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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 351, 430, and 531

RIN 3206-AH32

#### Reduction in Force and Performance Management

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations that enhance the opportunity for Federal employees to receive reduction in force retention service credit based on their actual job performance. The regulations also give agencies with employees who have been rated under different patterns of summary rating levels a mechanism to take this into account when providing employees additional retention service credit for reduction in force. These regulations also clarify certain other retention rights, including the coverage of employees serving under term appointments.

**DATES:** Effective date: December 24, 1997. Compliance dates: Subject to the requirements of 5 U.S.C. 7116(a)(7), agencies may implement revised §§ 351.504 and 351.803(a), at any time between December 24, 1997 and October 1, 1998. For reduction in force actions effective between December 24, 1997 and September 30, 1998, agencies may use either §§ 351.504 and 351.803(a) effective December 24, 1997 or the prior §§ 351.504 and 351.803(a) in 5 CFR part 351 (January 1, 1997, edition).

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**SUPPLEMENTARY INFORMATION:** On February 4, 1997, OPM issued proposed regulations concerning reduction in force and performance management. These proposed changes were designed to enhance the opportunity for Federal employees to receive reduction in force retention credit based on their actual job performance. They proposed changes to the crediting procedures used when employees are missing performance ratings, as well as giving agencies the authority to vary performance credit in reduction in force to take into account ratings given under different summary level patterns.

We received comments from 21 agencies, 4 unions, and 3 individuals. Not every commenter mentioned every proposed provision. The key changes OPM proposed in the regulations are summarized below, along with a summary of the comments received on that particular proposal.

#### Providing Retention Service Credit When Employees in the Same Reduction in Force Competitive Area Have Been Rated Under More Than One Pattern of Summary Rating Levels

On August 23, 1995, OPM issued final regulations, at 60 FR 43936, giving agencies the option to determine which of eight permissible patterns of summary rating levels to use for their performance appraisal programs. As a result, changes in the crediting of performance in reduction in force were necessary because this flexibility in the design of performance appraisal programs can affect employees' relative retention standing for reduction in force. The proposed regulations revised 5 CFR 351.504 to require an agency to take into account different patterns of summary rating levels when providing employees additional retention service credit in reduction in force competition based on their performance.

Under the proposed regulations, an agency with employees in a reduction in force competitive area who have been rated under different patterns of summary rating levels must decide how many years of retention service credit within the allowable range of 12 to 20 years to assign to particular summary rating levels in their patterns. The specific method selected by the agency to provide retention service credit for performance will of necessity be specific to the reduction in force

competitive area as the agency takes into account the combination of rating patterns used and the relative numbers of employees rated under each pattern.

If an agency has reduction in force competitive areas in which all employee ratings of record to be credited were given under the same pattern of summary levels, it is required to follow the current regulations for crediting performance in a reduction in force which now appear in paragraph (d) of section 351.504.

In applying the proposed regulations, agencies must treat employees within the reduction in force competitive area in a uniform and consistent manner. An agency carrying out a reduction in force may provide different amounts of additional retention service credit for ratings of record received in an employee's former agency than were provided by that former organization.

The majority of comments received on this proposal were very positive. Most of those who commented felt it was a necessary and logical outgrowth of performance rating flexibility that would be helpful to both agencies and employees. This proposal was especially well-received by those considering, or already using, alternative performance appraisal programs such as a 2-level ("Pass/Fail") program. Some agencies requested even greater flexibility to address what they see as potential inequities when employees in different competitive areas are rated under different appraisal programs, even if there is no inconsistency within each competitive area. This was deemed especially crucial to agencies having various offices or components using different summary rating patterns.

One commenter voiced the concern that employees rated as "Fully Successful" under a two-level program could actually be performing at very different levels. Another suggested that the proposal be modified in order to prevent an agency from giving less credit to an employee's ratings of record from their previous agency than to the agency's "own" ratings. Several other commenters suggested that specific mandates be established on how this flexibility is to be used.

OPM has carefully considered these suggestions and decided not to adopt them. We believe that many of these concerns are rooted in decisions about

using various types of performance appraisal programs in the first place, and most would be addressed by the requirement to provide uniformity and consistency within each competitive area. For example, an agency assigning 16 years of credit to a "fully successful" rating of record earned under a two-level program must give ALL employees who earned a "fully successful" rating of record in a two-level program this credit, no matter what agency or organization actually issued the rating. Granting additional flexibility, by definition, allows for decision-making that some may disagree with. Alternatively, an agency is free to choose a crediting system that mirrors the current 12/16/20 year pattern required for use in single-rating-pattern situations (they are required to examine the situation when multiple rating patterns exist, but there is no requirement to adopt any particular crediting method). In addition, agencies concerned about consistency are free to establish their own agencywide policies on how this flexibility will be used.

One commenter suggested that no additional credit beyond 12 years be provided for performance above the level of "Fully Successful". We have not adopted this suggestion since it goes beyond the scope of the proposal and because the new regulations would give agencies the flexibility to assign credit in this way if they choose, as long as ratings of record are assigned under more than one summary pattern in the competitive area.

#### *Extending the "look-back" period to 6 years*

This element of the proposal addressed the circumstance where employees have received fewer than three actual ratings of record in the last 4 years, which could occur due to a variety of circumstances. Current regulations require the substitution of an assumed rating of "Fully Successful" for each missing rating of record. To minimize the use of assumed ratings and to maximize the extent to which additional retention service credit is based on actual job performance, OPM proposed to lengthen the period of time from which ratings of record are taken into account from 4 years to 6 years prior to the reduction in force. This change would have been phased in to allow agencies time to change their recordkeeping procedures.

