

**DEPARTMENT OF DEFENSE****OFFICE OF PERSONNEL  
MANAGEMENT****5 CFR Part 9901**

RIN 3206-AL62

**National Security Personnel System****AGENCY:** Department of Defense; Office of Personnel Management.**ACTION:** Final rule.

**SUMMARY:** The Department of Defense (DoD) and the Office of Personnel Management are issuing final regulations governing the operation of the National Security Personnel System (NSPS), a human resources management system for DoD, as originally authorized by the National Defense Authorization Act for Fiscal Year 2004 and amended by the National Defense Authorization Act for Fiscal Year 2008. This final regulation governs compensation, classification and performance management under NSPS. NSPS aligns DoD's human resources management system with the Department's critical mission requirements and protects the civil service rights of its employees.

**DATES:** November 25, 2008.

**FOR FURTHER INFORMATION CONTACT:** At DoD, Bradley B. Bunn, (703) 696-5303; for OPM, Charles D. Grimes III, (202) 418-3163.

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**I. The Case for Action**

The United States needs a future force that is defined less by size and more by mobility and swiftness, one that is easier to deploy and sustain, one that relies more heavily on stealth, precision weaponry, and information technologies.

With this philosophy established in 2001, DoD set the direction for the transformation of defense strategy and defense management—the way DoD achieves its mission. To accomplish this, DoD transformed the way it leads and manages the people who develop, acquire, and maintain our Nation's defense capability. Those responsible for defense transformation—including DoD civilian employees—anticipate the future and, where possible, help create it. The Department continues to implement new capabilities to meet tomorrow's threats as well as those of today.

The National Security Personnel System (NSPS) is a key pillar in the Department of Defense's transformation. NSPS was established to provide a flexible and contemporary civilian personnel system that is essential to the Department's efforts to create and maintain an environment in which the DoD Total Force thinks and operates as one cohesive unit.

DoD civilians are unique in Government. They are an integral part of an organization that has a military function. DoD civilians complement and support the military around the world in every time zone, every day. Just as new threats, new missions, new technologies, and new tactics are changing the work of the military, they are changing the work of our entire civilian workforce as well. To continue to support the interests of the United States in the current national security environment—where unpredictability is the norm and greater agility the imperative—civilians must be an integrated, flexible, and responsive part of the Total Force team.

The Federal personnel system in use by much of the Department and the Federal Government is based on 20th century assumptions about the nature of public service and cannot adequately address public service requirements in the 21st century national security environment. Although this personnel system is based on important core principles, the principles are manifested in an inflexible, one-size-fits-all system of defining work, hiring staff, managing people, assessing and rewarding performance, and advancing personnel. The inherent weaknesses of this system make support of DoD's mission

complex, costly, and ultimately risky. The pay and movement of personnel is linked to outdated, narrowly defined work definitions with inadequate means of making distinctions in pay between high and low performers.

Recognizing this, NSPS is designed to provide a more flexible, mission-driven system of human resources management that retains core principles while providing a more cohesive Total Force. Additionally, the Department's 28 years of experience with transformational personnel demonstration projects, covering approximately 30,000 DoD employees, has demonstrated that fundamental change in personnel management results in individual career growth and opportunities, workforce responsiveness, and innovation. All of these things multiply mission effectiveness.

The immense challenges facing DoD today support the continuation of this civilian workforce transformation. Civilian employees are being asked to assume new and different responsibilities, take more risk, and be more innovative, agile, and accountable than ever before. It is critical that DoD supports the entire civilian workforce with modern systems—particularly a human resources management system that supports and protects their critical role in DoD's Total Force effectiveness. The enabling legislation provides the Department with the authority to meet this transformation challenge.

More specifically, the law provides the Department and OPM authority to establish a flexible and contemporary civilian human resources management system for DoD civilians. The attacks of September 11 and the continuing war on terrorism make clear that flexibility is not a policy preference. It is nothing less than an absolute requirement, and it must be the foundation of civilian human resources management.

NSPS promotes a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded. The system provides the civilian workforce a contemporary pay-banding construct which includes performance-based pay. This allows for the establishment of more competitive salaries and the ability to adjust salaries based on various factors, to include labor market conditions, performance, as well as changes in employee duties.

In other words, NSPS provides a more flexible HR management system to attract skilled, talented, and motivated people, while also retaining and improving the skills of the existing workforce. The system retains the core values of the civil service while

allowing employees to be paid and rewarded based on performance, innovation, and results. It also provides employees with greater opportunities for career growth and mobility within the Department. DoD leadership will ensure that supervisors and employees understand NSPS and can function effectively within it.

The NSPS pay and classification system provides a more flexible support structure that helps attract skilled and talented workers, retain and appropriately reward current employees, and create opportunities for civilians to participate more fully in the total integrated workforce. A pay-banding structure replaced the artificial limitations created by the previous pay and classification systems. With broad pay bands, the Department is able to move employees more freely across a range of work opportunities without being bound by narrowly described work definitions. The pay structure is more responsive to market conditions. The Department is able to adjust rate ranges and local market supplements based on variations relating to specific occupations, rather than using a one-size-fits-all approach. Labor market conditions also are considered when making pay-setting decisions. As prescribed in the enabling legislation, NSPS better links individual pay to performance using performance rather than time on the job to determine pay increases.

Despite the professionalism and dedication of DoD civilian employees, the limitations imposed by the Governmentwide Federal personnel system often prevent managers from using civilian employees effectively. This causes the Department to sometimes use military personnel or contractors when civilian employees are the best choice to accomplish the task. The Federal personnel system limits opportunities for civilians at a time when the role of DoD's civilian workforce includes more significant participation in Total Force effectiveness. NSPS generates more opportunities for DoD civilians by providing an incentive for managers to turn to them first when certain vital tasks need doing. This frees uniformed men and women to focus on matters unique to the military.

A key to the continued success of NSPS is ensuring that the system is perceived as being fair, i.e., establishing a trust between employees and supervisors. The Department's mission cannot be accomplished without the civilian workforce. NSPS recognizes that employees more readily exercise personal responsibility and sustain a

high level of individual performance and teamwork when they perceive that the system and their supervisors are fair. The Department and the Office of Personnel Management have addressed fairness in NSPS in several dimensions: system design; the right to seek review of important categories of management decisions; workforce access to information about system provisions, processes, and decisions criteria; and accountability mechanisms.

NSPS regulations and implementing issuances include safeguards against arbitrary actions. Examples include written performance expectations, multi-level reviews of performance plans expectations and performance rating and payout decisions, and mandatory within-grade increase buy-in for all employees who are moved to NSPS via management-directed actions. In addition, NSPS continues employees' and labor organizations' rights to challenge or seek review of key decisions. For example, non-bargaining unit employees will be able to request reconsideration of their job objective rating or their rating of record through an administrative grievance procedure. Bargaining unit employees use a negotiated grievance procedure to challenge matters related to their rating of record. Employees must be notified in advance of a proposed adverse action, be given time and opportunity for reply, and be given a decision notice that includes the reasons for the decision in accordance with Governmentwide adverse action and employee appeal rules. Labor organization officials may file unfair labor practices claims or grievances. Labor organizations may seek collective bargaining on NSPS implementation under Governmentwide labor relations rules.

The Department and Components make information about NSPS rules, policies, and practices readily available to the workforce in the form of published regulations, published implementing issuances, local level instructions, training, and other sources.

The last dimension of accountability for fair decisions and practices under NSPS builds on human capital management mechanisms beyond NSPS, and on internal NSPS provisions. First, there are human resources management accountability reviews within the Department that identify and address issues regarding the observance of merit system principles and regulatory and policy requirements, including those established under NSPS. In addition, the Department monitors the outcomes of administrative and negotiated grievances, performance rating reconsiderations, equal employment

opportunity complaints, and whistleblower complaints to correct chronic problems and particular failings.

Second, NSPS program evaluation findings enable the Secretary and the OPM Director to determine whether the design of NSPS and the pattern of its results meet statutory requirements like fairness and equity and the specific performance expectations for a credible and trusted system. Section 9901.107 of this rule identifies the requirement for an NSPS program evaluation. A robust and long-term NSPS program evaluation plan of studies and reviews, transactional data analyses opinion surveys, and other evaluative methods has been fielded.

Fairness in NSPS is not a specific thing, but rather an intrinsic quality built into the design of a flexible human resources management system—one to be accounted for during reviews and evaluations of NSPS operations and decisions.

## II. The Need for Change

The Department's experience operating under the current NSPS regulations as well as the 28 years of experience with transformational personnel demonstration projects, covering nearly 30,000 DoD employees, has shown that fundamental change in personnel management has a positive impact on individual career growth and opportunities, workforce responsiveness, and innovation; all these things enhance mission effectiveness.

Public Law 108–136 amended title 5, United States Code, to provide the Department with the authority to meet this transformation challenge through development and deployment of NSPS. Public Law 110–181, while amending Public Law 108–136, continues to promote a performance culture in which the performance and contributions of the DoD civilian workforce are linked to strategic mission objectives and are more fully recognized and rewarded. It also retains flexibilities to streamline the method for classifying positions and to provide a more flexible support structure for both pay and classification in order to help attract skilled and talented workers; retain and appropriately reward current employees; respond to DoD mission requirements; and create opportunities for employees to participate more fully in the total integrated workforce. The System offers the more than 181,000 currently covered employees a contemporary pay banding construct, which includes performance-based pay. NSPS allows the Department to be more

competitive in setting salaries and to adjust salaries based on factors such as labor market conditions, performance, and changes in duties. The updated HR management system rules more specifically govern how retained classification, compensation, and performance management flexibilities will be implemented. The greater level of detail reflects a continued commitment to greater transparency regarding provisions of Pub. L. 110–181 and system improvements in light of operational experience with NSPS. The System retains the core values of the civil service, including merit system principles and veterans' preference, and allows employees to be paid and rewarded based on performance, innovation, and results.

### III. Significant Changes to the Original Law

The original NSPS statute was enacted on November 24, 2003, and provided the Secretary of Defense, in regulations jointly prescribed with the Director of OPM, the authority to establish a flexible and contemporary civilian personnel system called the National Security Personnel System. This new civilian personnel system was intended to cover most of the approximately 700,000 DoD civilian employees, including blue-collar employees.

Among its features, it provided authority to establish a pay-for-performance system that recognizes and rewards employees based on performance and contribution to the mission; a new pay-banding system to replace the General Schedule (GS); a simplified job classification process and flexible processes to assign new or different work; streamlined hiring processes and the ability to offer more competitive, market-sensitive compensation; improved workforce shaping procedures that reduce disruption with greater emphasis on performance as a factor in retention; expedited disciplinary and employee appeals processes for faster resolution of workplace issues, while preserving due process rights of employees; and a labor-management relations system that recognized DoD's critical national security mission and the need to act swiftly to execute that mission, while preserving collective bargaining rights of employees. The changes to labor relations included the ability to negotiate at the national level instead of negotiating with more than 1,500 local bargaining units, and the ability to establish a new independent third party to resolve labor relations disputes in DoD.

The National Defense Authorization Act of 2008 (Pub. L. 110–181, January 28, 2008) amended 5 U.S.C. 9902, retaining authority for performance-based pay and classification and compensation flexibilities, but substantially modifying other NSPS authorities. The law, among other things—

- Brings NSPS under Governmentwide labor-management relations rules.
- Excludes Federal Wage System (blue collar) employees from coverage under NSPS.
- Requires DoD to collectively bargain procedures and appropriate arrangements for bringing DoD bargaining unit employees under NSPS prior to conversion of these employees.
- Brings NSPS under Governmentwide rules for disciplinary actions and employee appeals of adverse actions.
- Brings NSPS under Governmentwide rules for workforce shaping (reduction in force, furlough, and transfer of function).
- Requires that this regulation be considered a major rule for the purposes of section 801 of title 5, United States Code, with advance Congressional reporting for OPM/DoD jointly-prescribed NSPS regulations.
- Gives these regulations the status of Governmentwide rules for the purpose of collective bargaining under chapter 71 when these rules are uniformly applicable to all organizational or functional units included in NSPS.
- Mandates that all employees with a performance rating above “unacceptable” or who do not have current performance ratings receive no less than sixty percent of the annual Governmentwide General Schedule pay increase (with the balance allocated to pay pool funding for the purpose of increasing rates of pay on the basis of employee performance).
- Limits NSPS conversions to no more than 100,000 employees per year and eliminates the requirement for the Secretary of Defense to determine if the performance management system meets key parameters before increasing NSPS coverage to more than 300,000 employees.

Based on the changes Public Law 110–181 made to section 9902 of title 5, the revised rule deletes subparts E, F, G, H, and I (dealing with staffing, workforce shaping, adverse actions, appeals, and labor relations, respectively) of the current NSPS regulations.

Public Law 110–181 also amended section 9902 by modifying the authority to conduct national-level bargaining and

retains the rights of employees to organize, bargain collectively and participate through labor organizations of their own choosing in decisions that affect them, subject to any exclusion from coverage or limitation on negotiability established pursuant to law. It extends and expands exclusions from NSPS coverage for certain DoD laboratories through October 1, 2011. Some of these laboratories operate under demonstration project authorities which provide their own pay-for-performance systems.

In establishing the revised System, only certain provisions of title 5, United States Code, may be waived or modified by DoD and OPM:

- Chapter 43 (dealing with performance management);
- Chapter 51 (dealing with General Schedule job classification);
- Chapter 53 (dealing with pay for General Schedule employees and pay for certain other employees), except for certain sections for which waiver or modification is barred by law; and
- Subchapter V of chapter 55 (dealing with premium pay), except sections 5544 (dealing with prevailing rate employees) and 5545b (dealing with firefighter pay).

Finally, Public Law 110–181 has a significant effect on the content of the current regulations governing NSPS. Previous legislation authorizing NSPS permitted the promulgation of regulations outlining a framework for NSPS. Implementing issuances provided the detail lacking in the regulatory framework. Taken together, the regulations and the implementing issuances formed the structure of NSPS. However, Public Law 110–181 eliminated the previous legislation's exclusive statutory collaboration process for employee representatives to participate in design and implementation of NSPS. Public Law 110–181 mandated the Governmentwide labor relations system in title 5, chapter 71, for NSPS and conferred the status of Governmentwide rule on regulations governing NSPS. Given these new provisions, much of the structure of NSPS must be established in regulation, rather than through the collective bargaining process, for purposes of uniformity and consistency of the operation of NSPS, much like the Governmentwide regulations that establish the structure of the General Schedule.

### IV. Two Years of Operational Experience Under NSPS

In order to provide consistency and uniformity of application throughout the Department, certain NSPS features

previously described in DoD implementing issuances have been incorporated into this regulation. DoD now has more than 2 years of experience with these features and has determined that they effectively support key performance parameters of NSPS. In addition, the regulation includes modifications made to NSPS as a result of operational lessons learned over the last two years.

#### *A. Classification*

##### *Effective Date of Classification of Position*

The regulation now provides specific details for entitlement to retroactive effective date of a classification decision. While the prior regulation provided for both a classification reconsideration process and a retroactive effective date, more detail has been added to provide for a uniform and consistent application.

#### *B. Compensation*

The regulation modifies rules governing the current compensation structure by removing the link between increases in the minimum rate of the rate range and across-the-board increases. This change enables more flexibility in responding to labor market changes that may impact the lower end of a pay range for an occupation, but not the middle or upper ranges. Also, discretionary authority is now provided to give targeted general salary increases to designated occupational series within a pay band. This flexibility enables management to adjust pay to recognize market forces when the pay band itself is market competitive but, due to rapidly changing markets, the current salaries paid to employees in certain occupations are not.

#### *C. Pay Administration*

Several changes have been made in the area of pay administration. Pay-setting flexibilities have been expanded to permit discretionary within-grade increase buy-ins when employees from outside of NSPS move to an NSPS position. Safeguards have been incorporated for employees who are moved to NSPS via management-directed actions. In these cases, the regulation now specifies a required within-grade increase buy-in. A significant level of detail has been added to describe how pay is administered upon promotion, reassignment, reduction in band and appointment to the Federal service. Most of this detail reflects the pay-setting rules that have proven effective

during the past 2 years in the operation of NSPS.

The regulation retains management's flexibility to set pay within a given range, but provides safeguards by placing limitations on the factors management may use in exercising its discretion as well as establishing pay increase limits that cannot be exceeded without higher-level review. There have also been some modifications to pay-setting practices based on DoD's experience with the System. Most significantly, pay-setting rules for employees moving into NSPS from other systems or moving from NSPS positions covered by targeted local market supplements have been revised. Pay for these employees was previously set using "base salary." Pay will now be set using "adjusted salary" (includes base salary plus any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment. In these cases, when the new position is in a different location, a geographic pay conversion will be processed. These rules allow management to set pay more competitively and equitably compensate employees by permitting pay to be set in a manner that prevents a loss in adjusted salary in certain circumstances. Further changes in NSPS pay-setting rules include the discretion to adjust the rate of pay of a teacher moving into NSPS up to 20 percent to take into account the shorter work year incorporated in the annual rate of a teacher paid under 20 U.S.C. 901.

##### *Pay Retention*

Pay retention rules have been modified to provide a "grandfather" clause for employees who are covered by General Schedule grade and pay retention rules at the time they are converted into NSPS. These employees will not be subject to the 104-week limit on pay retention. They will be entitled to pay retention indefinitely, subject to specifically identified pay retention termination events. Much detail has been added in the area of pay retention to identify circumstances for which pay retention is mandatory, eligibility requirements for optional pay retention, and events leading to termination of pay retention. These rules reflect current practices under NSPS.

##### *Accelerated Compensation for Developmental Positions (ACDP)*

"Treatment of Developmental Positions" (§ 9901.345) has been modified to specify criteria for Accelerated Compensation for

Developmental Positions (ACDP) increases, identify the range of pay increases that are permitted under this discretionary authority, and to expand the discretionary use of ACDP to employees in developmental or trainee level positions assigned to the lowest pay band of a nonsupervisory pay schedule and trainee level positions or positions assigned to the Student Career Experience Program. To date, this authority has been available only to employees in developmental or trainee level positions in professional and analytical occupations. The change provides additional flexibility in recognition of pay progression patterns in other occupations.

##### *Premium Pay*

A critical feature of NSPS compensation is the ability to modify premium pay in response to current and future needs. This flexibility facilitates the Department's ability to accomplish its diverse mission. The revised regulation incorporates rules governing NSPS premium pay. Premium pay includes pay such as overtime pay, compensatory time off, holiday, Sunday, and standby pay. Among the premium pay features unique to NSPS are on-call premium pay for health care personnel in specified circumstances, pay for weekend duty for health care personnel, and foreign language proficiency pay. For the most part, the regulations reflect current premium pay policies under NSPS, which include certain modifications to the standard title 5 premium pay laws and regulations to address unique DoD mission requirements and differences in the NSPS classification and pay structure.

##### *Conversion/Movement Out of NSPS*

Regulations have been added to provide a process for converting employees out of NSPS when their position is removed from coverage under the System and to provide a "virtual GS grade" to employees who leave their NSPS position to accept employment in a General Schedule position. These rules promote more equitable pay setting upon moves to the General Schedule pay system.

#### *D. Performance and Pay Pool Management*

##### *Higher Level Review*

The revised regulation more specifically outlines safeguards to ensure the NSPS performance and pay pool management system is fair and equitable based on employee performance. For example, under subpart D, the revised regulation now

provides for a higher level review of performance expectations and recommendations for ratings of record, share assignment, and payout distribution. This review helps ensure that assigned employee objectives are reviewed for appropriateness and consistency within and across the organization and/or pay pool as well as employee ratings, share assignments, and payout distribution. These safeguards help ensure equity in performance payouts.

#### Calculating Annual Payout

Rating levels, share assignment ranges, and rounding rules for conversion of raw performance scores are also specified in the revised regulation, as well as formulas for share values and calculation of performance payouts. The language also clarifies the intended application of a common share value (expressed as a percent of pay) throughout an entire pay pool, to include all sub pay pools. This further preserves equity across a pay pool.

#### Flexibility in Extending Performance Appraisal Periods

The authority to extend individual performance appraisal periods to enable employees to complete minimum periods is specified as well as limitations on this authority. By specifically providing for extension of individual rating cycles, valued performers and higher-performing employees moving to NSPS positions can more quickly benefit from the NSPS performance-based pay features.

