\_\_ .404 Certification criteria.

(a) To be certified, an agency's applicable appraisal system(s) for senior executives or senior professionals must make meaningful distinctions based on relative performance and meet the other requirements of 5 U.S.C. chapter 43, as applicable, in addition to the particular criterion cited here (*i.e.*, consultation). Such system(s) must provide for the following:

(1) Alignment, so that the performance expectations for individual senior employees derive from, and clearly link to, the agency's mission, GPRA strategic goals, program and policy objectives, and/or annual performance plans and budget priorities;

(2) Consultation, so that the performance expectations for senior employees meet the requirements of 5 CFR part 430, subparts B and C, as applicable, and/or other applicable legal authority; are developed with the input and involvement of the individual senior employees who are covered thereby; and are communicated to them at the beginning of the applicable appraisal period, and/or at appropriate times thereafter;

(3) Results, so that the performance expectations for individual senior employees apply to their respective areas of responsibility; reflect expected agency and/or organizational outcomes and outputs, performance targets or metrics, policy/program objectives, and/or milestones; identify specific programmatic crosscutting, external, and partnership-oriented goals or objectives, as applicable; and are stated in terms of observable, measurable, and/or demonstrable performance;

(4) Balance, so that in addition to expected results, the performance expectations for individual senior employees include appropriate measures or indicators of employee and/or customer/stakeholder feedback; quality, quantity, timeliness, and cost

effectiveness, as applicable; and those technical, leadership and/or managerial competencies or behaviors that contribute to and are necessary to distinguish outstanding performance;

(5) Appropriate assessments of the agency's performance—overall and with respect to each of its particular missions, components, programs, policy areas, and support functions—such as reports of the agency's GPRA goals, annual performance plans and targets, program performance measures, and other appropriate indicators, as well as evaluation guidelines based, in part, upon those assessments, that are communicated by the agency head, or an individual specifically designated by the agency head for such purpose, to senior employees, appropriate senior employee rating and reviewing officials, and PRB members. These assessments and guidelines are to be provided at the conclusion of the appraisal period but before individual senior employee performance ratings are recommended, so that they may serve as a basis for individual performance evaluations, as appropriate. The guidance provided may not take the form of quantitative limitations on the number of ratings at any given rating level, and must conform to 5 CFR part 430, subpart B or C, as applicable;

(6) Oversight by the agency head or the individual specifically designated under paragraph (a)(5) of this section, who certifies, for a particular senior employee appraisal system, that—

(i) The senior employee appraisal process makes meaningful distinctions based on relative performance;

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

(iii) Pay adjustments, cash awards, and levels of pay based on the results of the appraisal process accurately reflect and recognize individual performance and/or contribution to the agency's performance;

(7) Accountability, so that final agency head decisions and any PRB recommendations regarding senior employee ratings consistent with 5 CFR part 430, subparts B and C, individually and overall, appropriately reflect the employee's performance expectations, relevant program performance measures, and such other relevant factors as the PRB may find appropriate; in the case of supervisory senior employees, ratings must reflect the degree to which performance standards, requirements, or expectations for individual subordinate employees

clearly link to organizational mission, GPRA strategic goals, or other program or policy objectives and take into account the degree of rigor in the appraisal of their subordinate employees;

(8) Performance differentiation, so that the system(s) includes at least one summary level of performance above fully successful, including a summary level that reflects outstanding performance, as defined in § \_\_\_\_.402, and so that its annual administration results in meaningful distinctions based on relative performance that take into account the assessment of the agency's performance against relevant program performance measures, as described in paragraph (a)(6) of this section, employee performance expectations, and such other relevant factors as may be appropriate. Relative performance does not require ranking senior employees against each other; such ranking is prohibited for the purpose of determining performance ratings. For equivalent systems that do not use summary ratings, the appraisal system must provide for clear differentiation of performance at the outstanding level; and

(9) Pay differentiation, so that those senior employees who have demonstrated the highest levels of individual performance and/or contribution to the agency's performance receive the highest annual summary ratings or ratings of record, as applicable, as well as the largest corresponding pay adjustments, cash awards, and levels of pay, particularly above the rate for level III of the Executive Schedule. Agencies must provide for transparency in the processes for making pay decisions, while assuring confidentiality.

(b) Consistent with the requirements in section 3(a) of the Inspector General Act of 1978, an agency's Inspector General or an official he or she designates must perform the functions listed in paragraphs (a)(5) and (6) of this section for senior employees in the Office of the Inspector General.