Several of those who commented supported this proposal, believing that the potential for increasing the use of actual performance appraisals earned by employees outweighed the additional record-keeping requirements it would

impose on agencies. Some even suggested that we modify the proposal to allow agencies to go back longer than 6 years when necessary. However, the majority of commenters disagreed with the proposed lengthening of the "look-back" period from 4 years to 6 years, even with the phase-in provisions. The objections centered on the view that a 6-year-old appraisal is too dated to serve as an accurate indicator of current employee performance, and that allowing older appraisals to be used in reduction in force might discourage supervisors from preparing current appraisals when required. Some were also concerned that these additional administrative requirements were unduly burdensome, especially in light of the current emphasis on simplification, paperwork reduction, and streamlining. We have considered these comments, as well as the possibility of providing agencies with flexibility to determine what the length of their "look-back" period should be for specific reductions in force. We concluded that the significant additional administrative requirements resulting from a 6-year "look-back" do not justify the results, especially since the other changes provided for in this regulatory package would significantly reduce the number of assumed ratings. For these reasons, we concluded that the current "look-back" period of 4 years should be retained.

#### *Averaging actual ratings received if fewer than three*

To further enhance the use of actual performance in determining reduction in force service credit, OPM proposed to remove the requirement to fill in missing ratings of record with assumed "fully successful" ratings when an employee has received only one or two actual ratings of record. Under the proposal, the actual rating(s) of record available would serve as the sole basis of the employee's credit, and no assumed ratings would be used. Consequently, if an employee has received only two actual ratings of record during this period, the value assigned to each rating would be added together and divided by two to determine the amount of additional retention service credit.

Among those who commented on this proposal, there was an almost equal number of those who supported it and those who did not. Most of those opposing the proposed change cited the greater weight that would necessarily be placed on the one or two actual ratings of record received. One commenter was concerned that supervisors would be less likely to complete ratings of record

as a result of this proposal. A number of commenters, however, supported this proposal because it simplifies the process and allows an employee's actual demonstrated performance to take the place of an artificially prescribed level of credit (assumed "Fully Successful"). In considering the comments received on this issue, we were persuaded that this change would serve to simplify the procedure and would increase the emphasis on actual performance, a stated goal of the proposed regulations. Therefore, we are adopting this proposal in the final regulations.

#### *Crediting performance for employees with no actual ratings*

OPM had proposed two methods of providing performance credit for reduction in force in cases where an employee would have no actual ratings of record at all. Under the proposed regulations, an employee with at least one year of current continuous service would be given the additional retention service credit for the most common, or "modal", summary rating level, as defined in 5 CFR 351.203, for the summary level pattern that applies to the employee's position at the time of the reduction in force. The proposal would allow agencies to determine the modal rating using ratings of record in the competitive area, in a larger subdivision of the agency, or agencywide, as long as the applicable modal rating(s) was applied uniformly and consistently within the competitive area to all employees with no ratings of record.

Under the proposal, the modal rating would not be used for employees who have completed less than one year of current continuous service. Instead, additional retention service credit would be given based on a Level 3 (Fully Successful or equivalent) rating of record under the summary level pattern that applies to the employee's position at the time of reduction in force.

Those who commented negatively on this proposal disliked the idea of using a modal rating because it did not represent performance actually demonstrated by the employee. Some felt the use of a modal rating was arbitrary and unfair, and potentially vulnerable to appeal or other challenge, while others saw it as more fair to employees than an assumed "fully successful" rating that now falls below the Governmentwide average rating. Several agencies were also concerned with how this requirement would be incorporated into existing automated systems.

One commenter suggested that the regulations be revised to require that all employees with at least one year of service must have a rating of record before a reduction in force can be conducted. We have not adopted this suggestion because we feel it is impossible to require a rating of record in all circumstances, given the various rating cycle dates and other circumstances that can occur.

One of those who commented suggested that employees who have received no ratings of record should receive no performance credit for reduction in force. We have not adopted this suggestion because we believe it unfairly and severely penalizes an employee who has no ratings of record due to factors completely outside his/her control. We believe that some reasonable and fair method of constructing performance credit is necessary to deal with these circumstances.

It is important to note that the modal rating would only be used in cases where the employee has no ratings of record of his/her own to credit. Since no rating of record exists, some form of "assumed" rating is the only recourse available. Because the modal rating is the summary level that was given most often to employees in the organization conducting the reduction in force, we believe it is the best way to assign credit with the least disadvantage to an individual employee who has no rating of record reflecting his/her actual performance.

Much of the opposition to the modal rating proposal focused on the complexity for personnelists in administering two different types of formulae based on length of service (less than one year means use assumed "Fully Successful"; more than one year requires tabulation of modal rating). Some saw this as contradictory to ongoing simplification initiatives. In addition, several commenters pointed out that this distinction could result in an employee with 364 days of service being treated differently (in terms of performance credit for reduction in force) than another employee with 366 days of service. We agree that the distinction based on length of service adds greater complexity to the process, and we have therefore eliminated this distinction in the final regulations. Instead, the modal rating will be used to grant performance credit in reduction in force for all employees who have no ratings of record. We feel this better supports the principles of uniformity and consistency in the reduction in force treatment of employees.

Several commenters requested that OPM designate the basis used by agencies to determine their modal ratings (i.e., agencywide; agency subdivision; or competitive area). They also asked that agencies not be allowed to change this basis once it is selected without OPM and/or union approval. However, agencies have different data systems and not all will have a great deal of flexibility in terms of tabulating modal ratings. Some may only have agencywide performance appraisal data to work with. We felt that it was necessary to preserve this flexibility for determining the basis used for tabulating modal ratings to ensure that all agencies are able to implement this requirement. However, we would encourage agencies to consider making this determination in partnership with employees and their representatives.

#### *Use of Non-430 Ratings in Reduction in Force*

OPM proposed language in the revised section 351.504 that would require agencies to use all ratings of record given to employees for assigning additional retention service credit during a reduction in force, including a performance evaluation given to an employee under an appraisal system not covered by the provisions of 5 CFR part 430, subpart B, if it meets the conditions specified in the new paragraph (c) of section 430.201.

Those who commented in support of this proposal felt it was appropriate to give credit for such ratings in a reduction in force if they were equivalent to those given under part 430.

One commenter disagreed with the proposal, believing it would be too difficult for agencies to establish the equivalent summary pattern and rating level for these non-430 ratings. We have considered this objection; however, we feel that agencies should be able to make these determinations with help from the agency that gave the rating and/or members of OPM's performance management staff.