#### Pay Pools

The pay pool concept has also been further defined in this regulation by providing parameters for pay pool composition and specifying the roles of pay pool officials within the pay pool process.

Much thought was given to achieving the “right” balance between safeguards and management flexibility. For example, although pay pool share ranges have been specified for each rating level, management still has the flexibility to determine assignment of shares within that range. System safeguards were added to ensure fairness, equity, and a performance focus by expressly stating and limiting the factors which may be used in the determination of share assignment. Similarly, management still retains the flexibility and authority to determine the distribution of a performance payout between base salary increase and bonus or a combination thereof. However, to ensure safeguards within the system, the factors management may use in

exercising this authority have also been expressly defined and limited to ensure fairness, equity, and a performance focus. While pay pool funding is still determined by management, higher-level reviews have been required to provide internal controls. Additional safeguards added include a uniform approach to handling performance payouts for employees who leave a pay pool after the end of the performance period, but before the date of the payout. Finally, to promote transparency of the pay pool process, a requirement has been added for organizations to share with employees the average rating, ratings distribution, share value (or average share value), and average payout (expressed as a percentage of base salary) at the completion of the performance payout process.

#### Reconsideration Process

Employee performance reconsideration opportunities have been expanded to permit reconsideration of individual performance objective ratings in addition to the overall rating of record. This change recognizes that many pay pools use raw performance scores as a guide in determining how many shares to assign to employees. Since raw performance scores may be impacted by individual performance objective ratings, the ability to request review of individual performance objectives enables employees to seek redress on all performance rating decisions affecting their pay.

#### E. Other Changes

Other changes reflected in this regulation include language providing salary increases for employees who did not meet the minimum period of performance due to an approved paid leave status or performance of labor activities on “official time.” These pay adjustments will be based on the modal rating of a pay pool. Likewise, provisions have been made to adjust the pay of employees returning from temporary assignments outside of NSPS or returning from long-term training for which no NSPS performance plan was assigned. These changes ensure that employee pay is not harmed by the inability to meet a minimum performance period or inability to rate performance while employees either exercise statutory leave entitlements or fulfill other roles important to the organization.

Finally, the regulations in subpart D (dealing with performance management) permit limited coverage under NSPS pay-setting and classification flexibilities for employees who are

appointed for less than 90 days. Providing access to NSPS pay-setting flexibilities for these positions enhances DoD’s competitive position in the labor market when hiring temporary employees for 90 days or less.

## V. Response to Public Comments

### A. Major Issues

The proposed rule was published in the **Federal Register** on May 22, 2008. The public comment period concluded June 23, 2008. In response to the proposed rule, the Department received 526 comment submissions during the 30-day public comment period. In reviewing the comment submissions, we discerned several recurring themes that spanned multiple sections of the proposed regulation. Major issues identified included: (1) Specificity of the regulation; (2) collective bargaining and labor relations; (3) performance and pay pool management; (4) the influence of performance versus market factors on pay; and (5) control points. Because these issues are critical to understanding the objectives of NSPS, as well as its implementation, we have given them particular attention in the following sections of this **SUPPLEMENTARY INFORMATION**.

#### 1. Specificity of the Regulation

A significant issue raised in the public comments concerned the level of specificity in the proposed regulation. Some commenters, pointing to a lack of detail regarding specific issues, such as performance management, sought more specificity in the proposed regulation itself as opposed to the Department providing future direction in implementing issuances, which are not open to public comment. However, many of the commenters who weighed in on this issue argued that the proposed regulation is too specific. Commenters suggested that the increased level of detail was written into the proposed regulation not to improve the clarity of the regulation, but to preclude negotiation with labor organizations. Labor organization representatives argued that because DoD, under the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008), no longer has authority to establish a labor relations system under its control, the Department is attempting to write regulations as narrowly as possible to avoid the collective bargaining process.

Interestingly, during the public comment period for the 2005 regulation, a large number of commenters recommended that the regulation include far greater specificity, with

numerous commenters stating that they were unable to provide substantive comments without more information. Some additional specificity was written into the final 2005 regulation in response to these comments, but it retained its original goal of establishing a general policy framework to be supplemented by detailed implementing issuances.

This regulation of necessity includes more specificity than the 2005 regulation in order to preserve uniformity and consistency of application of NSPS in the changed statutory environment created by Public Law 110–181. The uniform and consistent application of NSPS is important to ensure equitable treatment of all employees, whether bargaining unit or non-bargaining unit; for ease of movement of employees across components and organizations; and to achieve efficiencies in support systems such as automated performance management tools and training. Public Law 110–181 restored the Governmentwide labor relations coverage of title 5, chapter 71, to NSPS employees and conferred the status of Governmentwide rule upon this NSPS regulation. It also removed the statutory collaboration process which ensured uniformity and consistency and was the exclusive process for employee representative involvement in the design and implementation of NSPS. Given those provisions, OPM and DoD concluded the 2005 regulatory framework and detailed implementing issuance construct created unwarranted risk to the goal of uniform and consistent application of NSPS to both bargaining unit and non-bargaining unit employees. With much of the operational core of NSPS in its implementing issuances subject to collective bargaining, we concluded the likely outcome of bargaining over the various components of NSPS would be multiple versions of NSPS for bargaining unit employees (there are more than 1,500 local bargaining units in DoD) and one NSPS for non-bargaining unit employees. Therefore, OPM and DoD chose to incorporate sufficient detail in this regulation, under the legislative grant of Governmentwide regulation status, to preserve the uniformity and consistency of a single NSPS. The regulation provides a standardized, yet flexible, DoD NSPS environment that promotes the growth of all employees and improves management's ability to manage the workforce. Labor organizations still retain collective bargaining rights regarding NSPS under title 5, chapter

71. In fact, labor organizations may seek to collectively bargain implementation of NSPS prior to implementation for bargaining unit employees to the same extent bargaining occurs on implementation of other Governmentwide regulations across the Federal Government.

## 2. Collective Bargaining and Labor Relations

In addition to their concerns on how the specificity of the regulations affects the collective bargaining rights, labor organizations made numerous comments in each subpart that various matters should be subject to collective bargaining under 5 U.S.C. chapter 71. In some cases these matters are not subject to collective bargaining today for bargaining unit employees outside NSPS as such matters are covered by law. In other cases, these matters are limited in collective bargaining because they are covered by Governmentwide regulations encompassing these employees. There were also various suggestions to include language throughout the regulations that collective bargaining rights exist on certain specified matters, even where the scope of collective bargaining rights is actually more limited than what is suggested by the labor organizations.

DoD is committed to fulfilling its obligation to bargain in good faith consistent with Governmentwide labor relations rules under 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902 and section 1106(b) of Public Law 110–181. However, it is appropriate that the Department seek uniformity and consistency in its NSPS employment practices through issuance of regulations. We do not believe it is necessary to repeat throughout the regulations a statement regarding any statutory collective bargaining rights and have not adopted the suggestion. This does not occur today in other Governmentwide regulations or agency policies. However, we have added a clarifying general statement in subpart A regarding collective bargaining obligations prior to converting bargaining unit employees to NSPS.

## 3. Performance and Pay Pool Management

### Background

The Department designed NSPS to be a robust performance management system in recognition of the increased importance of performance in making pay and retention decisions. NSPS uses a multi-level appraisal system that makes distinctions in levels of employee performance and links employee

achievements, contributions, knowledge, and skills to organization results. NSPS also allows the Department to better recognize and support team contributions and accomplishments. The System ensures that performance expectations are clearly communicated to employees and are linked to the organization's strategic goals and objectives. This provides the ability to recognize valid distinctions in performance and reward employees based on those distinctions, which will foster a high-performance culture within the Department.

NSPS modifies the way DoD employees are paid. NSPS bases individual pay increases on performance instead of primarily on tenure and time-in-grade, i.e., the emphasis is on quality of results achieved as opposed to length of experience. In addition, this system is far more market-sensitive. Both of these goals are met through the changes in the classification, pay, and performance management systems.

We believe the Department's pay-for-performance system is essential to DoD's ability to attract skilled and talented workers; retain and appropriately reward current employees; respond to DoD mission requirements; and create opportunities for employees to participate more fully in the total integrated workforce.

Performance and pay pool management inspired a large number of comments during the public comment period. In fact, many commenters raised issues that related to both subparts C and D, since pay administration and performance management are so closely aligned. In reviewing the comments that addressed aspects of performance management under the proposed regulation, we identified seven recurring issues. These issues are addressed in the following paragraphs.

### Fairness

Many commenters expressed concerns about fairness in operation of the NSPS performance management system. Whether they characterized their concern as "favoritism," "cronyism," "nepotism," or the euphemism "good ol' boy" system, commenters expressed concerns that NSPS could or would present opportunities for unfairness within the performance appraisal and overall performance management system. These commenters feared supervisors and Pay Pool Managers would assign ratings based on personal preferences and relationships unrelated to performance.

From the beginning, NSPS was designed to be consistent with specific

guiding principles. Among the principles emphasized in the performance management process are fairness, credibility, and transparency, as well as adherence to merit system principles. The regulation establishes many safeguards—or checks and balances—specifically designed to guard against favoritism, cronyism, and unfair practices.

First and foremost, the performance management system design features uniform performance criteria across NSPS (see SC 1940 of NSPS implementing issuances). By using uniform criteria, NSPS ensures employees performing similar categories of work are evaluated using the same tools of measurement. To ensure that the measurement tools are interpreted consistently across the organization and in a manner free from favoritism, cronyism, or other inappropriate consideration, NSPS provides multiple-level reviews of recommended ratings, share assignments, and payout distribution determinations. Not only does the supervisor/rating official offer a recommended rating of record based on an overall assessment of the employee's accomplishments (§ 9901.412(b)), but these recommended ratings receive a higher-level review—a requirement identified and added to the revised regulation in § 9901.412(c) and made effective via implementing issuances. Following the higher-level review, a panel of senior leaders (i.e., the Pay Pool Panel) reviews and reconciles ratings within a pay pool (§ 9901.412(f)). In reconciling ratings, share assignments and payout distribution recommendations, the panel compares the employee's accomplishments (via supervisory assessments and optional employee self assessments) to job objectives and standard rating criteria to ensure that the same understanding of performance criteria has been applied to employees across a pay pool. The Pay Pool Panel considerations do not include a pre-established distribution of ratings as a factor in determining the rating of record. This is because NSPS regulations also prohibit forced distribution of ratings (§ 9901.412(a)). As opposed to a forced alignment of employee ratings against a particular distribution pattern, employee performance reflects a measurement of “what” an employee accomplished (and “how”) against standardized performance measurements. The employee also has a voice in how his or her work is viewed via the opportunity to write a self-assessment of what was accomplished by the employee and in

what manner objectives were achieved during the performance cycle. Such assessments become part of the record that is forwarded to the higher-level reviewer and Pay Pool Panel. Checks and balances such as those described above form the safeguards for fairness and equity built into the regulation and the performance management system.

As with the multi-level review for employee ratings of record, NSPS also provides for reviewing performance plans at multiple levels. First, supervisors are responsible for making sure that performance objectives accurately reflect an employee's work and for engaging employees in that determination (§ 9901.406). Employees participate in the development of performance expectations via conversations and written communication with their supervisors (§ 9901.406(g)). Second, there is a review of performance expectations at a higher level to ensure that assigned employee objectives are consistent and equitable with similar positions within and across the organization (§ 9901.406(h)).

In addition to the checks and balances outlined in the preceding paragraphs, NSPS contains four other important features intended to contribute to the sustainment of a fair, credible, and transparent system. First, supervisors and managers will be held accountable in a specific job objective for effectively managing the performance of employees under their supervision and will be assessed and measured on their performance against this objective (§ 9901.406(d)). There is a connection between administration of the performance management system and supervisory performance ratings and, consequently, a supervisor's pay. Second, DoD is committed to extensive training, both initial and ongoing, for supervisors, managers, and employees so that they understand the requirements of the performance management system. For supervisors and managers, in particular, training is focused on how to establish and communicate performance expectations, how to assess employee performance, and how to appropriately translate that assessment into pay adjustments. Third, there are various review and evaluation processes designed to monitor the implementation of NSPS and identify inconsistent, unfair treatment of employees so that these situations, if they occur, can be remedied in a timely manner. As a final check and balance, employees may also request reconsideration of ratings of record as well as ratings for individual job objectives under § 9901.413.

To ensure that employees are treated fairly, there are rules to guard against arbitrary actions, enable employees to challenge or seek review of key decisions, and for setting up accountability mechanisms. All of these safeguards and checks and balances are monitored during regular and recurring reviews and evaluations of NSPS at multiple levels within the Department.

#### Uniformity and Consistency

Some commenters questioned whether performance would be measured uniformly and consistently among pay bands, occupational areas, and Components. While there is opportunity for some aspects of implementation of NSPS performance management to be handled flexibly to accommodate different circumstances, NSPS is designed to ensure uniformity and consistency in the most important core features of performance management. For example, the regulation mandates a uniform summary rating level pattern (§ 9901.405(b)(5)) and share assignment range for each rating level (§ 9901.342(f)), and it provides common formulas for determining the share factor value and payout within each pay pool (§ 9901.342(g)).

The NSPS implementing issuances and NSPS performance tools further institutionalize uniformity and consistency via the establishment of standardized NSPS performance measures applied across NSPS. For example, NSPS uses standardized performance criteria, which evaluate “what” was accomplished (also known as performance indicators), as well as standardized contributing factors and benchmark descriptors, which serve to measure “how” an objective was accomplished (SC 1940). The use of standardized criteria and rules helps to ensure consistency across NSPS.

#### Transparency

Several commenters expressed concern that ratings and performance payout determinations are made “behind closed doors,” and commenters questioned whether the NSPS system meets its stated goal of transparency. While it is true that Pay Pool Panels deliberate in private, this is necessary to protect the privacy of employees as individuals as well as to provide an atmosphere for robust performance management discussion. Nevertheless, there are a number of requirements in the system that helps preserve transparency outside of the pay pool deliberation. The regulation adds language to specify requirements for sharing of pay pool information to NSPS

employees (§ 9901.342(g)(10)). In addition, through implementing issuances (SC 1940), NSPS requires notice to employees of additional pay pool related information. This information may include the membership and composition of the pay pool to which the employee belongs; projected pay pool funding amounts; rules for making share assignment and payout distribution determinations; percentage of pay pool funding to be applied to bonuses versus increases to base salary; criteria for Organizational Achievement Recognition (OAR) awards; identity of Pay Pool Manager, Pay Pool Panel members, and Performance Review Authority; and performance indicators and contributing factors. The regulation also specifies that performance expectations (e.g., job objectives) must be communicated to employees in writing (§ 9901.406(b)). Performance measurement criteria are available to all employees through Web sites (e.g., <http://www.cpms.osd.mil/nsps>) and agency implementing issuances. The regulation adds greater detail to performance and pay pool management (such as specifying number of rating levels (§ 9901.405(b)(5)), rounding rules for raw performance scores (§ 9901.405(b)(6)), share ranges (§ 9901.342(f)), factors that may be considered in making a share assignment or payout distribution determination (§ 9901.342(g)), share value and payout formulas (§ 9901.342(g)), minimum criteria for eligibility for a performance payout (§ 9901.342), as well as identification of and procedures for performance payouts for specially situated employees not previously covered in the regulation (§ 9901.342(i)–(l)).

#### Premium on Good Appraisal Writing Skills

A few commenters expressed concern that the NSPS system rewards those who can write well, not necessarily those who perform best. Commenters believe that employees who have difficulty communicating their accomplishments in a self-assessment will be at a disadvantage in comparison to good writers, even if their performance level actually exceeds that of the good writers. Another commenter expressed concern that employees are required to write their own appraisals. The written employee self-assessment is optional and is just one of many components of the NSPS performance management system. Another component of the performance management system is that each rating official also prepares a written assessment of employee performance.

One of the system safeguards that helps ensure employees are not adversely affected by the “written word” is the requirement that Pay Pool Panels afford a rating official the opportunity to provide further justification before the panel changes a recommended rating of record (§ 9901.412(f)). This requirement provides an opportunity for further explanation as well as that presented in writing. Additionally, to assist both employees and rating officials in the development of written assessments, DoD has developed and made available both classroom and Web-based writing classes (see “iSuccess” training at <http://www.cpms.osd.mil/nsps/training.html>). Also, DoD has made available guidance in the form of writing tips and “lessons learned” by other organizations that have implemented NSPS to help employees and rating officials write effective self-assessments, performance plans, and performance assessments.

Finally, mock pay pool exercises offer both employees and rating officials the opportunity to practice their writing skills. A mock pay pool exercise is a way for organizations to understand the pay pool process. During the exercise, employees may submit written self-assessments and rating officials may submit supervisory assessments for consideration by the pay pool panel. Pay pool panels can communicate back to both rating officials and employees the value of those assessments to the appraisal process and make suggestions on how to write such assessments more effectively. Also through mock pay pools, organizations identify ways to improve their process to achieve greater consistency and ensure fairness in ratings and payouts. Past experience has shown that these exercises improve not only participants’ familiarity with the process, their understanding of the various aspects of the pay-for-performance system, and the quality of their decisions, but also their writing skills in the context of the performance management system.

#### Differences Between Grade-Based Systems and NSPS in Rewarding Performance

Commenters noted that the proposed regulation allows organizations with wage grade workers and NSPS employees to reward performance differently, which could result in inequities. We assert differences do not necessarily result in inequities. Without doubt, there are differences between the design of the NSPS personnel and performance award system and the Federal Wage System (FWS) personnel and performance management systems.

These differences with the FWS existed even when NSPS positions were still covered by the General Schedule (GS). They are a result of overall differences in the compensation systems. For example, GS grades have 10 steps, with waiting periods from one to three years between steps. Each step represents approximately a 3 percent increase in base pay awarded primarily based on seniority. The FWS has only five steps, but much shorter waiting periods (six months to two years) and larger increases (approximately 4 percent increase in base pay). Like the GS, the FWS also awards steps primarily based on seniority. The basis for pay progression under both GS and FWS systems is primarily a combination of seniority-based pay progression in the form of step increases, promotions, and cost of labor (e.g., locality pay). Performance pay, when awarded, is typically paid out via bonuses. In contrast, the design of the NSPS compensation and classification architecture has no step increases and fewer promotions. The express purpose of this design decision is to redirect pay, formerly paid out based, in part, on seniority, toward rewarding and encouraging performance (i.e., performance-based pay). Therefore, under NSPS, pay progression primarily occurs via performance-based increases. In the absence of step increases and promotions to grades that no longer exist, NSPS applies civilian pay increase dollars that would have been expended on those pay progression methods to performance-based increases and Accelerated Compensation for Developmental Positions (ACDP). In redirecting the seniority-based and promotion-based pay increases under the General Schedule to performance pay, it is appropriate that performance awards under NSPS be greater than performance awards under systems that do not redirect step increases and promotions associated with more defined levels of work to performance. The differences between NSPS and grade-structured systems are simply differences rather than inequities. Therefore, we made no attempt to align NSPS performance rewards to those of other personnel systems. In so doing, we reiterate the belief that Congress and the American people expect their public employees to be paid according to how well they perform, rather than how long they have been on the job.

Another commenter expressed an equity concern that NSPS employees may be disadvantaged over General Schedule employees where there is internal competition for reassignment

and promotion to other positions. In particular, the commenter expressed a belief that the NSPS performance appraisal system creates an impression that an employee with a “3” as his or her last rating of record is inferior to a GS employee with all Level 9’s. Despite inconsistencies in rating scales across the government (to include pass/fail, NSPS, and 3 and 4 level rating systems, etc.), the employee’s record of accomplishment along with appropriate employment references and a copy of the aggregate NSPS rating distribution (available via NSPS web site) should serve to inform prospective employers of the value of a NSPS Level 3 rating of record.

#### Communication of Performance Expectations

Commenters also noted that the proposed regulation does not place enough accountability on supervisors to communicate performance expectations. One commenter noted that the proposed regulation does not explicitly require the supervisor to notify the employee of performance expectations. Yet § 9901.406 of the proposed regulation very explicitly states the requirement to communicate performance expectations to employees prior to holding the employee accountable for them (“Performance expectations will be communicated to the employee in writing, prior to holding the employee accountable for them.”). That section further states: “Performance expectations that comprise a performance plan are considered to be approved when the supervisor has communicated the performance plan to the employee in writing.” In addition to the employee requirements stated in § 9901.406(c), § 9901.406(d) states that performance expectations of supervisors and managers additionally will include assessment and measurement of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees’ performance. Inasmuch as the “planning” phase of performance management is considered to incorporate development and implementation of subordinate employees’ performance plans and those plans, per the regulation, are only considered approved once communicated to the employee in writing, the regulation does in fact hold supervisors and managers accountable for communicating performance expectations.