#### § \_\_\_\_.405 Procedures for certifying agency appraisal systems.

(a) *General.* To receive system certification, an agency must provide documentation demonstrating that its appraisal system(s), in design, application, and administration, meets the certification criteria in § \_\_\_\_.404 as well as the procedural requirements set forth in this section.

(b) *Certification requests.* In order for an agency's appraisal system to be certified, the head of the agency or designee must submit a written request

for full or provisional certification of its appraisal system(s) to OPM.

Certification requests may cover an agencywide system or a system that applies to one or more agency organizations or components and must include—

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

(i) Organizational and employee coverage information;

(ii) Applicable administrative instructions and implementing guidance; and

(iii) The system's use of rating levels that are capable of clearly differentiating among senior employees based on appraisals of their relative performance against performance expectations in any given appraisal period reflecting performance evaluation results that make meaningful distinctions based on relative performance, and which include—

(A) For the agency's senior executives covered by 5 CFR part 430, subpart C, at least four, but not more than five, summary rating levels—an outstanding level, a fully successful level, an optional level between outstanding and fully successful, a minimally satisfactory level, and an unsatisfactory level;

(B) For the agency's senior professionals covered by 5 CFR part 430, subpart B, at least three, but not more than five, summary levels—an outstanding level, a fully successful level, an optional level between outstanding and fully successful, an unacceptable level, and an optional level between fully successful and unacceptable; and

(C) For agencies not subject to 5 CFR part 430, subparts B and C, a summary rating level that reflects outstanding performance or a methodology that clearly differentiates outstanding performance, as defined in § \_\_\_\_.402;

(2) A clearly defined process for reviewing—

(i) The initial summary ratings and ratings of record, as applicable, of senior employees to ensure that annual summary ratings or ratings of record are not distributed arbitrarily or on a rotational basis, and

(ii) In the case of senior employees with supervisory responsibilities—

(A) The performance standards, requirements, or expectations for the employees they supervise to ensure that they clearly link to organizational mission, GPRA strategic goals, or other program and policy objectives, as appropriate, and

(B) The performance standards, requirements, or expectations and the performance ratings of the employees

they supervise to ensure that they reflect distinctions in individual and organizational performance, as appropriate;

(3) Documentation showing that the appraisal system(s) meets the applicable certification criteria, as follows:

(i) For provisional certification, the requirements in § \_\_\_\_.404(a)(1)–(4); and

(ii) For full certification, all of the requirements in § \_\_\_\_.404.

(4) For full certification, data on senior executive annual summary ratings and senior professional ratings of record, as applicable (or other documentation for agencies that do not use summary ratings), for the two appraisal periods preceding the request, as well as corresponding pay adjustments, cash awards, and levels of pay provided to those senior employees; and

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

(c) *Certification actions.* At the request of an agency, the Director of OPM, at his or her discretion and in accordance with the requirements of this subpart and with OMB concurrence, may grant full or provisional certification of the agency's appraisal system(s). OPM, with OMB concurrence, may—

(1) Grant full certification of an agency's senior employee appraisal system(s) for 2 calendar years when an agency has demonstrated that it has designed and fully implemented and applied an appraisal system(s) for its senior executives or senior professionals, as applicable, that meets the certification criteria in § \_\_\_\_.404 and the documentation requirements of this section.

(2) Grant provisional certification of an agency's senior employee appraisal system(s) for 1 calendar year when an agency has designed, but not yet fully implemented or applied, an appraisal system(s) for its senior executives or senior professionals, as applicable, that meets the certification criteria in § \_\_\_\_.404. OPM may extend provisional certification into the following calendar year in order to permit an agency to take any actions needed to adjust pay based on annual summary ratings, ratings of record, or other performance appraisal results determined during the calendar year for which the system was certified; or

(3) Suspend certification under paragraph (h) of this section if, at any time during the certification period, OPM, with OMB concurrence, determines that the agency appraisal system is not in compliance with certification criteria.

(d) *Pay limitations.* Absent full or provisional certification of its appraisal system(s), an agency must—

(1) Set a senior executive's rate of basic pay at a rate that does not exceed the rate for level III of the Executive Schedule, consistent with 5 CFR part 534, subpart D, when effective; and

(2) Limit aggregate compensation paid to senior employees in a calendar year to the rate for level I of the Executive Schedule, consistent with 5 CFR 530.203(b).