#### *Implementation Date Issues*

##### (1) Performance in Retention Service Credit Determinations

The new agency authority to determine retention service credit when employees in a competitive area are rated under multiple rating patterns described in § 351.504(e) would apply only to ratings of record that are put on record, as defined in paragraph (b)(3) of § 351.504, on or after October 1, 1997. The agency credits any ratings of record put on record on or before September

30, 1997, based on the Governmentwide 12-, 16-, and 20-year formula for additional retention service credit currently in effect.

Agencies were divided on their preference for which ratings of record could be assigned credit using the new flexibility. While some wanted to be able to establish credit for ratings of record given since 1995 (when performance management was deregulated), others wished to establish credit only for ratings of record given under cycles begun after October 1, 1997. OPM originally proposed that the flexibility would apply to ratings of record put on record on or after October 1, 1997, and has decided to retain this provision in the final regulation.

A related issue was the effective date of the regulations and its effect on the implementation of some of the provisions, particularly those affecting the flexible assignment of service credit and situations where fewer than three ratings of record are available. Concerns such as the lead time required for changes in the automation of RIF processing programs, and the need to meet collective bargaining requirements prior to the implementation of these regulations were also raised during the comment process. OPM originally proposed implementation on October 1, 1997. We have considered the suggestions received on this issue and have determined that overall fairness is best managed through giving agencies the flexibility to implement the provisions of Sections 351.504 (crediting performance) and 351.803 (notice of eligibility for reemployment and other placement assistance), at any time between the effective date of these regulations and October 1, 1998. Agencies are required to apply the provisions used in a uniform and consistent manner to all employees in a given RIF competitive area.

When crediting performance in a reduction in force, agencies would have the option to implement immediately as of the effective date of these regulations the provisions for establishing credit when ratings of record were given under mixed summary level patterns (351.504(e)) and the use of the modal value for missing ratings as well as averaging only actual ratings of record found during the 4-year "look-back" period (351.504(c)). At its discretion, an agency could decide to delay implementation of these provisions until no later than October 1, 1998, and continue to use the performance crediting provisions in the current § 351.504 (i.e., those in effect on January 1, 1997).

The effect of the provisions in paragraphs 351.504 (b) and (d) remain unchanged by the new regulations. When applying paragraph 351.504(a), the context created by the new definition for rating of record and other regulatory changes will permit the use of non-430 ratings under the conditions specified even when an agency is using the older version of 5 CFR 351.504.

This gives agencies able to proceed immediately the opportunity to do so, without forcing others that need time to complete more extensive preparations into an unrealistic time frame. However, for reduction in force actions effective after September 30, 1998, the new provisions for crediting mixed-pattern ratings of record and handling situations where ratings are missing must be applied by all agencies.

#### (2) Implementation of Provisions During Ongoing Reductions

Several commenters mentioned their concern that ongoing reductions in force would be disrupted by the requirement to implement these provisions. Revising the procedures for handling missing ratings of record and crediting performance under multiple rating patterns could result in changed reduction in force outcomes, new notices, and additional delays due to notice period requirements. We agree that this would prove unnecessarily disruptive to both agencies and employees. However, we believe that giving agencies the option to implement the provisions of sections 351.504 and 351.803 at any time up until October 1, 1998, will allow them to take into account any upcoming reduction in force activity and plan accordingly.

#### Technical Amendments

OPM proposed a number of technical changes in parts 351, 430 and 531, which served to clarify existing regulations in various areas. These included redefinition of rating of record under part 351 to refer to the part 430 definition, provisions for handling employees with a written notice of pending action under part 752 similarly to those with action pending under part 432, changes to the critical element definition, barring non-critical elements in two-level appraisals, and clarifications of: appraisal period, acceptable level of competence determinations, competitive area, competitive level, procedures for determining grade intervals for assignment, expiration and amendment of reduction in force notices, assignment rights optionally provided to excepted service employees, and coverage of term employees under retention subgroups.

We received comments on some of these proposed clarifications. One suggested rewording of the definition of rating of record to better reflect that this rating belongs to the employee rather than the agency. We agree and have adopted this suggestion.

Several commenters asked what date should be used as the effective date of a rating of record. Perhaps contributing to their confusion are changes to the way ratings of record are reported to the Central Personnel Data File. While a rating of record is a personnel action, OPM no longer requires that it be reported separately with its own distinct nature of action code (009). Rating of record information is now transmitted to OPM via other standard reporting procedures. When a separate nature of action code was used, the previous reporting procedures specified that the effective date for a rating of record was the ending date of the appraisal period to which the rating applied. The new procedures capture this same information as an isolated data element and eliminate the need for separate processing of many thousands of actions. It is OPM's view that the ending date of the applicable appraisal period is the effective date of the rating of record, and this date should be used to determine whether or not a rating of record falls within the 4-year "look-back" period.

Section 5 CFR 351.402(b) clarifies OPM's longstanding policy on the minimum standard for a reduction in force competitive area. All of the comments on this proposed revision supported the change, and the proposed regulation is adopted without further modification.

To conduct a reduction in force, section 5 CFR 351.402(a) provides that the agency must establish the applicable competitive area that is the boundary within which employees compete for retention under reduction in force procedures.

Section 5 CFR 351.402(b) provides that employees in a competitive area compete for retention under OPM's reduction in force regulations only with other employees in the same competitive area. Employees do not compete for retention with employees of the agency in another competitive area.

Section 5 CFR 351.402(b) provides that the agency must define each competitive area solely in terms of organizational unit and geographical location. The competitive area then includes all employees within the organizational unit and geographical location that is included in the competitive area definition. Each employee competes with all other

employees in the competitive area for positions under OPM's retention regulations. There is no minimum or maximum number of employees in a competitive area. Also, in any one reduction in force, an agency may not use one competitive area for the first round of competition and a different competitive area for second rounds of competition.