#### Perceived Administrative Burden

Some commenters objected to the amount of time and resources needed to administer NSPS, particularly the

performance management component. Commenters cited the amount of paperwork required under NSPS and the limitations of the NSPS Performance Appraisal Application (PAA) tool. We agree that the design of NSPS and the safeguards built into the system result in increased time demands, especially during the start-up years. However, DoD’s experience with Personnel Demonstration Projects indicates that the amount of time required for the same tasks levels off and even decreases as the organization gains experience with the pay pool process. Additionally, as experience and efficiency increase, organizations tend to parlay the process of reviewing individual performance into an examination and driver of overall organizational performance, thus increasing the return on their investment of time. Consequently, we have not altered the requirements, believing that the end result is fairness and consistency—key objectives of NSPS—and the ability to further individual as well as organizational performance. Another commenter indicated that there are an insufficient number of characters available in the PAA to adequately provide self assessment information. We continuously evaluate the PAA tool to improve it to better meet user needs. We have addressed many of the initial limitations of the system and are currently reviewing changes to other features such as the limitation on the number of characters that users can enter into various fields.

#### 4. Performance Versus the Influence of Market Factors on Pay

While a number of commenters supported the idea of a performance-based pay system, some commenters were less supportive of the consideration of non-performance-related factors when setting pay. These commenters objected to the weight given to factors other than performance. For example, one commenter stated: “The factors used in determining if [employees] get a raise or a bonus are \* \* \* complicated and \* \* \* have nothing to do with performance. Employees have no control over many of these factors, which include attrition rates, shortages of skills, and labor market. Obviously, this really isn’t a true pay-for-performance system.” In response to this comment—and the many commenters who expressed similar concerns about the use of factors other than “performance” in setting pay—we acknowledge that it is a misperception that compensation under NSPS is based solely on performance. From its inception, NSPS was designed

to emphasize both performance pay and compensating employees based on market factors. In the Supplementary Information for the 2005 regulation we said the following about the new system: “The pay structure will be much more responsive to market conditions” and “Labor market conditions will also be considered when making pay-setting decisions. As prescribed in the enabling legislation, the new compensation system will better link individual pay to performance \* \* \*”. We also said: “As the Department moves away from the General Schedule system, it will become more competitive in setting salaries and it will be able to adjust salaries based on various factors, including labor market conditions, performance, and changes in duties.”

The NSPS compensation system, first described in the 2005 NSPS regulation, is designed to fundamentally change the way employees in the Department are paid. First, it allows DoD, after coordination with OPM, to define occupational career groups and levels of work within each career group that are tailored to the Department’s missions and components. Second, it gives DoD considerable discretion, after coordination with OPM, to set and adjust the minimum and maximum rates of pay for each of the pay schedules and pay bands within those career groups based on national and local labor market factors and other conditions. Instead of “one size fits all” pay rates and adjustments, NSPS allows DoD to customize those adjustments and optimize valuable but limited resources. This kind of flexibility, which is lacking under the GS and FWS pay systems, enables DoD to allocate payroll dollars to the occupations and locations where they are most needed to carry out the Department’s mission. At the same time, NSPS is a system that balances linking individual pay to performance and aligning positions both internally based on position classification and externally based on labor market.

The NSPS classification, compensation, and performance management structures are designed to act in tandem to achieve two significant objectives: Reward performance and pay employees consistent with current national and local market conditions. As a result, beyond providing a system for rewarding performance, NSPS is structured to be far more responsive to applicable labor markets than grade-based systems and provides the flexibility needed to quickly adjust to a constantly changing labor market. Some of the mechanisms by which NSPS responds to applicable markets are

decisions involving setting the pay of employees initially hired into NSPS positions, payout distributions between base salary and bonus, establishment of control points, establishment of targeted local market supplements, targeted general salary increases, and the adjustment of pay band minimums and maximums. By utilizing contemporary pay practices to establish a market-sensitive system, DoD is better able to establish itself as an attractive employer in a competitive environment.

Under NSPS, DoD has created a system that allows the flexibility necessary to consider both market factors and performance in making compensation decisions. As a result, DoD is in a better position to attract, retain, and reward a workforce that is able to meet the high expectations set for it by the Department's senior leaders for the purpose of accomplishing the Department's mission—the defense of our nation.

#### 5. Control Points

A number of commenters expressed concerns about control points. Many perceived them as inappropriately limiting employees' potential for salary growth in a pay-banded system where pay is expected to be based on performance. They felt the full pay band salary range should be accessible to every employee in a band and advanced the argument that control points effectively cap a top performer at the control point, subverting the goal of a pay-for-performance system. Others opined that by establishing control points, the merit system principle of equal pay for equal work has been thwarted. The concept of control points is not inconsistent with the goals of a pay-for-performance system which, from the initial design phase of NSPS, envisioned a greater link between pay decisions and an individual's performance.

While a statutory requirement exists for NSPS to better link individual pay to performance, the NSPS performance-based features are not intended to result in "performance" trumping all other factors that may be considered in setting pay and pay progression. Unlike the GS and FWS pay systems, which compensate employees primarily on a seniority basis, NSPS requires that many factors be considered in setting pay. For example, the statutory requirements for NSPS specify that the system shall "not waive, modify, or otherwise affect the public employment principles of merit and fitness" set forth in 5 U.S.C. 2301, "\* \* \* including the principles of \* \* \* equal pay for equal work." Inasmuch as the merit system principle

of "equal pay for equal work" further requires that equal pay should be provided for work of equal value, "*with appropriate consideration of both national and local rates paid by employers in the private sector and appropriate incentives and recognition \* \* \* provided for excellence in performance* [italics added] \* \* \*", managing pay using either or both market and/or performance-based control points makes sound business management sense and is consistent with statutory requirements.

Another key requirement of NSPS is that it be "flexible and contemporary." While compensation structures prior to the 1980's were primarily aligned to highly structured classification systems, the need to compete for talented employees who possess the knowledge, skills, abilities and/or competencies associated with 21st century technologies and industries essential to the DoD national security mission requires a shift in emphasis to a market-sensitive compensation strategy in order to respond to quickly changing labor markets. Therefore, NSPS regulations governing control points allow management to consider and balance a variety of factors, in addition to performance, in determining rates of pay and salary progression through a pay band.

Control points represent one tool that can be used to manage employees' progression through the bands and can help ensure that only the highest performers move to the upper range of a pay band. Control points also allow management to account for variances in position responsibilities within a pay band. This allows the Department to set pay more consistently with the labor market and to be more effective in attracting and retaining top performers. In fact, several of the DoD demonstration projects have successfully used control points in their pay-for-performance systems.

Sometimes, higher parts of a pay band are reserved for the highest of performers; at other times, parts of the pay band are reserved for work or skill combinations not easily acquired for which the labor market pays a higher rate of pay and which management has identified as being important to organizational performance. Therefore, for pay progression to occur beyond an established control point, the employee must meet certain criteria, such as specific work assignments, acquisition of particular competencies, and/or a rating of record at a particular level. With one exception, the restriction on receiving pay increases once a control point is reached is no different from the

restriction on increases in basic pay a General Schedule employee experiences once he or she reaches the maximum step of his or her grade. The one exception to this analogy is that the General Schedule employee must be promoted in order to pass the step 10 or maximum rate of the pay range for the grade. In contrast, an NSPS employee may move past a control point subject to meeting the criteria associated with passing that control point.

Control points also provide management with the latitude needed to positively impact a variety of pay decisions, such as starting rates, rate ranges, and the size and mix of performance payouts. Control points manage pay progression to reflect duties and responsibilities, labor markets, and/or performance. DoD requires that control points be applied consistently to similar positions in the same pay band and career group within a pay pool.

A commenter noted that "pay bands with control points are the GS scale by another name." Some control points may indeed be similar to the GS grade structure. This may merely reflect a common labor market between the positions assigned those control points and the General Schedule system. As stated earlier, however, there is considerably more room for pay progression within a band than within a GS grade. NSPS employees may move more easily from control point to control point within their assigned band, or other comparable bands. Additionally, unlike the General Schedule employee who reaches the step 10 of his or her GS grade, an employee with a Level 3 or higher rating of record is guaranteed a share of the pay pool and any amount in excess of the control point (or the top of the pay band, if applicable) is paid out as a bonus.

Another individual noted that control points can be a factor in determining whether a performance payout is awarded as a bonus or a base salary increase, which could have the effect of reducing retirement benefits, since bonuses are not counted toward retirement in retirement calculations. As under the General Schedule, performance bonuses under NSPS do not count toward retirement. However, they are a means of recognizing and paying for performance when an employee is not eligible for further increases in pay.

One labor organization representative suggested that control points may delay advancement for employees in one band compared to employees in another band even though both employees perform at the same level. This is true. Under

NSPS, employees performing similar levels of work may be compensated quite differently based on type of work, competencies required, or level of performance. This was also true under the General Schedule. For example, GS-13 pilots at one time received a special rate of pay that was approximately 30 percent higher than the rate GS-13 employees in other occupations received. This difference in rates reflected differences in staffing difficulties and labor markets between different occupations.

Another labor organization representative noted that we state that the Secretary will determine control points when previously this function was delegated to Components. They believe this is an attempt to limit their ability to bargain and take away a flexibility previously delegated by DoD to its own managers. We note that the Secretary is ultimately responsible for decisions involving NSPS, and authority is provided to the Secretary throughout the regulation to make these decisions. However, the day-to-day operation of many features may be delegated to the Components, including determining control points. These delegations will be provided in implementing issuances. Concerns about collective bargaining rights have been addressed under "Collective Bargaining and Labor Relations" located under "Major Issues".

Other commenters suggested that if control points must exist, language should be inserted in the rules to the effect that control points will increase at the same time that rate ranges are adjusted and by an equivalent percentage. However, the basis for decisions driving the establishment of control points may not always mirror adjustments in rate ranges. No change has been made to the regulation in response to these comments. Nevertheless, it should be noted that whether or not control points are adjusted consistent with rate ranges, control points do not bar increases to base salary due to across-the-board NSPS general salary increases under § 9901.323(a)(1).

Another commenter suggested that, because control points are a somewhat foreign concept to most employees and will likely be viewed as incompatible with the pay band concept, additional information about the reasons for and need for control points might be helpful, either in the Supplementary Information for this regulation or the implementing issuances. Consequently, we have taken care to elaborate on responses addressing comments concerning control points and will continue to

examine other means of providing a greater understanding concerning the use of control points.

Finally, another commenter noted that "budget" should be added to the list of factors to consider when establishing a control point and noted that adding this factor is consistent with information provided in the Table of Changes for § 9901.321(c) for the proposed regulation, which listed budget as a factor. In fact, we have determined that a budget or cost factors should absolutely not influence the setting of control points. We have not adopted this suggestion.

#### *B. General Issues*

We received some comments which were not aimed directly at the substance of the proposed regulation but which we felt should be addressed.

One commenter noted that in the **SUPPLEMENTARY INFORMATION** of the proposed regulations (73 FR 29898) we certify, in accordance with the Paperwork Reduction Act of 1995, that this proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Act. The commenter asserted that this is an improper statement since it means that the new NSPS pay pool decisions and with it the monies that the pay pool will be "playing with" and dividing among employees will have no records concerning how the decisions were made. The commenter stated that this is especially worthy of recordkeeping if the Pay Pool Panel makes pay and award decisions that are different from those of the rating official and higher-level reviewer. The commenter said that these records seem extremely necessary since the pay pool is distributing taxpayers' money and because they ensure the application of equal treatment of pay for job performance. Actually, the Paperwork Reduction Act applies to the burden placed on the public by Government agencies in gathering information related to the agencies' missions. It does not pertain to the generation of records within the agency. Rating officials and Pay Pool Panels will, in fact, generate records associated with the rating and pay pool processes.

Another commenter requested that we allow noncompetitive temporary promotions for 180 days instead of 120 days. This comment relates to NSPS staffing provisions which we did not address in the proposed regulation. The original NSPS statute, Public Law 108-136, permitted the Department and OPM to modify certain OPM staffing regulations, including the 120-day limit

on temporary promotions, but the currently governing statute does not.

One commenter expressed concern that the proposed regulation does not include references to applicable 5 CFR regulations, thus requiring users to review and study both the **Federal Register** rules and the 5 CFR regulations to determine which apply to a particular situation. This individual stated that it would be better if the NSPS regulations had the applicable sections from 5 CFR included so that there is a single reference source. In response, we note that the NSPS regulations published in the **Federal Register** are ultimately incorporated into 5 CFR and the section(s) referenced in the **Federal Register** become the 5 CFR reference(s) (e.g., § 9901.101 in the **Federal Register** becomes 5 CFR 9901.101). To the extent that the comment was intended to recommend inclusion of 5 CFR language in lieu of a cross reference when one has been provided, we note that references allow for application of revisions to those sections without change to this regulation in the event the language in the referenced section is modified. Therefore, cross references to 5 CFR sections covering the General Schedule continue to be incorporated in the final rule.

A labor organization representative articulated apprehension with the fact that an employee's performance payout can be provided as a salary increase, a bonus, or a combination of the two, potentially resulting in each person's pay being different and, thereby, greatly multiplying the workload of administrative staffs and the Defense Finance and Accounting Service. The representative stated that previously there were standard pay increments, but now each employee's pay is different, requiring more time to process actions, raising the possibility of more errors, and requiring increased staff to correct the errors, all of which conflicts with DoD's recent staff consolidations and downsizing initiatives to reduce overhead costs. It is true that employees will no longer be paid at fixed step rates but, rather, may have their pay set at numerous points within their pay band rate range as a result of many different decisions based on various factors. To the extent possible, pay actions will be programmed to occur through an automated process. For example, general salary increases and most performance payouts will occur through an automated process. Many other pay decisions, however, will require manual intervention because it is not possible to program the many potential pay-setting variations. With the flexibility of pay banding come the challenge and the

responsibility for setting pay correctly and minimizing errors. However, both sufficient training for all personnel involved in NSPS pay setting and the establishment of adequate review processes prior to finalizing pay actions will create the expertise associated with pay-setting decisions as well as mitigate error rates.

Several comments were received related to various issues involving reassignments and promotions. Several commenters observed that, since many movements that were formerly promotions under the GS system are now processed as reassignments in the NSPS pay banding environment, the financial enticement for taking on a new assignment is not as great as in the past. Another commenter stated that in addition to the higher salary received upon promotion, the promotion itself is a prestigious event, insinuating that the lack of promotion opportunities in a pay-banded system is detrimental to employee self-esteem. One commenter declared that being reassigned instead of promoted is “unfair” and “cheats” those who qualify for higher-level positions. This commenter further believes that this practice discourages employees from accepting an NSPS position and will force young, energetic employees to leave DoD for agencies operating under the old system. Others commented that reassignments and promotions can occur noncompetitively without other employees even being made aware of vacant positions. Some of these commenters asserted that employees would be placed in high-level positions without required knowledge, skills, and abilities simply because they are someone’s close friend. Another employee asked that we change the proposed rules to permit a fair process for notifying employees of promotion opportunities because a model employee might not have a chance to compete because they do not belong to an association, do not participate in community work, or fish with the boss. Still another commenter alleged that the system will effectively eliminate certain groups of employees from obtaining promotions based on the supervisor’s personal feelings toward those people.

By law, and by design, NSPS does not waive, modify, or otherwise affect the public employment principles of merit and fitness set forth in section 2301 of title 5 (merit system principles) or any provision of section 2302 of title 5, relating to prohibited personnel practices. At the same time, NSPS is designed to be a modern, contemporary, flexible, and agile human resources management system to help DoD meet the national security challenges of the

21st century. The NSPS classification system recognizes ranges of difficulty in various organizational and work situations, allowing for natural progression from entry/developmental to journey and expert levels of work, and provides broad-banded pay that offers employees greater advancement opportunities. NSPS pay bands combine a range of work into one discrete pay band level—each individual or single pay band level normally encompasses work formerly performed at one or more GS grade levels. This structure permits employees to move more easily, i.e., be reassigned, between different positions or assignments within their assigned pay band or to positions in comparable pay bands. It also results in fewer “promotions” than under the GS system.

NSPS is a performance-based pay system; the primary method of pay progression with a pay band is the performance payout. Under NSPS, employees have the opportunity, based on performance, to move more rapidly through a salary range than they may have had under a previous system. In many cases, they may have additional earning potential. Additionally, NSPS provides other pay incentives. For example, employees in pay band 1 of the nonsupervisory pay schedules may receive an Accelerated Compensation for Developmental Positions payment as described in § 9901.345. In addition to regular performance payouts, high-performing employees may receive additional performance increases that reward extraordinary individual performance, organizational or team achievement, or for other special circumstances. Employees are also eligible to receive chapter 45 incentive awards. Unlike the GS system, NSPS employees may also receive reassignment base salary increases of up to 5 percent in accordance with the rules at § 9901.353. When employees are promoted to a higher-level pay band, they are entitled to a more significant base salary increase of at least 6 percent and may receive an increase of up to 12 percent, or more, in accordance with the rules at § 9901.354. While many studies have indicated that employees are motivated by more than money to accept challenging work, we think the potential to progress financially in a pay-banded system, without being constrained by a “one-size fits all” design, will be accepted and welcomed by high-performing employees. We acknowledge, however, that this may take some time.

With respect to the comments regarding competitive versus noncompetitive movement, as with the

GS system, many NSPS positions to which employees are reassigned are advertised; however, some are not. As under the GS system, some reassignments are done competitively if the position the employee will be reassigned to ultimately leads to a position in a higher full performance pay band (i.e., a higher-level of work under the NSPS classification architecture). Whether a position is advertised or not, employees who are reassigned to another position must be qualified for the position, unless they are reassigned as a result of reduction in force procedures and qualification requirements are waived.

### *C. Issues by Subpart*

#### *1. Subpart A—General Provisions*

Subpart A defines the roles and general characteristics of the National Security Personnel System (NSPS). This subpart describes who is eligible for coverage under NSPS, identifies the authorities and responsibilities of OPM and DoD for administering and implementing the system, and defines key terms used through the regulation.

#### *Section 9901.101—Purpose*

Section 9901.101 explains the overall purpose of the regulation in 5 CFR part 9901, which is to implement a human resources management system as authorized by section 9902 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008). Section 9901.101 states various guiding principles and key operational characteristics and requirements. It also describes who is eligible for coverage under NSPS, identifies the authorities and responsibilities of OPM and DoD for administering and implementing the system, and defines key terms used throughout the regulation.

Labor organization representatives stated that the process of issuing a regulation prior to any bargaining does not meet the intent of Congress. The law requires DoD to honor collective bargaining obligations prior to any decision to implement NSPS for bargaining unit employees. The law also requires the Department honor national consultation rights under 5 U.S.C. chapter 71 for any proposed rule before it becomes final. Collective bargaining does not occur prior to national consultation and only occurs after the proposed rule becomes final and if a decision is made to implement for bargaining unit employees. DoD and OPM have met the requirements of law and the intent of Congress in issuing these regulations.

Labor organization representatives expressed concern that the requirement in § 9901.101(a) to establish implementing issuances to supplement any matter in the regulation excludes input from the Office of Personnel Management (OPM) and prevents collective bargaining. They also stated that the Department has published these proposed changes without employee involvement or collective bargaining, contrary to the requirement at 9901.101(b) that the system be more “credible and trusted.” We received many comments regarding issues surrounding collective bargaining; we have addressed them more in depth under the “Major Issues” section. DoD is committed to fulfilling its obligation to bargain in good faith on this regulation consistent with Governmentwide labor relations rules under 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902 as amended by NDAA 2008 and section 1106(b) of NDAA 2008. The scope of collective bargaining for this regulation, however, was determined by the statute.