(e) *Full Certification.* (1) OPM, with OMB concurrence, may grant full certification when a review of the agency's request and accompanying documentation demonstrates that the design, application, and administration of the agency's appraisal system(s) meet the criteria in § \_\_\_\_ .404 and the documentation requirements of this section.

(2) An agency with a fully-certified appraisal system(s) may set the rate of basic pay under 5 CFR part 534, subpart D, when effective, for a senior executive covered by a certified system at a rate that does not exceed the rate for level II of the Executive Schedule and pay senior employees covered by certified system(s) aggregate compensation in a certified calendar year in an amount up to the Vice President's salary under 3 U.S.C. 104.

(3) Full certification of an agency's appraisal system will be renewed automatically for an additional 2 calendar years, if—

(i) The agency meets the annual reporting requirements in paragraph (g) of this section; and

(ii) Based on those annual reports, OPM determines, and OMB concurs, that the appraisal system(s) continues to meet the certification criteria and procedural requirements set forth in this subpart.

(f) *Provisional certification.* (1) OPM, with OMB concurrence, may grant provisional certification when the design of an agency's appraisal system(s) for senior executives or senior professionals, as applicable, meets the requirements set forth in this subpart, but insufficient documentation exists to

determine whether the actual application and administration of the appraisal system(s) meet the requirements for full certification. OPM, with OMB concurrence, may grant provisional certification to an agency more than once.

(2) During the 1-year period of provisional certification, an agency may set the rate of basic pay for a senior executive covered by the provisionally certified system at a rate that does not exceed the rate for level II of the Executive Schedule (consistent with 5 CFR part 534, subpart D, when effective) and pay senior employees covered by provisionally certified systems aggregate compensation in the certified calendar year in an amount up to the Vice President's salary under 3 U.S.C. 104 (consistent with 5 CFR part 530, subpart B).

(3) An agency must resubmit an application requesting provisional certification for every calendar year for which it intends to maintain provisional certification. An agency with a provisionally certified appraisal system(s) may request that OPM, with OMB concurrence, grant full certification upon a showing that its performance appraisal systems for senior executives and senior professionals, as applicable, meet the certification criteria in § \_\_\_\_ .404 and the documentation requirements in this section, particularly with respect to the implementation and administration of the system(s) over at least two consecutive performance appraisal periods.

(g) *Annual reporting requirement.* Agencies with certified appraisal systems must provide OPM with a general summary of the annual summary ratings and ratings of record, as applicable, and rates of basic pay, pay adjustments, cash awards, and aggregate total compensation (including any lump-sum payments in excess of the applicable aggregate limitation on pay that were paid in the current calendar year as required by § 530.204) for their senior employees covered by a certified appraisal system at the conclusion of

each appraisal period that ends during a calendar year for which the certification is in effect, in accordance with OPM instructions.

(h) *Suspension of Certification.* (1) When OPM determines that an agency's certified appraisal system is no longer in compliance with certification criteria, OPM, with OMB concurrence, may suspend such certification, as provided in paragraph (c)(3) of this section.

(2) An agency's system certification is automatically suspended when OPM withdraws performance appraisal system approval or mandates corrective action because of misapplication of the system as authorized under §§ 430.210(c), 430.312(c), and \_\_\_\_ .403(e).

(3) OPM will notify the head of the agency at least 30 calendar days in advance of the suspension and the reason(s) for the suspension, as well as any expected corrective action. Upon such notice, and until its system certification is reinstated, the agency must set a senior executive's rate of basic pay under 5 CFR part 534, subpart D, when effective, at a rate that does not exceed the rate for level III of the Executive Schedule. While certification is suspended, an agency must limit aggregate compensation received in a calendar year by a senior employee to the rate for level I of the Executive Schedule. Pay adjustments, cash awards, and levels of pay in effect prior to that notice will remain in effect unless OPM finds that any such decision and subsequent action was in violation of law, rule, or regulation.

(4) OPM, with OMB concurrence, may reinstate an agency's suspended certification only after the agency has taken appropriate corrective action.

(5) OPM may reinstate the certification of an appraisal system that has been automatically suspended under paragraph (h)(2) of this section upon the agency's compliance with the applicable OPM-mandated corrective action(s).

[FR Doc. 04-17319 Filed 7-26-04; 4:54 pm]

BILLING CODE 6325-39-P