Section 5 CFR 351.402(b) clarifies that the minimum competitive area for any agency component is a subdivision of the agency within the local commuting area that is under separate administration. An agency may establish separate competitive areas for different components in the same local commuting area if each component is under separate administration, which includes that each is independent of the other in operation, work function, and staff.

As used for purposes of establishing a minimum competitive area consistent with section 5 CFR 351.402(b), "separate administration" is the administrative authority to take or direct personnel actions (i.e., the authority to establish positions, abolish positions, assign duties, etc.) rather than the issuance or processing of the documents by which these decisions are effected. This separate administration is evidenced by the agency's organizational manual and delegations of authority that document where, in the organization, final authority rests to make these decisions. (The competitive area standard also recognizes that many agencies retain certain personnel-related actions such as classification authority or final approval of higher-graded positions to a central authority above the organizational standard required for a minimum competitive area).

The same standard is used for a minimum competitive area in a local commuting area in both a headquarters organization or field component. Former references in 5 CFR 351.402(b) to organizational units that could comprise a minimum competitive area in a headquarters organization or field component were examples of where separate administration is often found in agencies. These references were deleted in final 5 CFR 351.402(b) to clarify that the same minimum competitive area standard is applicable whether the organizational unit is headquarters, a field activity, a duty station, or other applicable organization.

Under 5 CFR 351.402(b), an agency may establish a competitive area that is larger than the minimum standard. However, a competitive area may not be smaller than the minimum standard.

The fact that several activities may be serviced by the same personnel office does not, of itself, require that they be placed in the same competitive area. The personnel office merely processes personnel actions rather than having final responsibility to make decisions on whether to establish positions, abolish positions, assign duties, *etc.*

Another commenter felt that the proposal did not go far enough in dealing with employees who have received written decisions under part 752, and suggested that those employees be excluded from reduction in force competition altogether. There is, however, no basis in law to eliminate the right of these employees to remain in reduction in force competition until they are actually removed from Federal service. Therefore, this suggestion was not adopted.

OPM had also proposed changes to the requirements for reduction in force separation notices to include an estimate of severance pay if applicable, and information on benefits available under new subparts F and G (Career Transition Assistance Programs) of part 330 of this chapter and from the applicable State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act. To increase placement opportunities for employees affected by downsizing, the proposed section also required that agencies give employees receiving a reduction in force separation notice a release to authorize, at their option, the release of their resumes for employment referral to State dislocated worker unit(s) and potential public and private sector employers. OPM is developing material for this purpose.

A few commenters were concerned that these requirements would place a greater burden on personnel offices and reduce the emphasis on employee empowerment that is central to successful career transition programs. One felt the role of obtaining authorization for release of resumes belonged solely with the placement coordinator, and that this did not belong with the reduction in force notice since placement efforts would already be well underway by the time reduction in force notices are issued.

We agree that, ideally, placement efforts should begin long before reduction in force notices are issued. However, this is not always possible. We have considered these comments carefully and feel that providing a release that can be completed entirely at the employee's option remains within the spirit of empowerment and simply serves as another vehicle for coordination between Federal

Government and other public and private employers that will hopefully aid employees in the transition process. Many agencies have personnel office staff who serve in dual roles, both conducting the reduction in force and assisting employees in placement. Since a reduction in force notice is issued to all employees being separated, it provides a unique opportunity for the agency to give employees career transition information and to ensure that all employees being separated will receive it. However, in recognition of the fact that agencies will need time to modify their reduction in force notices, we have made this provision one of those which may be implemented at any time between the effective date of these regulations and October 1, 1998. All notices issued on or after October 1, 1998, must meet the requirements of these regulations.

One commenter was concerned that the severance pay estimate calculation might be open to challenge if it was later found to be in error. They suggested instead that agencies provide information on how to compute severance pay and let employees do the calculations themselves. We have not adopted this suggestion because we believe agency-developed severance pay estimates are much more likely to be accurate than those done by employees. Further, we would emphasize that agencies should clearly indicate that their severance pay calculations are merely estimates, as many agencies do now, but that employees are ultimately responsible for verifying these estimates.

Several commenters suggested that we add a requirement that specific information on the employee's competitive level, including the names of employees in various levels, be added to the notice. Information of this type is normally discussed during reduction in force counseling sessions between affected employees and knowledgeable personnel specialists. Releasing this type of information in a reduction in force notice has serious privacy implications and would not be useful in isolation, nor would it serve to help the employee better understand his/her reduction in force rights without counseling. Therefore, we have not adopted this suggestion.

Another commenter questioned the restriction in the definition of critical elements to individual performance only, especially in light of the workplace trends toward team performance. We do not disagree with the observation that team work is becoming more prevalent in the workplace and should be captured

when measuring performance. In recognition of the importance of team work in many organizations, the performance management regulations specifically provide for the use of non-critical elements that can address performance measured at the team level and that impact the summary level, which can be particularly useful in making performance distinctions above the Fully Successful (or equivalent) level. In addition, the regulations permit the use of critical elements to measure the individual's contribution to the team's success or failure. However, it would be inappropriate to allow a single team failure (i.e., failed team critical element) to result automatically in every individual on the team being designated as Unacceptable when some of the individual performance within the team is probably Fully Successful or better.

Critical elements are the cornerstone of individual accountability in employee performance. Therefore, they should not be used to measure performance over which the employee is not intended or expected to exercise individual control or authority. In addition, there is the prohibition that non-critical elements cannot be used with a two-level summary pattern (i.e., pass/fail). Organizations that summarize performance at only two levels can choose to incorporate additional performance elements to identify and measure team accomplishments. We, therefore, made no change to this proposal.

One commenter suggested that a within-grade increase following a delay, based on the circumstances stated in the regulations and a subsequent rating of record of Level 3 or higher, should be paid retroactively. Because no change was, or is, proposed to the current language at 5 CFR 531.409(c)(2)(iii) that addresses a retroactive within-grade increase following a delay in the acceptable level of competence determination, that paragraph had not appeared in the proposed regulations as printed in the **Federal Register**. Because that current language will remain in effect, the commenter's concern is already accommodated.