Labor organization representatives expressed concern that the new regulation incorporates content from implementing issuances developed under the 2005 regulations. These commenters felt that incorporation of material from existing issuances into the revised regulation somehow conflicted with Public Law 110–181 (NDAA 2008). Some commenters indicated they believed the implementing issuances themselves were no longer valid due to the passage of that law. While portions of the implementing issuances became invalid due to the passage of Public Law 110–181, the implementing issuances were left largely intact and valid. To the extent the implementing issuances are inconsistent with the requirements of Public Law 110–181, we have not incorporated that material into the revised regulation. Revised implementing issuances were published on June 10, 2008 to implement policy changes and technical corrections, as well as make revisions based on requirements of Public Law 110–181. The authority for these issuances extends from the 2005 regulations, currently still effective where consistent with Public Law 110–181 (see section 1106(b)(3) of Public Law 110–181). Since certain modifications in these issuances impact equity with respect to the treatment of the Department’s employees, we considered the release of the revised issuances crucial. We anticipate that these issuances will need additional revisions once this regulation is finalized and published.

#### *Section 9901.102—Eligibility and Coverage*

Section 9901.102 sets forth general rules regarding employee eligibility and coverage under the various subparts of part 9901. Categories of eligible employees become covered only when the Secretary affirmatively approves coverage. Under this section, the Secretary has the explicit discretion to extend or rescind coverage to the Department’s civilian employees.

Commenters objected to § 9901.102(a), stating that there is no statutory authority in Public Law 110–181 that allows DoD to apply NSPS to employees covered by anything other than the waivable or modifiable chapters of title 5, United States Code. We do not agree. The language at § 9901.102(a)—stating that employees are eligible for coverage “except to the extent specifically prohibited by law”—does not permit the Department to convert to NSPS any employees who cannot legally be covered by NSPS. Section 9901.102(f) describes the special circumstances under which it would be possible for the Secretary to extend NSPS coverage to employees who are not in systems established under the waivable or modifiable title 5 chapters. The Secretary may extend coverage to eligible employees under subparts B through D to the extent those provisions are not in conflict with other statutory requirements. We made no change to the proposed regulations based on these comments.

Several commenters expressed concern that the newly proposed NSPS regulation did not adequately define eligible employee groups for coverage under NSPS. Commenters described §§ 9901.102(a) and 9901.102(f) as inappropriately allowing NSPS to be applied to employees not specifically covered by title 5, including Domestic Dependent Elementary and Secondary Schools (DDESS) personnel. Another commenter stated that personnel not explicitly covered under title 5 had protective rights entitling them to collectively bargain their pay outside the scope of any NSPS statute. We have not modified the proposed regulation because it does not permit the Secretary to convert to NSPS any employee who cannot be legally covered by NSPS. Although title 10 DDESS educators are authorized to negotiate rates of pay, including any rates of pay linked to performance, to the same extent that they could before the enactment of NDAA 2004 as noted in 5 U.S.C. 9902(e)(9) (2008), that does not preclude the Secretary from taking action to

convert them to coverage under NSPS if that is determined to be appropriate.

Commenters requested we amend § 9901.102(b) to conform to 5 U.S.C. chapter 71 requirements to provide advance notice to labor organizations regarding the extension of NSPS coverage to specific categories of employees. Although the proposed regulation was silent on this matter, the Department is committed to meeting its statutory obligations under 5 U.S.C. chapter 71 regarding advanced notice and opportunity to bargain the implementation of any decision to extend NSPS coverage to bargaining unit employees. The absence of a specific reference to chapter 71 language does not relieve the Department of its chapter 71 obligations. For clarification, we have added the following to § 9901.102(b): “The Secretary will notify affected employees and labor organizations in accordance with the requirements of 5 U.S.C. chapter 71 regarding a decision to extend NSPS coverage to any bargaining unit employees.” Any such notices would be provided at the appropriate level of recognition where the collective bargaining relationship exists.

Another commenter remarked that § 9901.102(b) was confusing and that we should rewrite the section to indicate that any category covered under this paragraph must be covered by all the subparts listed to be eligible. Similarly, another commenter stated that we should amend this section by deleting “one or more subparts” from § 9901.102(c) and substituting “subparts B–D”; changing the last sentence of § 9901.102(e) to state “The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application to them of subparts B–D”; and deleting from the first sentence of § 9901.102(f)(1) the words “one or more subparts” and substituting “subparts B–D.” The commenter reasoned that the current proposed language allows employees to be covered by (1) subparts B, C, and D; (2) subparts B and D; (3) subparts C and D; or, (4) subpart D. The commenter asserted that, because no apparent reason exists for this variety of options and the provisions of all of these subparts are related, employees should be covered by all of them or none of them. The law requires coverage by a performance management system that links pay and performance (subpart D); however, the Secretary has statutory discretion to apply the other subparts (B and C) to employees once these employees are covered by the NSPS performance management system. We do not agree and have not changed the

proposed regulation in response to this comment.

Another commenter noted that § 9901.102(e) does not clearly state that the Department is under no obligation to notify a labor organization if the organization is not affected by an NSPS rescission. This section requires notification to labor organizations when an NSPS rescission affects bargaining unit employees. While we agree with this comment, no change to the proposed regulation is necessary.

Commenters stated that we should strike § 9901.102(f), pertaining to the Secretary's authority to make coverage decisions, because the NSPS statute does not grant such authority to the Secretary. This section does not permit the Secretary to convert to NSPS any employees who cannot legally be covered by NSPS. The language at § 9901.102(f) is consistent with law and remains unchanged.

Finally, under § 9901.102(b) we have added a requirement imposed by NDAA 2008 to the end of the first sentence of this paragraph specifying that no more than 100,000 employees per year may be moved into NSPS. Also, in § 9901.102(f)(3), we have added a reference to § 9901.231 and clarified the language found in the proposed regulations.

#### Section 9901.103—Definitions

Section 9901.103 provides definitions of terms used in more than one subpart.

Commenters differed with respect to the degree of specificity in the definitions. Some commenters stated that some of the new or revised definitions are too broad and fail to provide enough detail for important terms. Others considered the definitions misleading because they are too detailed. One commenter recommended reinserting removed definitions, even though the terms and subparts to which these definitions applied have been removed from this regulation. We have not made changes in response to these comments.

A commenter requested that the definition for *appraisal* in § 9901.404 be moved to this section and redefined to say, "Appraisal means a written assessment of an employee's accomplishment of job objectives and contributions." We have not inserted the definition for *appraisal* in this section because the term is not used outside of subpart D. We have also not changed the definition of this term in § 9901.404 in response to this comment.

Commenters expressed concern over the lack of consideration for earning potential in the definition of *comparable pay band* or *comparable*

*level of work* as it applies to classification. The definition is consistent with the NSPS classification structure. Comparable pay bands mean a comparable level of work without regard to the earning potential of the bands because labor markets may drive different salary ranges for different pay schedules due to differences in types of work vs. level of work. We have not revised this definition in response to these comments.

Similarly, one commenter objected to the terms *higher level of work* and *lower level of work* as they relate to movement to an NSPS position from a non-NSPS (e.g., GS) position. The commenter stated that it was inappropriate to apply the broad classification criteria associated with a pay banding system with more narrowly defined non-NSPS classification criteria. The commenter pointed out that each NSPS position does have a specific level of difficulty, complexity of duties, and independence; therefore, it is more appropriate (albeit impractical) to consider these factors in light of the GS classification standards in order to determine whether they constitute a higher or lower level of work. For example, since a GS-9 position is not comparable in terms of job complexity or qualifications needed, movement to a YA-2 position that was formerly classified to a GS-13 should be considered a higher level of work, and promotion rules should apply. This view is completely contrary to the flexibility we have designed into NSPS and would have the effect of continuing to bind us to the GS or other more restrictive systems. Therefore, we have not revised our definition of these terms. However, for clarity, we modified the last sentence of the definition of these terms, as well as the last sentence of the definition of *comparable level of work*, to say, "When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a [higher, lower, comparable] level of work than the grade or level of the non-NSPS position based on application of the NSPS classification structure as described in implementing issuances."

One commenter suggested that the word "behaviors" be deleted from the definition of *competencies* because this term relates to skills, not behaviors. Another commenter also asked us to revise this term stating that "competency" means capability, not behavior. According to OPM's Delegated Examining Operations Handbook, a competency is a "measurable pattern of knowledge, skill, abilities, behaviors, and other characteristics that an individual needs to perform work roles

or occupational functions successfully." The definition in § 9901.103 is an adaptation of OPM's definition; therefore, we have not revised this definition in response to the comment.

Another commenter stated that the term *contribution* is vague and unnecessary because it is duplicative of the concept of "accomplishment of assigned work." The commenter also said that the phrase "or group of employees," which appears within the definition, is improper because performance evaluation properly concerns only an individual's performance, not a group's performance. An employee's contribution may go well beyond accomplishing assigned work. The employee may add value to the finished product by performing a task exceptionally well or by moving beyond assigned work to produce more than is required or expected. Similarly, we consider it appropriate to take into account an employee's role in team contributions when assessing an employee's overall contribution to the organization. As a result, we have not removed the term or revised the definition.

Another commenter asked that we add information to the definition of *Pay Pool Manager* (PPM) to indicate that the payout distribution includes salary increases and bonuses, thereby establishing the agency's approval authority for each type of payment. We agree and have revised this definition accordingly.

Commenters expressed concern over the broad definition of the term *performance*. These commenters stated that *performance* means "effort to accomplish assigned work," and they objected to the references to "demeanor" and "attitude" in the definition of *performance*, saying that these requirements are inappropriate absent a genuine nexus between demeanor and accomplishment of an assignment. These commenters also stated that any "behavior" or lack of "civility" or "respect for others" that has no nexus with accomplishment of work assignment, but is so egregious as to be intolerable in any employee, is a conduct issue, not a performance issue. We note that the attributes causing concern are observable behaviors that affect the accomplishment of assignments, responsibilities, and organizational goals. We believe performance assessments would not be complete without considering employees' behaviors in carrying out work assignments. For example, because customer service is a paramount organizational objective, the manner in which employees treat customers is an

important aspect of overall performance. Employee behaviors can be objectively observed and evaluated against established performance expectations. Under NSPS, supervisors may consider how underlying misconduct negatively impacts the execution of an employee's duties, those of the team, and/or those of the organization to the same extent such matters may be considered under other performance management systems. We have not revised the definition for *performance* in response to these comments.

Commenters also objected to the definition of *unacceptable performance* as being over broad and stating that we should define it as meaning "failure to meet a performance expectation that may affect job retention"—a long-understood meaning of this term. These commenters recommended that, when defining the work assignment, managers should state the extent to which work should be done by a particular method or means, satisfy a particular qualitative or quantitative standard, or be done with a particular demeanor. We have not revised the definition of *unacceptable performance* in response to these comments.

Another commenter requested that the definition of *Performance Review Authority* (PRA) be changed to refer to "official(s)" to better indicate that a PRA can be more than one person. We agree and have modified the definition of PRA to clarify that this entity may be more than one person.

A commenter suggested the elimination of the mandatory use of contributing factors in determining performance ratings. In addition, the use of contributing factors was explained in response to a concern regarding whether the NSPS system is meeting its stated goal of transparency. These specific issues are discussed in the applicable sections of this regulation. Because this term is found in more than one subpart of the regulation, we moved the definition for *contributing factor* from § 9901.304 to § 9901.103 and provided a link to that section.

Other commenters recommended that the role of the Pay Pool Manager in the pay pool panel process be clarified. We did so by amending the definition of *Pay Pool Panel* to clarify the active membership of the Pay Pool Manager on that panel.

A commenter suggested that the definition of *rating of record* in the proposed regulation did not clearly define the term. We clarified the definition of *rating of record* as meaning the final numerical rating and narrative justification associated with a performance appraisal. In addition, we

revised item (2) under the definition of this term to reflect that we are referring to an unacceptable rating "of record."

#### *Section 9901.105—OPM Coordination and Approval*

Section 9901.105 identifies those actions requiring DoD to coordinate with or request approval from OPM prior to promulgating certain implementing issuances and certain other actions related to the ongoing operation of NSPS, where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole.

As described in this section, "coordination" entails (1) providing OPM with an opportunity to review and comment on DoD proposals and to officially concur or nonconcur with all or part of the proposals, (2) taking OPM's views into account, and (3) advising OPM of the final DoD decision, including reasonable advance notice of the decision's effective date.

Many commenters requested we broaden § 9901.105(c) to require OPM approval for any action outlined in §§ 9901.105(a) through (e). By design, and in keeping with the statutory objective of establishing a "flexible" system, these regulations give DoD considerable authority within the regulatory framework. At the same time, OPM continues to have a role in overseeing the civil service system and in advising the President on civil service matters, including matters covered by these regulations. We believe the coordination and approval roles as defined in this section allow OPM full latitude to fulfill its responsibilities. To require OPM approval for every action would undermine the intent to create a flexible system, especially when the action is in response to a time-sensitive national security matter. As a result, we have not revised the language in this section in response to these comments.

Finally, a modification to § 9901.105(b)(9) changes "general salary increases" to "targeted general salary increases" in accordance with revised terminology at § 9901.323(a)(2). This change was made in response to a comment discussed under that section.

#### *Section 9901.106—Relationship to Other Provisions*

Section 9901.106 describes the relationship of the NSPS regulation to other laws and regulations.

Several commenters expressed concern over the use of the term "great deference" in § 9901.106(a)(2), with respect to the DoD and OPM interpretation of this regulation. Commenters suggested that this term

has legal implications and that the degree of deference owed to an agency is determined by a court applying judicial precedents, not an agency's own declaration of the degree of deference that the agency believes it is owed. Commenters also stated that the provisions of this regulation will also be interpreted in light of their consistency with 5 U.S.C. chapter 71. The degree of deference courts afford an agency's interpretation of a statute it administers is well-settled by judicial precedent. Accordingly, we have removed the sentence addressing deference from the proposed regulation.

#### *Section 9901.107—Program Evaluation*

Section 9901.107 prescribes the Secretary's responsibility for evaluating the design and implementation of NSPS.

Many commenters questioned the deletion of the employee representative reference. They expressed concern that not explicitly including employees or employee representatives in the evaluation process excludes those on the ground level from that process. Some commenters expressed concern that, at the least, this omission was symbolic of a decrease in the importance of employee representatives in the evaluation process. One commenter suggested reinsertion of the reference to employee representatives as an explicit recognition of the importance of employee representatives to the evaluation process. The removal of the reference to employee representatives does not diminish their importance to program evaluation; rather, it clarifies that their participation is not a requirement for evaluation of NSPS.

Commenters also declared that Public Law 110–181 requires reviews by the Comptroller General under section 1106(c). We note that the requirements of § 9901.107 are not based on any statutory requirements. This section places a self-evaluation requirement on DoD and does not address third-party evaluations of NSPS, such as evaluations by the Comptroller General. Any obligations that may exist with regard to labor organizations will be honored consistent with 5 U.S.C. chapter 71, 5 U.S.C. 9902, and section 1106(b) of Public Law 110–181. We believe it is a matter of good management that any agency implementing a new human resources management system has a responsibility for evaluating that system so that any problems can be corrected and improvements made. We have made no change to the proposed regulation based on these comments.

One commenter suggested that the evaluation process that has occurred thus far in the life cycle of NSPS has been less than ideal and that evaluation teams do not have the power or the authority to follow up meaningfully on any specific evaluation. To address concern that NSPS regulations can and will be ignored with respect to the implementation of specific features, commenters asked that this section clearly give the NSPS Program Executive Office the responsibility and authority to investigate, analyze, and appropriately report on implementation of NSPS and to follow up, as necessary, to address issues and ensure compliance with the regulation. Another commenter noted the importance of evaluation of compliance and that evaluation of program outcomes cannot be a basis for deciding whether or not to change the regulation unless a proper determination is made as to whether the outcomes are the result of following or not following the requirements of the regulation. The commenter suggested that we add the following language to this section, "Evaluation will seek to determine compliance with and the consistency and fairness of the implementation of the regulations, as well as the effectiveness and employee views of classification, compensation, and performance management practices." The Department's established Human Capital Accountability System includes compliance-oriented reviews at field activities to ensure that personnel actions, decisions, and practices adhere to merit system principles and pertinent regulations, and holds DoD managers and human resource practitioners accountable for their human capital decisions and actions. These reviews include decisions and actions under NSPS as well as other personnel systems covering the non-NSPS workforce. Sharing NSPS-related information gleaned during accountability system reviews with the Program Executive Office makes a separate accountability program or authority unnecessary. Therefore, we have made no change to the proposed regulation in response to comments recommending incorporation of compliance reviews.

## 2. Subpart B—Classification

### General Comments

Subpart B covers classification under the NSPS system. This section waives the current General Schedule classification system for those eligible for NSPS and outlines the new system for classification. The new classification

system supports merit system principles and removes constraints of the narrowly defined grades under the General Schedule classification system.

Some commenters argued that the methodology and procedures for classifying and establishing jobs under the current regulation are ambiguous. Another commenter stated that NSPS lacks clear guidelines and that, in contrast, the GS system had built-in parameters for establishing pay grades using job factors. Some of these commenters suggested that NSPS adhere to the broad parameters established for the General Schedule classification criteria under 5 U.S.C. 5106. These broad parameters applicable to the General Schedule included the requirement that duties and responsibilities of the position, level of difficulty, responsibility and qualification requirements serve as the basis for determining the appropriate class and grade of a position. We agree that the regulation would be the appropriate place to provide a similar level of criteria for NSPS classification determinations. A new paragraph § 9901.201(b) has been added to address the basis for determining appropriate classification under NSPS. The new language reads as follows: "The basis for determining the appropriate classification under NSPS is the primary duties and responsibilities of the position, level of difficulty, occupational qualifications, competency requirements, mission of the organization, and relationship of the position to other positions or organizational levels."

Similar to General Schedule classification and qualification standards, the specific criteria within the broad parameters for NSPS position classification and qualification standards and functional guides are described in an issuance system not incorporated in the Code of Federal Regulations. While some commenters understood that the classification criteria would be further defined and clarified in implementing issuances, they objected to this approach because issuances are not subject to public comment. These commenters suggested that the NSPS classification program is less transparent and credible as a result. The same commenters tended to uphold the General Schedule classification system as a more transparent and credible system. Nevertheless, the NSPS classification system is modeled in transparency after the General Schedule. Neither the GS nor the NSPS classification system publishes classification criteria through the **Federal Register** process. As a result,

agencies can respond more quickly to evolving mission, technologies, and work methods applicable to Federal service occupations. The **Federal Register** process, including the public comment period, slows the ability of the agency to establish and implement classification standards in a timely manner. For this reason, both DoD and OPM opt to use other methods to engage stakeholders and solicit the input of the agency and professional and employee organizations. Once classification criteria are established, both the NSPS and GS systems provide transparency by making criteria available to the DoD population and the public sector at large via the Internet and the agency issuance system. Those classification standards established for NSPS can be found on the NSPS Web site at <http://www.cpmis.osd.mil/nsps> as well as at numerous other agency Web sites as well as through DoD civilian personnel offices.

Many commenters expressed the desire to include OPM in every phase of organization-wide classification changes. Their suggestions about OPM's role varied considerably, however, from wanting OPM to approve or disapprove any classification action taken by the Secretary to wanting OPM to approve all establishments of and alterations to classification standards. The regulation, which defines OPM's institutional role in the process in §§ 9901.105(b)(3) and (4), does provide for OPM coordination on NSPS classification standards. This coordination role enables OPM to meet its institutional role in the Federal Government at large. Requiring OPM approval, however, would unnecessarily restrict the ability of the Secretary to respond to unique national security requirements. Therefore, no change has been made to the proposed regulation in response to these comments.

Some commenters requested that the assignment of positions to career groups, pay schedules, and pay bands be open to the collective bargaining process as well as the classification appeals process. Collective bargaining under NSPS is governed by 5 U.S.C. chapter 71, 5 U.S.C. 9902, and section 1106(b) of NDAA 2008. DoD is committed to fulfilling any obligation to bargain in good faith on negotiable conditions of employment related to these regulations, consistent with those laws. We note that policies, practices, and matters involving assignment of positions to career groups, pay schedules and pay bands generally relate to classification of positions. To the extent that proposals related to career groups, pay schedules and pay bands involve negotiable conditions of

employment, the Department will satisfy its collective bargaining obligations.

#### Comments on Specific Sections of Subpart B

##### *Section 9901.201—Purpose*

Section 9901.201 explains the purpose of subpart B, which establishes a classification structure and rules for covered DoD positions and employees.

One commenter suggested that a machinist on the east coast should be paid the same as a machinist on the east [sic] coast and that we should remove all local market supplements (LMS) and simply pay people for the work they do. While machinists are excluded by this regulation, the commenter appears to perceive that the LMS is in conflict with the stated requirement to comply with merit principles in this section. Specifically, this section requires that the NSPS classification structure and rules in title 5, U.S. Code, are “in accordance with the merit principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.” First, we note that standard local market supplements under § 9901.323 are administered in the same manner and amount as locality pay for General Schedule employees under 5 U.S.C. 5304. Whether the same or different, however, local market supplements are in harmony rather than in conflict with the merit principle of “equal pay for equal work” in that they implement that part of the merit principle that states that pay will be set in accordance with “\* \* \* appropriate consideration of national and local rates paid by employers in the private sector, \* \* \*”. Therefore, no changes have been made to the proposed regulation in response to this comment.

##### *Section 9901.203—Waivers*

Section 9901.203 of the regulations specifies the provisions of title 5, U.S. Code, that are waived for employees covered by the NSPS classification system established under subpart B. As specified in § 9901.203(a), the waivers apply when a category of DoD employees is covered by a classification system established under this subpart, except with respect to OPM’s authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions, under § 9901.106 and § 9901.222(d).

Some commenters objected to the waiver of chapter 51 classification provisions and the substitution of language that the commenters argued is vague and does not contain clear standards. DoD is committed to implementing an easily understood and applied NSPS classification system across DoD. The waiver of chapter 51 was necessary to create a performance-based pay system, and provide the framework for an agile and responsive workforce. We do not believe that the waiver of chapter 51 provisions inhibits understanding or clarity of the NSPS classification process. In fact, to the contrary, the waiver of chapter 51 permits simplification of the more complex classification determination process designed under the General Schedule. While the regulation itself does not prescribe the specific criteria to be used in classifying NSPS positions, specificity is achieved in this system through issuances of position classification standards and functional guides. As stated earlier under subpart B general comments, we have added a new paragraph to § 9901.201 to address these criteria under NSPS. Section 9901.201(b) provides the basis for classification under NSPS. The basis for classification under NSPS takes into account information about the duties and responsibilities of the position, the level of difficulty, occupational qualifications, competency requirements, mission of the organization, and relationship to other positions or organizational levels.

##### *Section 9901.204—Definitions*

This subpart defines the key components and terms used in the NSPS classification system.

One commenter requested that a definition for “effective date” be added to this section. Because the meaning of the term “effective date” can vary depending on the context in which it is being used and can refer to different timing requirements when used in different parts of the regulations, we have not modified the term under this section. Instead, the regulation has been modified under § 9901.221 to add clarity where the term “effective date” is used and remove confusion concerning which types of actions pertain to this term under that section.

##### *Section 9901.211—Career Groups*

Section 9901.211 gives DoD the authority to establish career groups. Many comments raised in response to this section are similar to those raised in other sections (e.g., desire to bargain collectively over classification criteria)

and are therefore addressed under the *General Comments* section.

##### *Section 9901.212—Pay Schedules and Pay Bands*

Section 9901.212 provides DoD with the authority to establish pay schedules within each career group, as well as pay bands within each pay schedule. One commenter noted that the pay bands, as defined in this section, are simple to understand. Another commenter expressed concern that the discretion to establish more than one pay schedule for “similar” career groups was contrary to the merit system principle of “equal pay for equal work.” Career groups, as a rule, are not similar; rather they represent different types and categories of work or functions. We can only assume that the commenter’s concern is that the ability to define different pay schedules for similar levels of work in different career groups may be inconsistent with merit principles. NSPS recognizes that different occupations may be subject to different labor markets resulting in different pay levels for the same level of work.

Contrary to the commenter’s concern, establishment of different pay schedules reflecting appropriate labor markets is very much consistent with the merit system principle of “equal pay for equal work.” That principle specifically states that “equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.” Therefore the merit system principle of “equal pay” requires consideration of pay based upon: (1) Alignment and grouping of similar positions inside the organization; (2) the rates paid by the private sector; and (3) performance.

Another commenter suggested that the Secretary be required to receive OPM approval/concurrence when establishing NSPS qualification standards, rather than simply coordinating with OPM. The purpose of the coordination role with OPM is to enable OPM to meet its institutional role in the Federal Government-at-large and advise agencies of potential issues. Requiring OPM approval, however, would unnecessarily restrict the ability of the Secretary to timely respond to unique national security requirements. Consequently, no change has been made to the rule in response to these comments.

Additional comments raised in response to this section (e.g., recommendation to provide collective bargaining over matters covered by this

section) are similar to those raised for other sections of subpart B and are therefore addressed under the *General Comments* section dealing with subpart B.

#### *Section 9901.221—Classification Requirements*

Section 9901.221 requires that DoD establish a method for describing jobs and documenting those descriptions. DoD will establish, through issuances, criteria and procedures for assigning each job to an occupational series, career group, pay schedule, and band, and will classify each job accordingly.

Some commenters requested further specificity about the roles in the classification process. In particular, some commenters requested that the person responsible for advising the employee of a personnel action be explicitly mentioned. The proposed regulation is intentionally broad in this regard. The regulation recognizes that DoD agencies and components may choose different parties to be responsible for notification requirements within their organizations. Consequently, more specific information will be made available through Component-level implementing issuances and guidance. No change has been made to this part of the proposed regulation in response to these comments in order to preserve discretion for DoD Components to assign work in a manner that can be tailored to their organization's structures, mission, and management philosophies.

One commenter said that managers might wait too long past the effective date to file a personnel action, thus disqualifying an employee from receiving retroactive pay. Another commenter said that the seven-day notification period before a personnel action is too short. These comments reflect a misunderstanding of the effective date upon which the employee filing time begins. For purposes of preserving retroactive benefits, the employee filing time for a classification appeal does not begin until the effective date of the personnel action implementing the reclassification of an employee's position. Consequently, a manager cannot "manipulate" the timing of the effective dates of classification and personnel actions to prevent an employee from meeting a classification appeal filing timeline.

*Example:* A classification action reducing a position's pay band is signed on May 3rd. The personnel action (typically Standard Form 50) must be signed within 4 pay periods (typically 8 weeks) of May 3rd. For this example,

the Notification of Personnel Action (SF 50) effecting the personnel action is effective on June 10th. The employee must be notified no later than June 3rd ("at least 7 days before" the SF-50 is effective). If the employee files a classification appeal within 15 calendar days of the SF-50's date (no later than June 25), the employee preserves entitlement to retroactive action if the classification decision is overturned on appeal. If the employee files a classification appeal after 15 days of the effective date on the SF-50, the employee is not eligible for retroactive benefits. Because many of the comments reflected confusion over whether the employee's 15-day filing period to preserve retroactive benefits begins on the effective date of the classification action or the date of the personnel action, the proposed regulation has been modified to clarify that the 15-day filing period begins on the effective date of the personnel action.

Additionally, § 9901.221(d) and (e) have been reversed in order to help facilitate an understanding of employee filing timelines to preserve retroactive benefits upon appeal. The filing time period, which is the same as that allotted under GS and FWS, has proven sufficient under normal circumstances for an employee to register a classification issue. Therefore, no change was made to the proposed regulation regarding the filing timeline.

Another commenter stated that classification decisions that reduce an employee's pay should never be retroactive. We concur. There are no provisions under NSPS allowing a retroactive reduction in an employee's pay band or adjusted salary. The regulation states that a retroactive effective date for a classification action and the implementing personnel action is permitted only if the action resulted in a reduction in pay band or adjusted salary and if that action is subsequently reversed on appeal.

Several commenters suggested that the effective date of a classification action that increases or invalidates a reduction of an employee's pay and that follows an employee's formal raising of appeal of the matter to DoD or OPM should be retroactive to the later of (1) the date on which the employee first performed the work that is the subject of the action or (2) 30 calendar days before the date on which the employee first formally raised or appealed the matter. This recommendation, however, would prevent management from pursuing options that would result in more efficient position management in cases where an employee had not previously been downgraded. For

position management purposes, management must retain discretion to remove higher-level work, once identified, and assign that work to employees already classified at the higher level.

#### *Section 9901.222—Review of Classification Decisions*

Section 9901.222 of the proposed regulations provides employees the right to request that DoD or OPM reconsider the classification of their official position of record, including the pay system, career group, occupational series, pay schedule, or pay band. Commenters suggested that § 9901.222 be amended to include a procedure for appealing classification standards. One association argued that optometrists should be in the Medical Career Group and in pay band 3, suggesting that the classification standard and description of duties and requirements are based on 40-year-old information that does not reflect the changes to the profession since then. The association argued that the lack of an appeal right denies optometrists and others their inherent right to a day in court regardless of the merits of their case. All NSPS employees, including optometrists, have the right to appeal the career group and pay band to which they have been assigned. As under the General Schedule, classification criteria are not subject to appeal. We have modified the proposed regulation to further clarify this point in response to such comments.

Commenters asked for greater specificity in the language appearing in this section. One commenter noted that, while § 9901.222(b) says an employee may not appeal classification of a position to which an employee has been detailed or temporarily promoted, it does not specifically mention temporarily reassigned positions. We have amended the proposed regulation to include temporarily reassigned positions in § 9901.222(b). A commenter also noted that some temporary promotions and positions can extend for longer periods of time than considered in the regulation. The commenter suggested amending the proposed regulation to allow for appeal for employees assigned to temporary positions extending longer than two years. To ensure that NSPS employees have similar rights to employees covered by OPM and DoD appeal regulations, we have amended the proposed regulation to allow classification appeals in situations where employees have been temporarily promoted for two years or more.

Another commenter noted that the last sentence of the paragraph describing who receives an appeal in § 9901.222(c) is unclear. As indicated in § 9901.222(a), an employee may appeal to either DoD or OPM, who will receive the appeal in accordance with § 9901.223 or § 9901.224, respectively.

Commenters expressed concern that the pay bands of positions that have been established in NSPS during the conversion process are not currently open to appeal, even though the pay band classification of individual positions is open to such consideration. Commenters claimed that this difference means that employees whose positions and job descriptions were placed in lower pay bands cannot seek reconsideration. However, employees converted into NSPS were placed in pay bands that correlated with the GS grade of the position to which they were assigned prior to conversion. Consequently, there is no reduction in pay band upon conversion. Employees who believe they were converted to the wrong pay band may appeal their classification at any time. Because employees were converted to NSPS without a loss of pay and based on their GS classification at the time of conversion and not that of a lower grade, there is no basis for retroactive benefits. We have elected not to change the proposed regulation in response to these comments.

Finally, commenters suggested deleting § 9901.222(c) in its entirety, citing the potential for conflict between the NSPS regulation and local bargaining agreements in accordance with NDAA 2008. Some commenters saw the new process outlined in this section as superfluous because it and the local bargaining process are similar and have overlapping steps. Commenters also suggested that the accuracy of position descriptions was not a classification issue. One commenter cited *Veterans Administration and AFGE Local 2880*, 16 FLRA 50 (1984) as a reference. Many commenters deem the process as open to arbitration, suggesting that attempting resolution through the NSPS process is restrictive and inefficient. In response to these comments, § 9901.222(c) was modified to reflect that the employee may raise the issue of accuracy of a position description informally with the employee's supervisor or file a grievance using the applicable administrative or negotiated grievance procedure.

#### *Section 9901.223—DoD Classification Appeals*

Several commenters suggested that the reasons listed in §§ 9901.223(a)(2) and 9901.223(a)(3) for disallowing an employee representative (because the employee's duties are deemed priority work of the Government, or the employee's release would give rise to unreasonable costs) did not sufficiently protect the employee. The commenters expressed concern that the guidelines were insufficient justification to bar an employee representative from participating in the appeals process. These commenters believed employees should have the representative of their own choosing without regard to cost, availability, or impact on mission. The criteria by which management can disallow participation of a particular employee representative under this section are standard across the Government and necessary to the conduct of mission. No change was made to the proposed regulation in response to these comments.

Many commenters found confusing and complicating the requirement in § 9901.223(b)(1) that employees formally raise concerns about their classification to the immediate supervisor prior to filing an appeal. They expressed concern that the supervisory review might overlap with the employee's 15-day filing timeline and cause the employee to lose eligibility for retroactive benefits. Some commenters also expressed concern about what process would be followed in the event a supervisor did not respond to such an issue raised by an employee. In response to these comments, we modified § 9901.223 of the proposed regulation to remove the requirement that a classification concern must first be raised with an employee's immediate supervisor.

Commenters requested an alignment of the timeline given to the employee to preserve retroactive benefits with that given to the manager for response to a classification issue presented by an employee under § 9901.223(b)(1). As we have modified § 9901.223(b)(1), the 30-calendar-day response time for supervisors is no longer required, unless the employee chooses to use this step in the process. However, we note that, while the filing timeline to preserve retroactive benefits is 15 days from the *effective date* of the personnel action implementing the classification decision, the employee's timeline is at least 21 days from the notification of a personnel action. Pursuant to § 9901.221(d), employees must be notified in writing of the effective date

of a personnel action implementing the classification decision resulting in a reduction in pay band or adjusted salary. This notice must be provided at least seven days before the personnel action is taken and provide the employee with information on their right to appeal the classification decision and the time limits for so doing. Consequently, each employee will have seven or more days of awareness of a pending personnel action and the consequent appeal rights before the 15-day filing period to preserve retroactive benefits begins. Another commenter stated that § 9901.223(b) puts the supervisor in the role of human resources officer and that the supervisor may not have the qualifications for this role. We have not made any changes to the proposed regulation in response to this comment. Supervisors and managers are assisted in this role by their human resources office. The human resources office is responsible for providing advice and expertise to supervisors and managers throughout the classification appeals process. Additionally, we are confident that supervisors are well-qualified to respond to classification appeals due to their familiarity with the jobs and the simplified classification structure and criteria established under NSPS. Commenters suggested that the timeline in § 9901.223(b)(3) to challenge a classification decision be changed from 15 days after a classification action takes effect to 15 days after an employee has been notified of a personnel action. This change would allow the employee to avoid situations where a personnel action is taken on a classification matter with an effective date up to four pay periods prior to notice of the personnel action. The commenter expressed concern that such a situation would always put the employee outside the 15-day period to file an appeal after the effective date of a reclassification. Further, the commenter stated that the employee would have to request an extension under § 9901.223(b)(3) or lose the opportunity to appeal. We have concluded that the wording of the proposed regulation was unclear as to whether the "effective date" starting the 15-day filing time period was that of the position classification action or the personnel action implementing that action. Therefore, §§ 9901.221(e)(2) and 9901.223(b)(2) were revised to clarify that the 15-day filing timeline for employee classification appeals begins with the effective date of the "personnel action." We did not modify the proposed regulation to reflect the recommendation to begin the 15-day

period on the date of notification of the personnel action because this change would shorten the time period for employee appeal. Nevertheless, we have also modified the proposed regulation to provide the deciding official the authority to grant an extension of the filing timeline when an employee shows that he or she did not receive notice of the personnel action.

Several commenters objected to the requirement that an employee provide such personal information as name, mailing address, office telephone and fax numbers, name of the employee's Component and exact location of the employee's position within the Component upon submission of a classification appeal. These commenters preferred that the agency be held accountable for providing that information. Such information is standard to filing an employee classification appeal in the Federal Government. For example, OPM requires the same information in the filing of classification appeals under 5 CFR part 511. The data provided ensures that adequate information is available to act on the employee's request and thereby protects the employee's interests. Consequently, no action was taken in response to these comments. Another commenter suggested that two additional pieces of information be required of the employee in submitting a classification appeal. These additional documents included the current position description and the latest evaluation statement for the position, if available. Another commenter requested that the rule specify that the organization will provide these materials to the employee, due to their importance to the future of the appeal. No change was made based on these comments. Such documents are typically provided by the servicing human resources office.

Commenters also recommended that the proposed regulation be modified to disallow cancellation under the events outlined in § 9901.223(d)(2) when there may be an entitlement to retroactive benefits. We have modified the proposed regulation to accept this recommendation.

Some commenters interpreted § 9901.223(d) as restricting the employee's right to resolve classification grievances. They suggested adding these cancellation provisions to the collective bargaining process, thus not interfering with the employee's right to appeal by any avenue. No change was made to the proposed regulation in response to these comments. As previously stated, DoD is committed to fulfilling its obligation to bargain in good faith on negotiable

conditions of employment related to these regulations consistent with 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902 and section 1106(b) of NDAA 2008.

#### *Section 9901.224—Appeal to OPM for Review of Classification Decisions*

This section outlines the right to and process for appealing classification decisions to OPM.

One commenter expressed concern that this section would limit the appeal of adverse actions, excluding them from the MSPB. The section specifically addresses the employee's right to appeal a classification decision and does not concern or impact appeals of adverse actions to the MSPB. It should be emphasized that § 9901.224(d), which states that "OPM's final determination on an appeal made under this section is not subject to further review or appeal" mirrors the language in title 5 CFR 555.612, which states that "[a]n appellate decision made by the Office is final unless reconsidered by the Office. There is no further right of appeal." The MSPB has no jurisdiction to review classification decisions made by an agency. This regulation neither limits appeals of adverse actions to the MSPB, nor does it confer jurisdiction on the MSPB to adjudicate disputes regarding classification decisions. We have not made any changes to the proposed regulation in response to this comment.

#### *Section 9901.231—Conversion of Positions and Employees to the NSPS Classification System*

Section 9901.231 of the regulations addresses the conversion of positions to the classification system established under this subpart.

Commenters requested clarification regarding § 9901.231(b). In particular, commenters wondered whether the work level conversion tables used to place an employee in a pay band would be based on an employee's actual level of work or the work as described in the employee's position description, arguing that the work level conversion tables only consider positions that are properly classified under the OPM classification structure. No change has been made to the proposed regulation in response to this comment. Conversion tables are not published in this regulation. However, we note that classification of an employee's position upon conversion to NSPS is based on the employee's official position of record, and that it is assumed the employee's position is properly classified under the OPM or applicable classification structure. Some commenters expressed confusion

regarding the issue of temporary promotions as they relate to conversion, questioning whether or not the temporary position would be terminated prior to conversion and whether or not the employee would return to the temporary position after conversion (with pay adjustment). As explained in § 9901.231(c), an employee on a temporary promotion at the time of conversion into NSPS will be returned to his or her official position of record prior to processing the conversion. After the employee is converted to NSPS, a determination will be made as to whether there is still need for the temporary position. If so, that position will be properly classified according to NSPS classification criteria. Because NSPS bands are broader than General Schedule grades, it is possible that the position may be classified into the band to which the employee is assigned. Section 9901.371(k) of this regulation provides authority for the organization to set pay immediately after conversion if the employee is temporarily assigned back to the position to which he or she was temporarily promoted before converting to NSPS. That section permits temporary placement and pay subject to the same terms and conditions as the initial temporary promotion.

One commenter requested that § 9901.231(d) be changed to protect grade retention for converting employees. No change was made to the proposed regulation in response to this comment. NSPS does not provide for General Schedule or other pay plan grade retention upon conversion. If a converting employee's base salary exceeds that of the assigned NSPS pay band, the employee will receive pay retention. If an employee has a preexisting entitlement to pay retention under 5 CFR part 536 immediately before becoming covered by NSPS, consistent with § 9901.356(m), he or she will be entitled to a retained rate of pay without regard to the 104-week pay retention limit.

### **3. Subpart C—Pay and Pay Administration**

#### **Overview of Comments**

Subpart C contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902 (subject to the limitations on waivers in § 9901.303). Additionally, this subpart sets forth the rules for performance-

based pay, premium pay, and pay upon conversion into NSPS, as well as procedures for movement or conversion out of NSPS. By far, the largest number of individuals and labor organizations submitting comments focused on changes to this subpart of the proposed rule. Of the total comment submissions, approximately 80 percent touched on at least one aspect of pay and pay administration. General issues raised by commenters included concerns that the rule would permit favoritism and bias when determining performance payouts, mistrust of the pay pool administration process (especially as regards the highest-level reviewers), dissatisfaction with the use of control points within bands, concerns about the impact of bonuses on retirement, concerns about perceived infringements on collective bargaining rights, and perceptions of unfairness in terms of salary increases as compared to the GS system. Of those commenters dissatisfied with NSPS, many drew direct comparisons between the GS and NSPS systems, indicating a preference for the GS system. These commenters looked for consistency and comparability between the two systems in all areas, not just those prescribed by the NDAA. Commenters stated the concern that they would lose pay comparability with DoD employees remaining under the General Schedule and with employees in other Federal agencies. Also, many commenters argued that employees should receive 100 percent of the pay increases they would have received under the General Schedule in the form of across-the-board increases (not the minimum NSPS across-the-board increase of 60 percent of the Governmentwide GS pay increase with the balance being applied to performance-based payouts). Some commenters stated that the Department should disband NSPS altogether and return to the General Schedule classification and pay system.