One commenter suggested that within-grade delay procedures should be incorporated into agency performance management plans and, thereby, be subject to OPM review and approval. Within-grade delay is prescribed by regulation because it is a procedure where Governmentwide consistency is appropriate. There is no value added to having OPM review agency procedures implementing such uniform regulations. Furthermore, the Performance Management Plan alluded

to is no longer required because, in part, the 1995 revision was designed to eliminate needless repetition of regulatory language. Therefore, this suggestion was not adopted.

Several other suggestions for minor wording changes to provide greater clarification were adopted where we felt they were warranted. Most of the requests for clarification or additional discussion would be more appropriately handled through individual discussions between OPM staff and agency personnelists, which we are happy to provide upon request. In addition, some comments were provided that addressed reduction in force and performance management issues that were outside the scope of these proposed regulations, such as changing the way performance is used relative to the other reduction in force factors; these suggestions were not adopted since they were not pertinent to the specific proposals made in these regulations. Suggestions for wording changes to 5 CFR part 293 were not adopted because we felt there was no basis for issuing revised regulations in this area as long as we were eliminating the proposal to lengthen the "look-back" period for ratings of record.

To the extent practicable, these regulations should be implemented by agencies in partnership with management and employees' union representatives.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

**Executive Order 12866, Regulatory Review**

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

**List of Subjects**

5 CFR Part 351

Administrative practice and procedure, Government employees.

5 CFR Part 430

Decorations, medals, awards, Government employees.

5 CFR Part 531

Government employees, Law enforcement officers, Wages.

Office of Personnel Management.

Janice R. Lachance,  
Acting Director.

Accordingly, OPM is amending parts 351, 430, and 531 of title 5, Code of Federal Regulations, as follows:

**PART 351—REDUCTION IN FORCE**

4. The authority citation for part 351 continues to read as follows:

**Authority:** 5 U.S.C. 1302, 3502, 3503.

5. In § 351.203, the definition of "Annual Performance rating of record" is removed, and the definitions of *Current rating of record*, *Modal rating*, and *Rating of record* are added in alphabetical order, to read as follows:

**§ 351.203 Definitions.**

\* \* \* \* \*

*Current rating of record* is the rating of record for the most recently completed appraisal period as provided in § 351.504(b)(3).

\* \* \* \* \*

*Modal rating* is the summary rating level assigned most frequently among the actual ratings of record that are:

(1) Assigned under the summary level pattern that applies to the employee's position of record on the date of the reduction in force;

(2) Given within the same competitive area, or at the agency's option within a larger subdivision of the agency or agencywide; and

(3) On record for the most recently completed appraisal period prior to the date of issuance of reduction in force notices or the cutoff date the agency specifies prior to the issuance of reduction in force notices after which no new ratings will be put on record.

*Rating of record* has the meaning given that term in § 430.203 of this chapter. For an employee not subject to 5 U.S.C. Chapter 43, or part 430 of this chapter, it means the officially designated performance rating, as provided for in the agency's appraisal system, that is considered to be an equivalent rating of record under the provisions of § 430.201(c) of this chapter.

\* \* \* \* \*

7. In § 351.402, paragraph (b) is revised to read as follows:

**§ 351.402 Competitive area.**

\* \* \* \* \*

(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

\* \* \* \* \*

8. In § 351.403, paragraph (c) is added to read as follows:

**§ 351.403 Competitive level.**

\* \* \* \* \*

(c) An agency may not establish a competitive level based solely upon:

(1) A difference in the number of hours or weeks scheduled to be worked by other-than-full-time employees who would otherwise be in the same competitive level;

(2) A requirement to work changing shifts;

(3) The grade promotion potential of the position; or

(4) A difference in the local wage areas in which wage grade positions are located.

9. In § 351.404, paragraph (a) introductory text, and paragraph (b)(2), are revised to read as follows:

**§ 351.404 Retention register.**

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Upon displacing another employee under this part, an employee retains the same status and tenure in the new position. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

\* \* \* \* \*

(b) \* \* \*

(2) The agency shall list, at the bottom of the list prepared under paragraph (b)(1) of this section, the name of each employee in the competitive level with a written decision of removal under part 432 or 752 of this chapter.

10. Section 351.405 is revised to read as follows:

**§ 351.405 Demoted employees.**

An employee who has received a written decision under part 432 or 752 of this chapter to demote him or her competes under this part from the position to which he or she will be or has been demoted.

11. In § 351.501, paragraph (b)(3) is revised to read as follows:

**§ 351.501 Order of retention—competitive service.**

\* \* \* \* \*

(b) \* \* \*

(3) Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of a register, status quo appointments, term appointments, and

any other nonstatus nontemporary appointments which meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter.

\* \* \* \* \*

12. Section 351.504 is revised to read as follows:

**§ 351.504 Credit for performance.**

**Note to § 351.504:** Compliance dates: Subject to the requirements of 5 U.S.C. Section 7116(a)(7), agencies may implement revised § 351.504 at any time between December 24, 1997 and October 1, 1998. For reduction in force actions effective between December 24, 1997 and September 30, 1998, agencies may use either § 351.504 effective December 24, 1997, or the prior § 351.504 in 5 CFR part 351 (January 1, 1997 edition).

(a) *Ratings used.* (1) Only ratings of record as defined in § 351.203 shall be used as the basis for granting additional retention service credit in a reduction in force.

(2) For employees who received ratings of record while covered by part 430, subpart B, of this chapter, those ratings of record shall be used to grant additional retention service credit in a reduction in force.

(3) For employees who received performance ratings while not covered by the provisions of 5 U.S.C. Chapter 43 and part 430, subpart B, of this chapter, those performance ratings shall be considered ratings of record for granting additional retention service credit in a reduction in force only when it is determined that those performance ratings are equivalent ratings of record under the provisions of § 430.201(c) of this chapter. The agency conducting the reduction in force shall make that determination.

(b)(1) An employee's entitlement to additional retention service credit for performance under this subpart shall be based on the employee's three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, except as otherwise provided in paragraphs (b)(2) and (c) of this section.