We have addressed the questions concerning fairness of performance payouts and administration of the pay pool in "Performance and Pay Pool Management" under "Major Issues." Similarly, comments concerning control points have also been addressed under "Control Points" and concerns about collective bargaining rights have been addressed in "Collective Bargaining and Labor Relations" located under "Major Issues." The remaining concerns have been addressed under the various sections of this subpart. As a general statement in response to preferences expressed for the General Schedule, we believe that NSPS improves on the General Schedule by providing the

opportunity to appropriately reward top performers and/or compensate them in relation to their labor market value and performance.

The proposed regulation provides that the overall amount allocated for compensation of the DoD civilian employees included in NSPS may not be less than the amount that would have been allocated for compensation if they had not been converted to NSPS. Because NSPS takes the same amount of money paid out under the General Schedule and redistributes based on different factors (e.g., performance vs. seniority), it is possible that some employees may not do as well as they did under the General Schedule. At the same time, many other employees will do better under NSPS than they would have under the General Schedule. Overall, the payouts for NSPS employees under NSPS during the past 2 years of implementation have proven to compare favorably to the General Schedule. The changes made in the proposed regulation improve NSPS by clarifying aspects of system implementation while ensuring that important safeguards are in place to protect employee rights and uphold merit system principles.

The revised system is consistent both with the requirements of the National Defense Authorization Act (NDAA) 2008 and with the statutory requirement that the Department establish a "pay-for-performance" system that better links individual pay to performance. (See 5 U.S.C. 9902(b)(7)(I).) Furthermore, we believe Congress and the American public expect their public employees to be paid according to how well they perform, rather than how long they have been on the job. They also expect the Department to maximize its efforts to recruit and retain the most talented and motivated workforce to accomplish its critical national defense mission.

Comments related to specific sections of subpart C are described in the following sections.

#### General

##### Section 9901.302—Coverage

Section 9901.302 lists eligible DoD employees and positions, subject to a determination by the Secretary under § 9901.102(b).

A few commenters suggested extending coverage to Federal Wage System (FWS) prevailing rate employees, and several commenters questioned the authority of the Secretary to designate additional groups to be covered under NSPS. We have not revised this section in response to these

comments. NDAA 2008 specifically excluded FWS employees from NSPS and, except for those employees excluded by law, the Secretary has the discretion to extend coverage to eligible employees and categories of positions.

##### Section 9901.304—Definitions

This section provides definitions of terms used throughout the subpart.

Commenters objected to the definitions of *contribution*, *contribution assessment*, *performance share*, *sub pay pool*, and *unacceptable performance*. They felt the definitions are vague, improper, inaccurate, unnecessary and, in the case of the last term, contradictory to long understood interpretations of unacceptable performance. We have not revised these definitions in response to the comments because they accurately reflect the meaning of the terms as used in the regulation.

One labor organization representative recommended that definitions of *local market* and *labor market conditions* be included in this section. Inasmuch as these terms have generally accepted meanings and there is nothing particularly unique in the use of these terms in this regulation, definitions have not been added for these terms. We note, however, that generally *labor market* means the market in which workers compete for jobs and employers compete for workers, as defined by (1) the geographic parameter of a job search; (2) education and/or technical background sought; (3) experience required by the job; (4) licensing or certification requirements; (5) occupational membership; (6) level of work to be performed; and (7) industry in which employers compete for the same skills. The term *labor market conditions* generally means the availability and cost of labor in a given market and the factors/forces impacting the availability and cost of labor.

Another commenter recommended that either the YA-2 pay band maximum rate of pay be amended to match that of pay band YC-2, which establishes consistency between the maximum rates for YA and YC, or that the definition of *comparable pay band* or *comparable level of work* exclude those bands where there are differences in the maximum base salary rates. We have not made any change based on this comment. Structural adjustments to pay bands are made to reflect the overall market value of the level and type of work encompassed by that band. Levels of work can be comparable whether or not the pay range (minimum and/or maximum rates) remains the same. Additional discussion regarding the

terms *comparable pay band* and *comparable level of work* may be found at § 9901.103 in response to comments about these terms.

Finally, because the term is found in more than one subpart, we moved the definition of *contributing factor* from this section to § 9901.103 and provided a link to that section.

#### *Section 9901.305—Rate of Pay*

Section 9901.305 defines the term *rate of pay* and provides an explanation of what it means to establish and adjust a rate of pay in the context of 5 U.S.C. 9902(e)(9). Under that section of law, “any rate of pay established or adjusted in accordance with [5 U.S.C. 9902] shall be non-negotiable, but shall be subject to procedures and appropriate arrangements of [5 U.S.C. 7106(b)(2)–(3)].”

Representatives from several labor organizations commented that the proposed rule appears far too specific, in effect broadening the definition of rate of pay to narrow the scope of bargaining. The labor organization representatives contend that, while NDAA 2008 restored collective bargaining rights to DoD employees, this broader definition of “rate of pay” contradicts the intent of Congress. The proposed regulation language does not and cannot take away collective bargaining rights regarding “procedures and appropriate arrangements” and DoD is committed to fulfilling its obligation to bargain in good faith on these NSPS regulations consistent with Governmentwide labor relations rules under 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902 and section 1106(b) of NDAA 2008. The term “rate of pay” is undefined in statute. Although it is used frequently in connection with various aspects of title 5, it does not mean the same thing in every place it appears. We believe it is important to clarify this term and the NSPS statute provides authority to do so. Thus, DoD and OPM proposed a definition to ensure uniformity and consistency for NSPS implementation.

Some labor organizations suggested that all references to “and the conditions defining applicability of each rate” in § 9901.305(a)(2) be deleted from the definition of “rate of pay” suggesting that DoD was trying to evade its legal obligations by broadening the definition and narrowing the scope of collective bargaining. Establishing or adjusting a rate of pay for employees must take into account both the amount of the rate and the required eligibility criteria. Insofar as the term “conditions of applicability” may be misinterpreted, we have removed multiple references to

“conditions of applicability” from this section. Paragraph (b) of § 9901.305 has been revised to instead refer to “eligibility requirements”. Upon request, bargaining of procedures and appropriate arrangements concerning “rate of pay” is required. The definition of “rate of pay” will not preclude employee representatives from negotiating over such matters as procedures for determining order of overtime assignments. Order of overtime assignments involves management’s right to assign work in accordance with 5 U.S.C. 7106(a) and does not concern decisions regarding “rate of pay.” Rate of pay decisions are made separately from overtime assignment decisions. Bargaining over seniority, or other procedures to distribute overtime fairly, is not changed or impacted by this definition of “rate of pay.”

Several commenters suggested that the definition of “rate of pay” include within-grade adjustments, some of which are discretionary, as provided for in § 9901.351(c). Under §§ 9901.351(c) and 9901.371(j), the regulations provide for both mandatory and discretionary salary adjustments for employees moving from GS. These adjustments are based on the amount of time an employee has served in the GS within-grade increase waiting period. The absence of an explicit reference to these pay adjustments does not exempt them from the definition of “rate of pay” under § 9901.305(a). Nevertheless, for clarity purposes, “within-grade increase adjustments” has been added to the examples of rates of pay in § 9901.305(b)(3).

#### *Overview of Pay System*

##### *Section 9901.311—Major Features*

This section of the subpart describes the key structural features of the NSPS pay system.

One labor organization representative questioned § 9901.311(b) which prescribes that the NSPS pay system will include policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322. They indicated that these sections, in fact, merely state that DoD will do these things but do not contain any useful information and do not contain the details that would allow them to comment effectively. They recommend that we delete §§ 9901.321 and 9901.322. We disagree with this comment. As evidenced by the large number of substantive comments we received on these sections, these sections address key features of the

NSPS compensation structure as well as criteria pertaining to these features.

##### *Section 9901.312—Maximum Rate of Base Salary and Adjusted Salary*

This section establishes authority and criteria for limitations on maximum rates of pay for base and adjusted salaries under NSPS.

One commenter suggested that if the Secretary establishes maximum rates of base salary, the statutory comment and review process should begin, followed by collective bargaining. We have not revised this section in response to this comment. A statutory comment and review process is not required for maximum rates of base salary. Such a comment period is not required by law and would unnecessarily delay DoD’s ability to respond to labor market forces. The proposed regulation does require, however, that the Secretary coordinate with OPM prior to the establishment of maximum rates of basic pay. DoD is committed to fulfilling its obligation to bargain in good faith on this regulation consistent with Governmentwide labor relations rules under 5 U.S.C. chapter 71 and the requirements of 5 U.S.C. 9902, as provided for in NDAA 2008.

One commenter suggested that the NSPS proposed regulation needs a provision that allows the maximum of the rate range for physicians and dentists to keep pace with the maximum rates paid to the same occupations in the Veterans Health Administration under title 38, U.S. Code, without large automatic pay increases. Physicians and dentists are not subject to the maximum adjusted salary rate caps described in this section in recognition of salary ranges unique to the physician/dentist labor market, to include rates paid by the Veterans Health Administration under title 38. In the absence of an adjusted salary cap for physicians/dentists, adjusted salary in the proposed regulation is limited only in relation to the aggregate pay cap, which cannot exceed the salary of the President of the United States. Consequently, there is sufficient authority in the proposed regulation to continue to establish salaries for physicians and dentists consistent with title 38 as well as other labor markets without modification to the regulation.

Another commenter asked if the Secretary’s authority to establish higher adjusted salary rates for physicians and dentists applies to researchers or non-medical PhD research scientists. The increased maximum adjusted salary maximums are in recognition of a specific labor market and include those types of health care positions covered by the Veterans Health Administration

under title 38, which does not include researchers or other non-medical scientists.

*Section 9901.313—Aggregate Compensation Limitations*

This section sets forth authority and criteria for aggregate compensation limits.

One commenter suggested removing from the list of compensation types at § 9901.313(b) the following payments: Severance pay under 5 U.S.C. 5595, nonforeign area cost-of-living allowances under 5 U.S.C. 5941(a)(1), and lump-sum payments for accumulated and accrued annual leave on separation under 5 U.S.C. 5551 or 5552. The commenter argued that these payments are not compensation for work performed and therefore should not be included when calculating aggregate compensation limits. The commenter is correct because these specific payments are not subject to the aggregate limitation on pay. However, no change in the proposed regulation is needed because these payments are listed as exclusions in § 9901.313(b)(13).

*Section 9901.314—National Security Compensation Comparability*

Labor organization representatives commented that the proposed regulation does not include any mention of 5 U.S.C. 9902(e)(3), which requires rates of compensation for civilian employees to be adjusted the same as rates for members of the uniformed services. Commenters had objected to this omission in the 2005 regulation and objected again to the omission of this provision in the current proposed regulation. However, because comparability with military pay is already addressed under 5 U.S.C. 9902(e)(3) and requires no further elaboration to implement, there is no need to address it again in this regulation.

One commenter objected that § 9901.314 fails to mention both the requirement that aggregate compensation be no less than what would have been available had employees not been converted to NSPS through fiscal year 2012 and the requirement that a formula to be developed in years after 2012 for calculating the overall amount to be allocated for compensation of civilian employees included in NSPS. However, § 9901.314(a) and (b) specify these requirements in almost the exact language as that used in NSPS statute. Therefore, no change was made to the proposed regulation in response to this comment.

*Rate Ranges and General Salary Increases*

*Section 9901.321—Structure*

This section describes the Secretary's authority to establish ranges of base salary rates for pay bands.

Numerous comments were received on the control point feature of NSPS. Consequently, a comprehensive response to those comments including background information and the philosophy underlying the establishment and use of control points has been provided under the "Major Issues" section of this Supplementary Information.

*Section 9901.322—Setting and Adjusting Rate Ranges*

This section provides the Secretary with the authority to set and adjust the rate ranges established under § 9901.321; establish the effective date of new or adjusted rate ranges; establish different rate ranges and range adjustments for different pay bands; and adjust the minimum and maximum rates of a pay band by different percentages.

A commenter proposed that we delete "mission requirements" from the list of factors the Secretary may consider in setting and adjusting rate ranges under § 9901.322(a). The commenter stated that this is a vague, undefined concept that is not relevant to the value of work, and pay should be determined according to the value of work. We have not revised this section in response to this comment. While we have not defined the term "mission requirements," it is a frequently used term relating to those factors necessary to accomplish the Department's national security mission. We consider this to be among many relevant and important factors the Department may consider in determining appropriate rate ranges. It is essential that DoD devote its limited financial resources to attracting, recruiting, and retaining employees who possess the knowledge, skills, abilities and/or competencies relevant to its missions. Where market forces drive up the cost of labor in one or many occupations, DoD must have the ability to apply its limited resources to the skills most critical to its mission. For example, there may be a requirement for specific information technology, program management, or acquisition management skills. If those skills are in short supply in the labor market and critical to accomplishment of mission, DoD needs to have the ability to direct its resources to acquiring employees with those skills rather than losing those employees to competitors or adjusting

the pay of skills which they have already competitively priced. It is important to note, however, that the NSPS regulation does not give any one factor greater weight than any other; given the circumstances of a particular year, any factor may have a greater or lesser effect on decisions regarding adjustments in rate ranges. We believe the American public expects DoD to use its resources in the most cost effective manner possible.

One labor organization endorsed this section of the proposed regulation, citing its origins in NDAA 2008 and the requirement that no less than 60 percent of the general pay increase (GPI) go to all employees rated above unacceptable. Another commenter stated that the maximum rate of each pay band should be adjusted by the sum of the amount of the increase applied to the NSPS GPI plus the amount of the GPI applied to the pay pool because, if the pay ranges do not progress by the full amount of the GPI, management will lose the ability to compete with the GS market which is still a very significant competitor with the NSPS labor force. This commenter additionally asserted that continuing to increase the maximum of the pay range helps to reinforce to employees that the main purpose of NSPS is to put emphasis on performance rather than cutting civilian pay. We agree and have revised the language at § 9901.322(e) to add a requirement for the maximum rate of all pay bands to be adjusted by no less than the percentage amount of the General Schedule annual adjustment under 5 U.S.C. 5303. A similar comment was received which stated that we should require control point maximums to be adjusted at the same rate as the GPI; otherwise an employee could be denied a full GPI increase. We note that whether or not a control point is adjusted to reflect the amount of a NSPS across-the-board increase, both the NSPS statute [5 U.S.C. 9902(c)(7)] and the proposed regulation [5 CFR 9901.323(a)(1)] require that each employee eligible for such increase must receive it regardless of pay band control points. Therefore, no adjustment has been made to the proposed regulation in response to this comment.

Other labor organization representatives expressed concern that the ability of DoD to raise the maximum rate of a pay band by an amount different from the minimum rate could allow the Department to benefit a few favorite employees at the top of their band at the expense of other employees in the band. These commenters also believe this section of the proposed regulation offers too much opportunity

for manipulation and inequity. We do not agree. The ability to adjust pay band minimums and maximums is an important flexibility that enables the agency to respond to changing labor markets. These flexibilities include the ability to raise the minimum rate of a pay band while not changing the maximum rate, as well as lowering or raising the maximum of a pay range without adjusting the lower range for the purpose of responding to labor market forces. When adjusting range rates under this authority, the ranges are adjusted worldwide throughout all of NSPS. With an NSPS population currently exceeding 180,000 employees, the sheer volume of employees assigned to any given pay band at any given time negates the ability of targeting range adjustments to a "few favorite employees". Additionally, any adjustments to rate ranges must be coordinated with the OPM.

Another commenter questioned how often the Secretary can make rate range and other adjustments to pay. The proposed regulation generally does not specify when or how often the Secretary can authorize rate range and other adjustments, although it does require the Secretary to review established rate ranges for possible adjustment at least annually and adjust the maximum of each pay band at the time of a general salary increase under § 9901.323(a)(1). With the exception of the requirement to provide employees with ratings above unacceptable an increase of 60 percent of the GPI at the same time that a General Schedule annual adjustment takes effect under 5 U.S.C. 5303, and a requirement to adjust standard local market supplements in the same manner and to the same extent as corresponding locality payments under 5 U.S.C. 5304 and 5304a, the Secretary will make decisions regarding rate range and other adjustments to pay based on many variables, including mission requirements, labor market conditions, costs, pay adjustments received by other employees of other Federal agencies, and any other relevant factors.

One commenter recommended that the proposed regulation include a provision that allows the maximum of the rate range (including any occupational supplements) for physicians and dentists to keep pace with the maximum rates paid to the same occupations in the Veterans Health Administration under title 38, without large automatic pay increases. The commenter argued that the maximum of a range needs to be allowed to go higher without triggering a pay increase. The proposed regulation does not link adjustments in rate ranges

to mandatory increases in base salary. Therefore, an adjustment in the maximum rate of a pay range can be made without triggering a mandatory increase in an employee's base salary. Consequently, no change has been made to the proposed regulation in response to this comment.

#### *Section 9901.323—Eligibility for General Salary Increase*

This section describes the Secretary's authority and limitations on authority to grant both general salary increases and targeted general salary increases, as well as describing some requirements and criteria concerning these increases.

This section generated a large number of comments. Many commenters argued that employees should receive 100 percent of the pay increases they would have received under the General Schedule (not the minimum increase of 60 percent of the GS GPI plus performance-based payouts). Of the commenters who focused on this issue, most expressed the view that the Governmentwide GS GPI was actually a cost-of-living adjustment (COLA), to which all Government employees were entitled. In fact, this view is incorrect; the GS GPI reflects the *cost of labor*. The Federal Employees Pay Comparability Act of 1990 provided two types of annual salary adjustments: an across-the-board increase to the entire General Schedule based on the Employment Cost Index (ECI), and a locality pay increase to the entire General Schedule, in a particular locality area, based on the salaries of non-Federal employees working in that area. The ECI portion is based on an annual comparison of ECI changes as measured by the Bureau of Labor Statistics (BLS). However, the BLS comparison measures the "cost of labor or wages" as opposed to the "cost of living." Ultimately, the purpose of the GS increase is to ensure competitiveness with the private sector, versus offsetting increases in the cost of living. While discretion exists for employees to receive only a portion of the GPI as an across-the-board pay increase, the balance of the GPI also continues to be paid out as a base salary increase. The difference is that it is paid out based on performance as opposed to an automatic "across-the-board" increase. This enables DoD to pay the most competitive salaries to its highest performing employees.

Some commenters suggested that even employees who have reached a control point should receive the general increase, under the supposition that employees at the control point arrived there by being top performers. As indicated previously, under the

proposed regulation and 5 U.S.C. 9902(c)(7), such employees do not lose entitlement to the NSPS general salary increase authorized under the proposed § 9901.323(a)(1). Limitations on exceeding control points under increases authorized under this section are limited to "additional general salary increases" under § 9901.323(a)(2) related to staffing difficulties and § 9901.323(c) pertaining to that part of the GPI paid out through the pay pool process.

One commenter suggested that employees who experience an unintended and unforeseen loss in pay as a result of an NSPS pay setting rule, or lack of a rule, when they move to an NSPS position from a non-NSPS position outside of the conversion process be eligible for a one-time retroactive adjustment to compensate for the loss if that loss or inequity is subsequently rectified by establishing or changing a rule to address the situation. Such an adjustment could be a mechanism for the Secretary to rapidly and immediately address or mitigate inequitable situations resulting from the operation of the NSPS regulation when a rule, or lack of a rule, has significant adverse impact on an employee. We have not revised this section in response to this comment. It is not feasible to pay employees for changes in pay-setting rules that were not in effect on the effective date of personnel actions affecting their pay. Standard practice throughout the Government is to base all personnel actions affecting Federal employees on the Federal laws and regulations applicable to them on the effective date of the action. It is also not reasonable to presume that every change in regulation would have been preferred earlier if only that authority were permitted earlier.