(2) To provide adequate time to determine employee retention standing, an agency may provide for a cutoff date, a specified number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart. When a cutoff date is used, an employee will receive performance credit for the three most recent ratings of record received during the 4-year period prior to the cutoff date.

(3) To be creditable for purposes of this subpart, a rating of record must

have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (i.e., the rating of record is available for use by the office responsible for establishing retention registers).

(4) The awarding of additional retention service credit based on performance for purposes of this subpart must be uniformly and consistently applied within a competitive area, and must be consistent with the agency's appropriate issuance(s) that implement these policies. Each agency must specify in its appropriate issuance(s):

(i) The conditions under which a rating of record is considered to have been received for purposes of determining whether it is within the 4-year period prior to either the date the agency issues reduction in force notices or the agency-established cutoff date for ratings of record, as appropriate; and

(ii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new ratings of record will be put on record and used for purposes of this subpart.

(c) *Missing ratings.* Additional retention service credit for employees who do not have three actual ratings of record during the 4-year period prior to the date of issuance of reduction in force notices or the 4-year period prior to the agency-established cutoff date for ratings of record permitted in paragraph (b)(2) of this section shall be determined under paragraphs (d) or (e) of this section, as appropriate, and as follows:

(1) An employee who has not received any rating of record during the 4-year period shall receive credit for performance based on the modal rating for the summary level pattern that applies to the employee's official position of record at the time of the reduction in force.

(2) An employee who has received at least one but fewer than three previous ratings of record during the 4-year period shall receive credit for performance on the basis of the value of the actual rating(s) of record divided by the number of actual ratings received. If an employee has received only two actual ratings of record during the period, the value of the ratings is added together and divided by two (and rounded in the case of a fraction to the next higher whole number) to determine the amount of additional retention service credit. If an employee has received only one actual rating of record during the period, its value is the amount of additional retention service credit provided.

(d) *Single rating pattern.* If all employees in a reduction in force

competitive area have received ratings of record under a single pattern of summary levels as set forth in § 430.208(d) of this chapter, the additional retention service credit provided to employees shall be expressed in additional years of service and shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the employee's applicable ratings of record, under paragraphs (b)(1) and (c) of this section computed on the following basis:

(1) Twenty additional years of service for each rating of record with a Level 5 (Outstanding or equivalent) summary;

(2) Sixteen additional years of service for each rating of record with a Level 4 summary; and

(3) Twelve additional years of service for each rating of record with a Level 3 (Fully Successful or equivalent) summary.

(e) *Multiple rating patterns.* If an agency has employees in a competitive area who have ratings of record under more than one pattern of summary levels, as set forth in § 430.208(d) of this chapter, it shall consider the mix of patterns and provide additional retention service credit for performance to employees expressed in additional years of service in accordance with the following:

(1) Additional years of service shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the additional retention service credit that the agency established for the summary levels of the employee's applicable rating(s) of record.

(2) The agency shall establish the amount of additional retention service credit provided for summary levels only in full years; the agency shall not establish additional retention service credit for summary levels below Level 3 (Fully Successful or equivalent).

(3) When establishing additional retention service credit for the summary levels at Level 3 (Fully Successful or equivalent) and above, the agency shall establish at least 12 years, and no more than 20 years, additional retention service credit for a summary level.

(4) The agency may establish the same number of years additional retention service credit for more than one summary level.

(5) The agency shall establish the same number of years additional retention service credit for all ratings of record with the same summary level in the same pattern of summary levels as set forth in § 430.208(d) of this chapter.



(6) The agency may establish a different number of years additional retention service credit for the same summary level in different patterns.

(7) In implementing paragraph (e) of this section, the agency shall specify the number(s) of years additional retention service credit that it will establish for summary levels. This information shall be made readily available for review.

(8) The agency may apply paragraph (e) of this section only to ratings of record put on record on or after October 1, 1997. The agency shall establish the additional retention service credit for ratings of record put on record prior to that date in accordance with paragraph (d) of this section.

13. In § 351.602, paragraph (c) is revised to read as follows:

**§ 351.602 Prohibitions.**

\* \* \* \* \*

(c) A written decision under part 432 or 752 of this chapter of removal or demotion from the competitive level.

14. In § 351.701, paragraph (f) is added to read as follows:

**§ 351.701 Assignment involving displacement.**

\* \* \* \* \*

(f)(1) In determining applicable grades (or grade intervals) under §§ 351.701(b)(2) and 351.701(c)(2), the agency uses the grade progression of the released employee's position of record to determine the grade (or interval) limits of the employee's assignment rights.

(2) For positions covered by the General Schedule, the agency must determine whether a one-grade, two-grade, or mixed grade interval progression is applicable to the position of the released employee.

(3) For positions not covered by the General Schedule, the agency must determine the normal line of progression for each occupational series and grade level to determine the grade (or interval) limits of the released employee's assignment rights. If the agency determines that there is no normal line of progression for an occupational series and grade level, the agency provides the released employee with assignment rights to positions within three actual grades lower on a one-grade basis. The normal line of progression may include positions in different pay systems.

(4) For positions where no grade structure exists, the agency determines a line of progression for each occupation and pay rate, and provides assignment rights to positions within three grades (or intervals) lower on that basis.

(5) If the released employee holds a position that is less than three grades

above the lowest grade in the applicable classification system (e.g., the employee holds a GS-2 position), the agency provides the released employee with assignment rights up to three actual grades lower on a one-grade basis in other pay systems.

15. In § 351.705, paragraph (a)(3) is revised to read as follows:

**§ 351.705 Administrative assignment.**

(a) \* \* \*

(3) Provide competing employees in the excepted service with assignment rights to other positions under the same appointing authority on the same basis as assignment rights provided to competitive service employees under § 351.701 and in paragraphs (a) (1) and (2) of this section.

\* \* \* \* \*

16. In § 351.802, paragraph (a)(2) is revised to read as follows:

**§ 351.802 Content of notice.**

(a) \* \* \*

(2) The employee's competitive area, competitive level, subgroup, service date, and three most recent ratings of record received during the last 4 years.