Another commenter pointed out that non-NSPS candidates applying in response to vacancy announcements should be notified that they will receive only 60 percent of the general increase and no performance pay if they accept a reporting date to an NSPS position just prior to January. However, § 9901.323(c)(1) of the regulation provides authority to the Secretary to make such employees whole by providing them an additional increase equal to the difference between the General Schedule GPI and the amount of the GPI applied as an NSPS across-the-board GPI. Therefore, such notification is not necessary.

A labor organization representative erroneously stated that a determination to increase the minimum of the rate range would govern what the annual increase for acceptable employees will

be and that employees in one pay band could get one percentage increase while other employees in other bands could get different percentages because of labor market conditions or because one occupational series is considered to be more important than another at a particular point in time. Under the proposed regulation, the link between adjustments in the minimum of a pay band and an employee's entitlement to have his or her base salary adjusted has been severed. Instead, annual general salary increases are provided in accordance with the requirements of this section. Nonetheless, it is true that pay band minimums and maximums can be adjusted differently from pay schedule to pay schedule based upon labor market considerations. Such adjustments to band ranges in relation to the labor market are appropriate.

Another labor organization representative stated that they interpret our Supplementary Information in the proposed regulation concerning § 9901.323(a)—which states, “As required by section 9902(e)(7), the portion of the GS GPI amount that is not provided as an NSPS general salary increase must be allocated to NSPS pay pool funding for the purpose of increasing base salary rates on the basis of employee performance”—to mean that DoD has to increase payroll funding each year by the amount of the GPI and that it can't give any part of it out as cash bonuses or use this money for other than employee compensation purposes. It is correct that the balance of the amount of the GPI which is not paid out as a general salary increase must be allocated to pay pool funding for the purpose of increasing rates of pay on the basis of employee performance. While this does not guarantee that each employee will receive the remaining percentage as an increase to base salary, it does mean, in the aggregate, the amount must be paid out as an increase to base salary. This portion of the pay pool funding may not be paid out as a bonus.

Another commenter suggested that § 9901.323(a)(2) be revised to allow the additional general salary increase to target specialties within an occupation, such as Electronics Engineer versus Mechanical Engineer, as well as specific locations. The commenter stated that the ability to target specific occupational specialties and locations would make it more likely that relief would be authorized, since it would not impact as many employees. Another commenter recommended the general increase under § 9901.323(a)(2) should not only permit targeting to specializations within an occupation,

but also to segments of a pay band. We agree in part. The proposed regulation has been modified in response to these comments to enable targeting of specializations within an occupation. However, the proposed regulation was not modified to permit targeting by geographic location or parts of a pay band. The appropriate tool to recognize salary and market differences based on geographic location is through the use of the targeted local market supplement authority described in § 9901.332(c). We agree that there is a need to amend the proposed regulation to provide NSPS with the ability to design targeted local market supplements that will more effectively compensate employees where the higher market value has been recognized through the establishment of pay increases such as the OPM series of special salary rates, and we have amended our regulations at § 9901.331(b) to address this concern.

A labor organization representative protested that § 9901.323(a)(2) gives the DoD flexibility to provide some occupations within a pay band a larger increase than workers in other occupations in the same pay band based on factors other than individual performance. Some commenters objected to the perceived lack of objective criteria by which the Secretary would apply his or her authority to provide additional NSPS general salary increases under this section to employees in a designated occupational series in a pay band at times other than the effective date of the GS annual adjustment. They expressed concern that a general salary increase provided under this paragraph could be subject to abuse, discrimination, or inequity. There was also some confusion as to whether this was meant to be a different type of targeted local market supplement. It is not intended to function as a targeted local market supplement; rather, it is a one-time increase to base salary without geographic distinction. This provision provides an important tool to attract and retain employees performing critical national security missions. Contrary to concern about the perceived lack of objective criteria, the proposed regulation does identify four specific factors upon which these additional targeted salary increases will be based (labor market conditions, staffing difficulties, cost, and mission priorities). These criteria are much like the criteria governing the authority to provide special salary rates under the General Schedule. In fact, this authority and the targeted local market supplement are meant to be similar to the special pay

rate flexibility available for General Schedule employees under 5 CFR 530.301. The NSPS “additional general salary increase” functions as a “catch up” increase in base salary. The “targeted local market supplement”, similar to a GS special rate, is paid out as a supplement to base salary. Both exist to address labor market and staffing difficulties. Consequently, to facilitate understanding of the “additional general salary increase” authority, we have renamed this authority “targeted general salary increase” to align the authority with the terminology used for other NSPS pay tools used to address staffing difficulties.

A few commenters recommended that even employees who received a rating of unacceptable should receive at least 60 percent of the annual increase. Providing this increase to individuals who receive a rating of unacceptable is counter to one of the fundamental goals of NSPS, recognizing and appropriately compensating employees based on performance. This fundamental goal was recognized by the Congress in the NDAA 2008. Therefore, no change was made in response to this comment.

#### Local Market Supplements

##### *Section 9901.331—General*

This section of the proposed regulation describes the process by which base salary ranges may be supplemented in appropriate circumstances by local market supplements.

One commenter representing a labor organization suggested that, because employees with performance/complexity levels that put them at the top of the pay band will receive a partial or no increase when local market supplements are applied, the system does not adhere to principles of pay for performance. However, the only limits on paying a local market supplement in the proposed regulation is that associated with unacceptable performance under § 9901.332(d) and the maximum pay cap for adjusted salary under § 9901.312(b) and § 9901.332(b)(5) which limits adjusted salary to level IV of the Executive Schedule plus 5 percent (a maximum adjusted pay cap which is 5 percent higher than the General Schedule). We believe the American taxpayer favors a maximum pay cap that aligns NSPS salaries subordinate to Executive Level salaries in the Federal Government. Therefore, no change was made to the proposed regulation in response to this comment.

Another commenter suggested that § 9901.331(c) be clarified to clearly define the term “official worksite” for local market supplement entitlement. The commenter stated that with the Government’s emphasis on telecommuting, clear and distinct information should be provided to define “official worksite.” We have not changed the proposed regulation in response to this comment. The regulation references the General Schedule regulations at 5 CFR 531.605, which define how the official worksite is determined for an employee who is covered by a telework agreement.

*Section 9901.332—Standard and Targeted Local Market Supplements*

This section of the proposed regulation describes the Secretary’s authority and limitations on authority as well as employee entitlements and coverage conditions concerning standard and targeted local market supplements.

Labor organization representatives commented that the discretion provided to the Secretary to set local market supplements is too broad and that the Secretary should gain approval from, rather than merely coordinating with, OPM prior to setting local market supplements. We note that under NDAA 2008, the Secretary is required to set and adjust standard local market supplements consistent with the setting and adjusting of corresponding General Schedule locality payments under 5 U.S.C. 5304 and 5304a. We view the Secretary’s ability to establish targeted local market supplements as critical to appropriately compensating employees and believe appropriate parameters, including coordination with OPM, provide the necessary safeguards to address concerns. We have, however, provided clarity to the information concerning targeted local supplements by specifying that they are meant to address significant recruitment and retention problems.

Other commenters from labor organizations suggested that the local market supplement should not be dependent on employee performance; rather, poor performance should be reflected in base pay. Denying unacceptable performers adjustments in both their base salary and any applicable local market supplement clearly conveys the Department’s desire for emphasis on performance. It is consistent with a fundamental principle of NSPS, that is, we want to acknowledge and reward employees for their performance. At the same time, we want to assure the American taxpayer that the Department is not continuing to

pay salary increases to poor performers. This goal was recognized by the Congress in the NDAA 2008.

One commenter asked how NSPS addresses the situation involving an employee who moves to an NSPS position located in a geographic area where pay is not computed using adjusted rates (i.e., a rate that includes locality pay). If a salary-setting situation does not meet the criteria for adjustment based on adjusted rates of salary, the salary is set by comparison of base rates of salary. Where salary is set using comparisons of adjusted rates, locality pay is considered part of the adjusted rate of a General Schedule employee in the same manner as targeted local market supplement is considered part of the adjusted salary rate for NSPS employees.

*Section 9901.333—Setting and Adjusting Local Market Supplements*

This section addresses the setting and adjusting of standard and targeted local market supplements.

Commenters from labor organizations suggested that basing the size of local market supplements on available funds might demotivate current employees and lead to difficulty in attracting high-quality new employees to DoD. Standard local market supplements are determined in the same manner and amount as provided to General Schedule employees under 5 U.S.C. 5304 and therefore are not considered in terms of availability of funds. However, in determining the Department’s response to staffing shortages or difficulties, it is only prudent to consider cost in determining whether or not to approve a targeted local market supplement, and for what amount. It is possible that alternatives are available that will be less costly or that the cost would jeopardize other mission priorities. Cost is an appropriate factor for consideration in the use of optional pay tools.

A commenter expressed concern that the targeted local market supplement as discussed in § 9901.333(b) will be subject to abuse and discrimination and will not be transparent or credible to employees. Section 9901.332 of the proposed regulation has been modified to reflect that the purpose of a targeted local market supplement is to address significant recruitment or retention problems. Given the parameter in which it is to be used, the requirement for coordination with OPM, and the requirement for an annual review of each targeted local market supplement, it is difficult to envision how this authority might be used in a discriminatory manner. We believe the

regulation provides objective criteria, transparency and credibility to such determinations.

Another commenter suggested that a subparagraph be added to this section to clarify that, if the standard local market supplement exceeds the targeted local market supplement, the standard local market supplement should take effect corresponding to the same date of GS locality payments. The commenter stated that, if a targeted local market supplement is larger than the GS locality, at DoD’s discretion employees can receive the higher supplement because there are no distinct words to protect people if the targeted local market supplement falls below the GS locality payment. We have not revised this section in response to this comment. In accordance with § 9901.332(c) of this regulation, a targeted local market supplement applies to an employee eligible for a standard local market supplement only if the targeted local market supplement is a larger amount. While the targeted local market supplement does not apply to everyone in a pay band, once a category of employees has been identified to receive it, all employees in that category receive the payment provided they have a rating of record above unacceptable. The effective dates of targeted local market supplements are not tied to the effective dates for adjustments in the standard local market supplement in that targeted local market supplements can be approved throughout the year. Tying the effective date of a targeted local market supplement to that of the standard local market supplement could result in costly manpower delays in addressing significant recruiting or retention problems.

*Section 9901.334—Eligibility for Pay Increase Associated With a Supplement Adjustment*

This section provides that an employee must have a rating of record above “unacceptable” to receive a pay increase associated with a local market supplement adjustment.

One commenter posed several questions related to paragraph (b) of this section, which states that once an employee has a new rating of record above unacceptable, the employee is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of the new rating of record above unacceptable. The commenter wondered whether the effective date of the new rating of record was the day the

supervisor signed it, after it had been approved by the Pay Pool Panel, or when it was entered into DCPDS. Also, the commenter asked if an employee has a new rating of record signed by the supervisor but not yet entered into DCPDS, could that rating of record be missed when a change in the local market supplement takes place (particularly if the change takes place at any other time of the year other than the first pay period in January)? The commenter went on to suggest that § 9901.334(b) be made clearer by stating that the employee is entitled to the local market supplement occurring on or after the effective date, as specified in § 9901.412(b)(2) of subpart D, of the new rating of record above unacceptable. We agree that the effective date of a rating of record should be clarified.

Consequently, we have revised this paragraph to link to information in subpart D which discusses the effective date of ratings of record (§ 9901.411(d)).

Commenters from labor organizations suggested that, while denying underperforming employees their within-grade increase is appropriate, it is inappropriate to deny them the local market supplement as well, since the LMS should be awarded regardless of performance. Denying unacceptable performers adjustments in both their base salary and any applicable local market supplement clearly conveys the Department's desire for emphasis on performance. It is consistent with a fundamental principle of NSPS; that is, we want to acknowledge and reward employees for their performance. At the same time, we want to assure the American taxpayer that the Department does not continue to increase the salary of poor performers.

#### Performance-Based Pay

##### *Section 9901.341—General*

This section briefly describes the performance-based pay component of the pay system established under subpart C.

Labor organization representatives commented that performance-based payouts of raises or bonuses should not be given to teams or organizations as opposed to individuals, because this practice does not truly reward individual performance. Under the NSPS concept, organizational and team performance can be considered in assessing an individual's accomplishments. We expect that the importance of teamwork and cooperation will continue to be reinforced in the expression of performance standards and performance objectives. Through communication,

ongoing feedback, performance rating and performance rewards, the importance of teamwork and cooperation should be understood by employees. In addition, the regulations clearly describe in the definitions of *job objective* and *unacceptable performance* that the measurement of an employee's performance in determining his or her rating is based on the expectations set for the individual employee during the appraisal period. When organizational or team performance is considered in an employee's performance expectation, the assessment is based on the efforts, cooperation, and contributions of that individual employee to the success of the team and organizational goals. No change has been made to the proposed regulation based on these comments.

Commenters suggested that two employees could be doing the same exact work of the same exact quality, but because they are assigned to two different pay pools, their compensation will differ because it is now being dictated by the performance of the group. It is true that a pay pool that has a higher percentage of high-performing employees may have a different share value than a pay pool with a lower number of high-performing employees because the payouts are based on shares of a common fund. However, most pay pools are of sufficient size that the rating distribution normalizes to the standard population. Where this does not occur, we find we are similar to the General Schedule where employees are sometimes awarded differently for similar levels of performance.

##### *Section 9901.342—Performance Payouts*

Section 9901.342 describes the management and structure of performance pay pools and provides for the allocation and distribution of performance pay funds.

Labor organization representatives commented that, by employing Pay Pool Panels and Pay Pool Managers, the proposed regulation attempts to override any current locally bargained award panels consisting of union representatives along with managers. However, we note that performance-based pay and pay pools did not exist for most employees prior to NSPS. Where such pay pools or collective bargaining provisions related to 5 U.S.C. chapter 45 (dealing with incentive awards) existed prior to conversion to NSPS, DoD will continue to honor its collective bargaining obligations under 5 U.S.C. chapter 71. Under chapter 71, these regulations cannot override current collective bargaining agreements. No change was made to the

proposed regulation based on these comments.

Several commenters suggested that Pay Pool Managers, Pay Pool Panels, and Performance Review Authorities are additional layers between an employee's supervisor and the actual payout the employee receives. These extra layers of management, according to the commenters, are removed from the employees they rate, and they will likely have no direct knowledge of the employee's performance during the year.

Pay pool panels serve as calibration committees and are comprised of management officials who are usually in positions of line authority or in senior staff positions. As such they are familiar with the organization's mission and goals. First-hand knowledge of each employee is not necessary. The pay pool process and the higher-level reviews provide the necessary checks and balances to ensure that performance decisions are made in a careful, deliberative environment that ensures a common understanding of performance, share assignment, and payout distribution criteria that is applied across the pay pool. The Pay Pool Panel members ensure consistency by reviewing self and supervisory assessments (both prepared by personnel knowledgeable of employee's work) and comparing accomplishments to the employee's stated job objectives and performance criteria. If there are any questions regarding the recommended rating for an employee or the panel is likely to change the rating official's recommended rating, the supervisor or rating official will be requested to present further information or justification to the pay pool. Additionally, employees who feel their final job objective ratings or rating of record does not properly reflect their work may seek reconsideration consistent with § 9901.413 of the regulation. No change has been made to the proposed regulation based on these comments.

Labor organization representatives also expressed disapproval of the idea of sub pay pools, suggesting that the existence of large pay pools that require sub pay pools sets up a bureaucratic structure that separates the employee from the performance payout, obscures the connection between pay and performance, and increases the chances for erroneous and discriminatory pay decisions. In a further argument against sub pay pools, representatives of labor organizations suggested that § 9901.342(b)(3) be deleted because the sole purpose of sub pay pools is "reconciling ratings of record" and

consequent payouts, and the concept of "reconciling ratings" is improper, in the view of the commenters. We disagree. Reconciling ratings of record is an important safeguard for employees who are members of a pay pool. Reconciliation of ratings ensures that employees' pay is not harmed by the effect of "high" and "low" raters. Sub pay pools are established to create panels that can more effectively manage the reconciliation of ratings in larger pay pools. The duties and responsibilities of the sub pay pool are the same as that of the pay pool but for a smaller section of the pay pool. In addition, the sub pay pool operates within the requirements and guidelines established for the pay pool to which they belong. The overall Pay Pool Panel then reconciles the recommendations of the sub pay pool panels. Generally, the same size pay pool that justifies a sub pay pool panel (around 150 pay pool members) is also of a size that is less apt to result in a skewed rating distribution in comparison to the overall Department. This is because rating distributions tend to "normalize" to a distribution reflective of the overall organization given sufficient size populations. No change has been made to the proposed regulation based on this comment.

Another commenter requested clarification regarding what level of management, referred to in § 9901.342(b)(3), decides when to establish sub pay pools. Due to the size of DoD and the subsequent variable in organizations within DoD, these matters will be specified further when implemented by the DoD organizations.

One commenter suggested that minimum levels of funding for each pay pool must be established. The proposed regulation clearly indicates that the Secretary determines a percentage of pay to be included in pay pools and paid out in accordance with accompanying implementing issuances. The implementing issuances give Components the discretion to set funding for pay pools as long as they meet the minimums identified by the Secretary. Such funding floors are established outside of the regulation and are often dependent on Congressional determinations concerning general pay increases under 5 U.S.C. 5303. No change has been made to the proposed regulation based on this comment.

One commenter questioned whether it is expected that all of the money assigned to a pay pool will be paid out, or whether managers might be able to divert some funds to other uses or save them for use the following year. We agree that proper funding of pay pools

is fundamental to the success of NSPS. Section 9902(e)(6) of Public Law 110–181 clearly states that the amounts allocated for compensation of DoD civilian employees for NSPS shall be available for this purpose only. In order to comply with this statutory requirement, DoD funding floors for pay pools must be met in the aggregate at the Component level. Senior-level Component officials must certify that they have met this funding floor and have expended the resources within their organization. No change has been made to the proposed regulation based on this comment.

Commenting on § 9901.342(f), one commenter suggested that contributing factors add a level of complexity to the overall rating process far beyond their value and increase the time to write and evaluate both performance assessments. The commenter recommended eliminating contributing factors as a separate step in the rating process, to include eliminating the "plus or minus" concept and instead require consideration of these factors when evaluating an employee's performance. The specifics of how contributing factors will be applied in the NSPS evaluation of performance are not addressed in this regulation. Therefore, no change can be made to this proposed regulation in response to this comment. However, contributing factors will play an important role in defining an employee's performance by reflecting the manner of performance that is important for the accomplishment of the job objective. The specifics of this role will be outlined in implementing issuances. This paragraph has been modified, however, to eliminate any confusion regarding the consideration of contributing factors in determining share assignments.

A few commenters recommended a revision to § 9901.342(f) to assign shares as follows: Level 5—2 shares; Level 4—1.5 shares; Level 3—1 share; Level 2—0 shares; Level 1—0 shares. Per the commenter, the rationale for this suggested change is that performance payouts should be based on objective, mathematical calculation based on performance rating. The commenter expressed belief that the number of shares for each performance level should be fixed. Further, the variation should be proportionate to the true variation reflected in the definitions of the levels. In the commenters' view, it is appropriate that a Level 5 performer receive twice the number of shares as a Level 3 performer, not up to six times as many. Similarly, another commenter proposed to award partial shares for

employees with a Level 3 rating of record.

The Department recognizes that a valid, reliable, and transparent performance management system with adequate safeguards for employees is essential. However, it must also avoid a rigid, one-size-fits-all approach by providing the flexibility to address a variety of circumstances. By allowing a range of decision points regarding the number of shares, managers can more appropriately address the variety and complexity of factors that relate to employee compensation. The regulations provide the parameters and criteria for the performance-share calculation methodology in sufficient specificity so that managers, employees, and employee representatives can better understand how performance pay increases will be determined and paid. These criteria permit consideration of such factors as the employee salary in relation to control points and pay band maximums, recent salary increases, raw performance scores, and the employee's overall contribution to the mission of the organization. This enables organizations to recognize performance and reflect such market trends as accelerating salaries for employees at lower ends of pay ranges and decelerating salaries at higher ends of market ranges. No change has been made to the proposed regulation based on these comments.