\* \* \* \* \*

17. In § 351.803, paragraph (a) is revised to read as follows:

**§ 351.803 Notice of eligibility for reemployment and other placement assistance.**

(a) An employee who receives a specific notice of separation under this part must be given information concerning the right to reemployment consideration and career transition assistance under subparts B (Reemployment Priority List), F and G (Career Transition Assistance Programs) of part 330 of this chapter. The employee must also be given a release to authorize, at his or her option, the release of his or her resume and other relevant employment information for employment referral to State dislocated worker unit(s) and potential public or private sector employers. The employee must also be given information concerning how to apply both for unemployment insurance through the appropriate State program and benefits available under the State dislocated worker unit(s), as designated or created under title III of the Job Training Partnership Act, and an estimate of severance pay (if eligible).

**Note to § 351.803(a):** Compliance dates: Subject to the requirements of 5 U.S.C. 7116(a)(7), agencies may implement revised § 351.803(a) at any time between December 24, 1997 and October 1, 1998. For reduction in force actions effective between December 24, 1997 and September 30, 1998, agencies

may use either § 351.803(a) effective December 24, 1997, or the prior § 351.803(a) in 5 CFR part 351 (January 1, 1997 edition).

\* \* \* \* \*

18. Section 351.804 is revised to read as follows:

**§ 351.804 Expiration of notice.**

(a) A notice expires when followed by the action specified, or by an action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action.

(b) An agency may not take the action before the effective date in the notice; instead, the agency may cancel the reduction in force notice and issue a new notice subject to this subpart.

19. Section 351.805 is revised to read as follows:

**§ 351.805 New notice required.**

(a) An employee is entitled to a written notice of, as appropriate, at least 60 or 120 full days if the agency decides to take an action more severe than first specified.

(b) An agency must give an employee an amended written notice if the reduction in force is changed to a later date. A reduction in force action taken after the date specified in the notice given to the employee is not invalid for that reason, except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for a reduction in force action as a result of the change in dates.

(c) An agency must give an employee an amended written notice and allow the employee to decide whether to accept a better offer of assignment under subpart G of this part that becomes available before or on the effective date of the reduction in force. The agency must give the employee the amended notice regardless of whether the employee has accepted or rejected a previous offer of assignment, provided that the employee has not voluntarily separated from his or her official position.

**PART 430—PERFORMANCE MANAGEMENT**

20. The authority citation for part 430 continues to read as follows:

**Authority:** 5 U.S.C. chapter 43.

21. In § 430.201, paragraph (c) is added to read as follows:

**§ 430.201 General.**

\* \* \* \* \*

(c) *Equivalent ratings of record.* (1) If an agency has administratively adopted and applied the procedures of this



subpart to evaluate the performance of its employees, the ratings of record resulting from that evaluation are considered ratings of record for reduction in force purposes.

(2) Other performance evaluations given while an employee is not covered by the provisions of this subpart are considered ratings of record for reduction in force purposes when the performance evaluation—

- (i) Was issued as an officially designated evaluation under the employing agency's performance evaluation system,
- (ii) Was derived from the appraisal of performance against expectations that are established and communicated in advance and are work related, and
- (iii) Identified whether the employee performed acceptably.

(3) When the performance evaluation does not include a summary level designator and pattern comparable to those established at § 430.208(d), the agency may identify a level and pattern based on information related to the appraisal process.

22. In § 430.203, the definitions of *Critical element*, *Performance rating*, and *Rating of record* are revised to read as follows:

**§ 430.203 Definitions.**

\* \* \* \* \*

*Critical element* means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable. Such elements shall be used to measure performance only at the individual level.

\* \* \* \* \*

*Performance rating* means the written, or otherwise recorded, appraisal of performance compared to the performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for the minimum period. A performance rating may include the assignment of a summary level within a pattern (as specified in § 430.208(d)).

\* \* \* \* \*

*Rating of record* means the performance rating prepared at the end of an appraisal period for performance of agency-assigned duties over the entire period and the assignment of a summary level within a pattern (as specified in § 430.208(d)), or (2) in accordance with § 531.404(a)(1) of this chapter. These constitute official ratings of record referenced in this chapter.

23. In § 430.206, paragraphs (a)(2) and (b)(4) are revised, paragraphs (b)(6) and

(b)(7) are redesignated as paragraphs (b)(7) and (b)(8) respectively, and a new paragraph (b)(6) is added to read as follows:

**§ 430.206 Planning performance.**

(a) \* \* \*

(2) Each program shall specify a single length of time as its appraisal period. The appraisal period generally shall be 12 months so that employees are provided a rating of record on an annual basis. A program's appraisal period may be longer when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.

(b) \* \* \*

(4) Each performance plan shall include all elements which are used in deriving and assigning a summary level, including at least one critical element and any non-critical element(s).

\* \* \* \* \*

(6) A performance plan established under an appraisal program that uses only two summary levels (pattern A as specified in § 430.208(d)(1)) shall not include non-critical elements.

\* \* \* \* \*

24. In § 430.208, the introductory text to paragraph (d)(2) is revised, paragraph (d)(4) is revised, and a new paragraph (d)(5) is added to read as follows:

**§ 430.208 Rating performance.**

\* \* \* \* \*

(d) \* \* \*

(2) Within any of the patterns shown in paragraph (d)(1) of this section, summary levels shall comply with the following requirements:

\* \* \* \* \*

(4) The designation of a summary level and its pattern shall be used to provide consistency in describing ratings of record and as a reference point for applying other related regulations, including, but not limited to, assigning additional retention service credit under § 351.504 of this chapter.

(5) Under the provisions of § 351.504(e) of this chapter, the number of years of additional retention service credit established for a summary level of a rating of record shall be applied in a uniform and consistent manner within a competitive area in any given reduction in force, but the number of years may vary:

- (i) In different reductions in force;
- (ii) In different competitive areas; and
- (iii) In different summary level patterns within the same competitive area.

\* \* \* \* \*

**PART 531—PAY UNDER THE GENERAL SCHEDULE**

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

**Authority:** 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103-89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2);

Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of FEPCA, Pub. L. 101-509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102-378, 106 Stat. 1356;

Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682;

Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101-509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

26. In § 531.409, paragraphs (c)(1), (c)(2)(i), and (c)(2)(ii) are revised to read as follows:

**§ 531.409 Acceptable level of competence determinations.**

\* \* \* \* \*

(c) *Delay in determination.* (1) An acceptable level of competence determination shall be delayed when, and only when, either of the following applies:

- (i) An employee has not had the minimum period of time established at § 430.207(a) of this chapter to demonstrate acceptable performance because he or she has not been informed of the specific requirements for performance at an acceptable level of competence in his or her current position, and the employee has not been given a performance rating in any position within the minimum period of time (as established at § 430.207(a) of this chapter) before the end of the waiting period; or
- (ii) An employee is reduced in grade because of unacceptable performance to a position in which he or she is eligible for a within-grade increase or will become eligible within the minimum period as established at § 430.207(a) of this chapter.

(2) \* \* \*

- (i) The employee shall be informed that his or her determination is postponed and the appraisal period extended and shall be told of the specific requirements for performance at an acceptable level of competence.
- (ii) An acceptable level of competence determination shall then be made based on the employee's rating of record

completed at the end of the extended appraisal period.

\* \* \* \* \*

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 301

[Docket No. 96-016-26]

RIN 0579-AA83

#### Karnal Bunt; Additions to Regulated Areas

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

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

**SUMMARY:** We are amending the Karnal bunt regulations by adding portions of McCulloch, Mills, and San Saba Counties, TX, to the list of regulated areas and by expanding the boundaries of the regulated areas in La Paz, Maricopa, and Pinal Counties, AZ, due to the detection of Karnal bunt in those new areas. This action is necessary on an emergency basis to prevent the spread of Karnal bunt into noninfested areas of the United States.

**DATES:** Interim rule effective November 18, 1997. Consideration will be given only to comments received on or before December 24, 1997.

**ADDRESSES:** Please send an original and three copies of your comments to Docket No. 96-016-26, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comments refer to Docket No. 96-016-26. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690-2817 to facilitate entry into the comment reading room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Stefan, Operations Officer, Domestic and Emergency Operations, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737-1236, (301) 734-8247.

**SUPPLEMENTARY INFORMATION:** Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale

(*Triticum aestivum* X *Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the smut fungus *Tilletia indica* (Mitra) Mundkur and is spread by spores, primarily through the movement of infected seed. In the absence of measures taken by the U.S. Department of Agriculture (USDA) to prevent its spread, the establishment of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets. The regulations regarding Karnal bunt are set forth in 7 CFR 301.89-1 through 301.89-14.

The regulations in § 301.89-3(a) provide that the Administrator of the Animal and Plant Health Inspection Service will regulate each State, or each portion of a State, in which Karnal bunt, or any stage of development of *T. indica*, is present or in which circumstances exist that make it reasonable to believe that Karnal bunt is present. We currently require that a bunted wheat kernel be found in or associated with a field before an area will be designated a regulated area. A field's association with a bunted wheat kernel will be established when it has been determined that: (1) A bunted wheat kernel was found in the field during surveys; (2) seed from a lot contaminated with a bunted wheat kernel was planted in the field; or (3) the field was found during surveys to contain spores consistent with Karnal bunt and has been determined to be associated with grain at a handling facility containing a bunted wheat kernel.

The regulations in § 301.89-3(b) provide that less than an entire State will be designated as a regulated area only if the Administrator determines that the State has adopted and is enforcing restrictions on the intrastate movement of regulated articles that are equivalent to those imposed by the regulations on the interstate movement of regulated articles, and the designation of less than the entire State as a quarantined area will prevent the spread of Karnal bunt. The Administrator may also designate less than an entire State as a regulated area by exercising his or her extraordinary emergency authority under 7 U.S.C. 150dd when it is determined that a State is not taking adequate measures to prevent the spread of Karnal bunt.

Under § 301.89-3(e) of the regulations, a regulated area is further subdivided into areas classified as either restricted areas or surveillance areas. Restricted areas are further divided into restricted areas for seed and restricted areas for regulated articles other than seed. Restricted areas for seed are

generally larger than restricted areas for regulated articles other than seed and surveillance areas, and will encompass both.

A restricted area for seed is a distinct definable area that includes at least one field that has been: (1) Found during survey to contain a bunted wheat kernel; (2) planted with seed from a lot found to contain a bunted wheat kernel; or (3) found during survey to contain spores consistent with Karnal bunt and has been determined to be associated with grain at a handling facility containing a bunted wheat kernel.

Individual fields associated with a bunted wheat kernel, such as bunted kernels from a handling facility, are designated as restricted areas for regulated articles other than seed. The identity of those fields is determined using the same criteria discussed above with regard to restricted areas for seed, but it is the field itself, without any adjacent areas, that is designated as the restricted area for regulated articles other than seed.

A surveillance area is an area that includes at least one field that was either found during survey to contain a bunted wheat kernel, or that was found to contain spores consistent with Karnal bunt and has been determined to be associated with grain at a handling facility containing a bunted wheat kernel.

All Karnal bunt host crops are prohibited from being planted in an area restricted for the movement of regulated articles other than seed. Under the regulations, a surveillance area surrounds an area restricted for the movement of regulated articles other than seed. While Karnal bunt host crops may be planted in the surveillance area, they may not be used for seed. Surrounding and encompassing the surveillance area is an area where the movement of seed is restricted unless certain conditions are met.

Recently, during surveys conducted as part of the National Karnal Bunt Survey, bunted wheat kernels were detected in areas of Texas that lie outside the regulated area in that State, and in fields in Arizona that are within the State's regulated area but outside of the established restricted areas for regulated articles other than seed and surveillance areas.

Therefore, in accordance with the criteria described above, we are amending the regulations to reflect those recent detections of bunted wheat kernels. Specifically, in Texas we are designating 17 fields in San Saba County as restricted areas for regulated articles other than seed; designating portions of McCulloch and Mills