Several labor organizations and other commenters expressed concern about grouping supervisors and upper-level managers in the same pay pools as the non-management employees they supervise. These commenters expressed concern that, by combining supervisory and nonsupervisory personnel, there would be a temptation to lower nonsupervisory ratings in order to produce higher payouts for supervisors. These regulations and the implementing issuances currently provide safeguards to support the neutrality and impartiality of pay pool proceedings. The responsibilities of a Pay Pool Manager include the review of supervisors' recommended ratings of record for consistency and equity across organizational units and to guard against potential discrimination or politicization before finalizing ratings. No change has been made to the proposed regulation based on these comments.

One commenter indicated that factors that management may consider in determining the amount to be paid out as a bonus versus an increase in the rate of base salary do not include the option to establish a default split based on the composition of pay pool funds allocated

for payout as a bonus versus a base salary increase. Section 9901.342(g)(4) has been changed to add to the factors that management may consider in determining a pay pool payout distribution, a default split for the pay pool. This is in keeping with the practice of many NSPS pay pools to consider the percentage of pay pool funds applied to salary increases versus bonuses when determining how to distribute the payout between bonus and base salary increase for each employee.

One commenter suggested that § 9901.342(g)(5) be revised to include that an employee who has reached the maximum rate of the band will receive his or her performance payout as a bonus in lieu of an increase to base salary. This section has been revised to include this provision.

Another commenter requested clarification as to the flexibility of granting a performance pay increase that exceeds an established control point. The determination to grant such an increase is allowable but is dependent on the criteria upon which the control point for that pay band is based. These criteria may include performance factors or market values. For example, if the criteria for establishing a control point are based on performance factors, conceivably an employee could exceed the identified criteria and be provided a pay increase in excess of the established control point based on the employee's performance. No change has been made to the proposed regulation based on this comment.

A commenter requested clarification regarding whether an employee would be eligible for a performance payout if they move out of NSPS on a permanent move after the end of their rating cycle but move back into an NSPS position before the effective date of the payout. Employees who move out of NSPS after the end of the rating period are not eligible for the NSPS payout for that performance cycle whether or not they return to NSPS prior to the effective date of the payout. Such employees would become entitled to the pay progression mechanisms of the gaining personnel system. For example, if an employee moves to the General Schedule, their time in NSPS following their last equivalent increase would count toward the next General Schedule increase. If none was due the employee during the period of time under the General Schedule, the option to provide a WGI buy-in adjustment under § 9901.351 may be applied upon their return to NSPS. Provided the service performed under NSPS and the General Schedule was creditable for WGI

purposes, the service covered by the NSPS performance period would become creditable toward the WGI adjustment upon return to NSPS.

Also, a commenter requested clarification regarding an employee's entitlement to a performance payout in a situation when the employee leaves one pay pool after the end of his or her rating cycle and moves to another pay pool before the effective date of the payout. We agree and have added clarifying language under § 9901.342(g)(9). In response to several comments requesting increased transparency in the NSPS performance management system, § 9901.342(g)(10) is added requiring NSPS organizations to share average rating, ratings distribution, share value (or average share value), and average payout with NSPS employees. Organizations must ensure that the sharing of this information does not compromise the identities of NSPS employees in violation of the Privacy Act.

Another commenter suggested that an NSPS employee who earns a bonus for the performance year but retires before the end of the calendar year should still be able to receive a bonus payment. The regulation clearly states that an employee who is no longer covered by NSPS on the effective date of the payout is not entitled to a performance-based payout, which includes a bonus. Such employees may be considered for an incentive award action under 5 U.S.C. chapter 45 if performance during the applicable period merits recognition.

Many commenters (both individual commenters and labor organization representatives) expressed concern that, since bonus payouts are not considered when calculating retirement benefits, retirement benefits will be lower under NSPS than they would be under the GS system. As stated previously, since existing grade-based systems such as the General Schedule (GS) and the Federal Wage System (FWS) do not calculate pay received as bonuses toward defined benefit retirement plans, retirement benefits cannot be lower under NSPS than they would be under the GS system. NSPS, in the aggregate, does not substitute bonus payments for base salary increases. Performance-based bonuses are funded in addition to payment of dollars that were previously spent on base pay increases under the General Schedule and continue to be spent on base salary increases under NSPS. Additionally, like NSPS, existing GS and FWS systems do not permit pay increases beyond the limits of established ceilings (maximum rate of grade levels). However, within NSPS, those at the top of their control point or

pay band must still receive a payout, based on performance shares, in the form of a bonus, which is a clear advantage for NSPS employees. No change has been made to the proposed regulation based on these comments.

One commenter requested that the proposed regulation specify that prorating of performance payouts is not mandatory. The proposed regulation gives the Secretary the authority to issue implementing issuances regarding prorating payouts for employees. The implementing issuances give the Components discretion to determine whether prorating is required during the performance cycle. We believe that the Components can best make the determination of whether or not prorating is warranted, such as when an employee is on extended unpaid leave. No change has been made to the proposed regulation based on this comment.

Additional commenters expressed concern that an employee returning from uniformed service who does not have an NSPS rating of record may not be eligible for a bonus or pay increase if the employee is at the top of the control point or pay band. These commenters suggested that the provisions of § 9901.342(i) be changed to provide that employees returning after performing uniformed military service are eligible for performance-based pay pool bonuses if otherwise eligible by share assignment and payout distribution. Adjustments for employees returning from uniformed service are determined in accordance with § 9901.342(i). The purpose of this provision is to meet the intent of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to preserve the earning power of uniformed service members by ensuring that their salaries continue to progress at the same level they would have if they had not served on military duty covered by that law. This preservation of earning power is accomplished by granting applicable raises in the pay schedule. The provision does not seek to award pay for work not performed—that is, the intent is to adjust an employee's pay rate similar to how it would have been adjusted had the employee not left, not to entitle the employee to pay for periods he or she was absent (other than that associated with a paid leave status). Similarly, pay in the form of bonuses for periods of time during which the employee did not perform work would not be paid if the employee is not entitled to an NSPS rating of record, since this would constitute money not earned. No change has been made to the

proposed regulation based on these comments.

One commenter suggested that § 9901.342(i) and (j) clarify when performance payouts are “effective” and/or “paid.” These sections have been revised to add clarification to the effective dates in each of these circumstances.

A commenter recommended that § 9901.342(i) through (l) be changed to reflect that when an employee, who does not have an NSPS rating of record for an appraisal period, has his or her base salary increase determined on an average base salary granted to other employees with the same rating or a modal rating that the average should be based upon all employees in the same pay pool as opposed to including only those employees in the same pay schedule and pay band. The commenter noted that inclusion of this broader group in the calculations will prevent inappropriate and inequitable salary determinations. Paragraphs (i) through (l) of this section have been revised to use the average salary increase of the entire pay pool.

One commenter questioned whether, in § 9901.342(k), it was an oversight or intentional that employees working on “official time” (union officials) and those on extended paid leave do not receive the general pay increase. The employees identified in this section are in a pay status and are therefore covered by the provisions of § 9901.323 and will receive the applicable general pay increase at the same time as employees who do not meet the criteria for specially situated employees. No change has been made to the proposed regulation based on this comment.

Commenters also expressed concern regarding § 9901.342(k) which calls for a payout and share distribution based on the “modal rating” as using an “assumed rating” of a sort that is outlawed by OPM. The comments reflect confusion regarding the use of modal ratings under this section. Modal ratings as identified in this section are used only to determine a performance pay increase and not for the purpose of assigning a rating of record. Once the performance pay increase is determined, the modal rating serves no other purpose. No change has been made to the proposed regulation based on these comments.

Labor organization representatives sought clarification in the proposed regulation regarding exactly who—the Secretary, the Components, or another delegate—has the authority to set rules to determine performance payouts and the distribution of payouts between salary increases and bonuses. The Pay

Pool Manager, as defined in § 9901.103, is designated to manage the pay pool to include approving recommended share assignments and payout distributions. However, these determinations must be made consistent with the organization’s business rules. Such rules may be determined at the Component level or lower if delegated by the component. No change has been made to the proposed rule based on these comments.

One commenter suggested that pay increases or bonuses based on 100 percent union duties would seem to pay union officials for not performing any work for the agency. Providing salary increases to full-time union officials is consistent with Governmentwide practices regarding full-time union officials under 5 U.S.C. chapter 71. However, consistent with other Governmentwide systems, bonuses are not paid under NSPS. No change has been made to the proposed regulation based on this comment.

Finally, labor organization representatives expressed concern that DoD will not be able to adequately fund a pay-for-performance system because it does not control its budgets. They further state that DoD, like other Federal agencies, depends on Congress for its appropriations, and today’s Congress cannot bind future Congresses to adequately fund a pay-for-performance system. In establishing the NSPS statute, Congress provided in section 9902(e)(4) of title 5, U.S. Code, that, through FY 2012, to the maximum extent practicable, the aggregate amount allocated for compensation of DoD civilian employees under NSPS will not be less than if employees had not been converted to NSPS. Section 9902(e)(5) additionally provides that after FY 2012 the Department will develop a formula that ensures that, in the aggregate and to the maximum extent possible, employees are not disadvantaged in the overall amount of pay available as a result of conversion to NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that may affect pay levels. We therefore believe that NSPS will be properly funded and have made no change to the proposed regulation based on these comments.

#### *Section 9901.343—Pay Reduction Based on Unacceptable Performance and/or Conduct*

This section outlines parameters for reducing employee pay based on unacceptable performance and/or conduct.

Representatives of several labor organizations objected to the change in the proposed regulation that limits the range of a pay reduction under the circumstances described in this section to 5–10 percent of base salary (rather than 1–10 percent), expressing concern that the new language limits the ability of managers to choose a lesser penalty for unacceptable performance/conduct when warranted. Pay reductions based on unacceptable performance and/or conduct are not required in all cases and are in fact discretionary. However, to the extent that a manager determines that unacceptable performance and/or conduct warrants a pay reduction, a pay reduction of at least 5 percent is necessary to achieve and retain a high-performing workforce. No change has been made to the proposed regulation based on these comments. However, we have made minor editorial changes to the language in § 9901.343 for enhanced clarity and for consistency with language in related provisions in §§ 9901.353(f) and 9901.355(b)(4).

Several commenters requested clarification concerning the “applicable adverse action procedures” that must be applied before reducing an employee’s pay due to unacceptable performance and/or conduct. The language in the proposed regulation is meant to highlight that adverse action procedures must be followed when reducing an employee’s pay. For employees under NSPS, procedures provided under 5 U.S.C. chapter 75 apply whether or not the regulation specifically cites chapter 75. No change has been made to the proposed regulation based on these comments.

#### *Section 9901.344—Other Performance Payments*

This section describes who has authority to grant other performance payments, reasons for awarding these types of payments, employee eligibility requirements, and limits on other performance payments.

Labor organization representatives commented that this section actually addresses bonuses and quality step increases and attempts to override existing collective bargaining agreements, which often include pre-existing negotiated award programs. We disagree. This paragraph does not address quality step increases because they do not exist under NSPS. Under 5 U.S.C. chapter 71, Governmentwide regulations cannot override pre-existing agreements that conflict with the regulations. However, these agreements would have to be brought into compliance with the regulations when the agreements expire or are up for

renegotiation. No change has been made to the proposed regulation based on these comments.

Commenters also inquired about the source of funds for "Other Performance Payments" and wondered whether these payments might lower the amount of funds for the pay pools for performance payouts for other employees.

Additionally, one commenter wanted assurance that the Extraordinary Pay Recognition (EPR) and Organizational Achievement Recognition (OAR) will not be used to give preference to certain workers over others. These achievement recognition awards are funded from a source outside of the pay pool. As indicated in the proposed regulations, EPR and OAR are awarded based on performance and restricted to specific criteria for each recognition award. In the case of the EPR, an employee must have a rating of record of at least a Level 5 in order to be eligible for the award; in the case of the OAR, when awarded, it applies to all employees in the organization who have a rating of record of at least a Level 3. However, distinctions in OAR awards may vary based on the rating of record. These criteria alone serve to mitigate against favoritism, cronyism, and other actions that violate merit system principles. No change has been made to the proposed regulation based on these comments.

Finally, one commenter objected to language in § 9901.344(b)(1) stating that "the future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level." The commenter pointed out that no one can continuously perform at an extraordinary level, for then what had been extraordinary would become "ordinary" performance for that employee. The purpose of the EPR is to reward exceptionally high-performing employees whose performance and contributions to the organization are of an exceedingly high value based on an individualized assessment. There is the expectation that this or a higher level of performance will continue in future years. Although the increase granted by the EPR is permanent and does not require future revalidation, the performance objectives upon which the employee will be evaluated in the future will reflect the higher level of expectation. We did however, modify this section to clarify that the expectation of higher-level performance in the future is associated with an EPR paid out as an increase to base salary as opposed to a bonus. We believe that the EPR is an important flexibility and have made no additional change to the

proposed regulation based on this comment.

*Section 9901.345—Accelerated Compensation for Developmental Positions (ACDP)*

This section describes how ACDP payments may be awarded and under what circumstances.

This change to the proposed regulation generated several positive comments from individuals who applauded the expansion of ACDP payments. However, some commenters representing labor organizations suggested amending this provision to allow collective bargaining of this issue. Concerns about collective bargaining rights have been addressed in "Collective Bargaining and Labor Relations" located under "Major Issues."

Representatives of labor organizations also questioned the implication in this section that Components have the authority to choose whether or not to provide ACDP increases. These representatives suggested the institution of procedures governing the advancement of employees in developmental positions. The Department determined that such matters should be governed by Component policies, within the parameters provided by the proposed regulation. No change has been made to the proposed regulation based on this comment.

Another labor organization representative indicated that the proposed regulation is unclear regarding whether there is any limit on the number of ACDP increases that may be given or whether there is a specific interval between them. The inquiry also seemed to imply that these increases are "promotions." Although ACDP increases are designed to provide accelerated pay progression for entry/developmental positions, these increases are not promotions, and this terminology should not be used in order to avoid conflict and confusion with the meaning of that term under NSPS. Section 9901.103 provides a definition of *promotion* under NSPS; § 9901.354 describes how to set pay upon promotion. We did not prescribe any limit on the number of ACDP increases eligible employees may receive, nor the interval(s) at which they could occur. Such parameters, if any, would be linked to the specifics of Component training programs or developmental activities. Components choosing to provide ACDP increases must establish and document growth and development criteria by which additional pay increases will be determined.

Several commenters inquired whether or not the ACDP applied to student programs. In response to these comments, the proposed regulations have been changed to include positions assigned to the Student Career Experience Program.

Commenters suggested expanding the ACDP concept to engineers/technicians and employees in pay band 2 to make NSPS more comparable to the grade progression available within the GS system. This suggestion does not mirror the intent of NSPS to achieve pay progression beyond the trainee levels primarily through performance-based pay increases. The cost of providing increases similar to GS grade progression increases would offset the ability to award pay pool base salary increases, thus jeopardizing the linking of pay and performance as intended by the enabling legislation for NSPS. This is because pay pools are funded, in part, by money that previously was applied to GS promotion increases to grades that no longer exist under NSPS. No change has been made to the proposed regulation based on these comments.

Other commenters asked that the pay-setting guidance for employees in developmental positions under the GS scale (example: GS-12/13 or GS-13/14) also apply to those who applied but were not selected until after their agencies transitioned to NSPS. Again, we reiterate that the intent of NSPS is not to replicate the GS pay system but rather to redirect pay progression to a performance-based pay system as opposed to a pay progression based on position moves. ACDP provides for accelerated pay progression for the lowest ranges of journey level work in recognition of the inability to match market-based pay progression trends via performance-based payouts alone. For this reason, ACDP is limited to Pay Band 1 and employees in the Student Career Experience Program. No change has been made to the proposed regulation based on these comments.

One commenter questioned why accelerated awards are given to employees with a rating of record of Level 3, suggesting that this award should be given only to those achieving a rating of Level 4 or better. The implication by the commenter is that a Level 3 rating reflects less than the expected performance. In contrast, Level 3 is seen as recognizing those employees who performed their identified responsibilities and in doing so effectively met all of their performance expectations. The regulations clearly state that Components choosing to provide these increases must develop criteria by which the additional pay

increases will be determined. If an employee meets the identified criteria, and has met his or her performance expectations, the employee should be entitled to be considered for the pay increase. No change has been made to the proposed regulation based on this comment.

#### Pay Administration

##### *Section 9901.351—General*

This section outlines general provisions of pay administration including geographic recalculation, within-grade increase (WGI) adjustment, general pay-setting rules, pay periods and hourly rates, rate comparisons upon movement to an NSPS position, and setting of pay based on annual rates received by an employee as a teacher.

Several commenters questioned why the within-grade increase (WGI) adjustment equivalent applies to GS employees moving to NSPS, but does not apply to Federal Wage System (FWS) employees and other employees in step-type programs. In response to these comments, the use of this authority has been expanded to include moves from FWS to NSPS.

Another commenter noted that it appears that an employee may receive both a prorated WGI and up to a 5 percent increase upon reassignment, though it is not explicitly stated, and recommended this be clarified. We agree and have clarified this point in the regulations.

One commenter suggested adding the following sentence to the end of § 9901.351(b): “This adjustment may be made prospectively for NSPS covered employees whose pay was not set in this manner prior to the effective date of this regulation.” According to the commenter, this addition would allow Components to make employees “whole” who lost their targeted LMS when they were a “willing accession” to NSPS and not converted to NSPS with their organization. Another commenter suggested that we make a WGI buy-in for management directed reassignments retroactive to previous legislation to ensure all personnel are treated fairly. There is no provision that allows for regulations to apply retroactively unless an administrative error had occurred. There was no administrative error made in the pay setting for these employees; the regulations in effect at that time did not allow for this type of adjustment. These employees will have the opportunity to be fairly compensated for the work they perform under the NSPS structure of pay-for-performance.

Another commenter cited § 9901.351(c), saying that normally you

would not receive any type of pay increase on an individual realignment action and there does not appear to be a way that you could currently process something like this. In response to this comment, if an employee is realigned by management from a GS or FWS position into an NSPS position, he or she will be eligible for this provision. The personnel system will be updated to allow for this type of action to be processed.

##### *Section 9901.352—Setting an Employee's Starting Pay*

This section describes the Secretary's authority to set the starting base salary for individuals newly appointed or reappointed to the Federal service.

One commenter questioned what an employee's current rate of pay has to do with the value of a prospective employee. “Current salary” is identified under this section as one of many factors to be considered in setting an employee's starting pay. Other factors include labor market considerations; the skills, knowledge, and/or education possessed by the candidate; critical mission or business requirements; and salaries of other employees in the organization performing similar work. “Current salary” is considered a factor in setting salary in that it helps the manager to establish a salary level high enough to attract a candidate, but moderate enough to permit salary growth over a period of time. A manager should look at all of the factors listed under this section, when considering the setting of starting pay for a new employee, including “current salary.”

Another commenter recommended adding additional considerations to § 9901.352(a) such as fiscal constraints of the organization, the total remuneration being provided to employees, and historical recruitment and retention data for hard-to-fill positions. We don't feel that it is necessary to add these factors, as they can be considered under the current factors listed such as availability of candidates and business requirements of their respective organizations.

Another commenter recommended that the rules in this section be used for current Federal employees who move to NSPS from other pay systems through competitive procedures. The rules addressed in this section permit setting of salaries anywhere within a pay band for employees newly hired within the Federal Government. The competitive selections of current Federal employees are most appropriately processed as promotions, reassignments, or reduction in band actions under the NSPS pay setting regulations. This allows these

selectees to be fairly treated without disadvantaging current NSPS employees. NSPS strives to function in a manner that sustains fair competition with other Federal agencies. Changing the regulation to allow setting of salaries anywhere within the pay band for current Federal employees would create an unfair competitive advantage for DoD when it comes to the employees of other Federal agencies.

In a related comment, a commenter pointed out that the break-in-service requirement for reappointed individuals appears to create a loophole for employees in the NSPS pay-setting process and is also inconsistent with other break-in-service rules under the GS system. Specifically, they expressed concern that the proposed rule “on break in service for at least 1 full day” creates a situation where an employee who resigns for a one-day period can have his or her pay set anywhere within a rate range as opposed to being subjected to internal pay-setting rules for other employees (e.g., the 5 percent cap on reassignments). The commenter also notes that our proposed rule is inconsistent with definitions previously released in processing guidance for NSPS personnel actions. The requirement for a break in service was added to the regulation to create uniformity and consistency in application of pay-setting rules for new appointments and reappointments. As a condition for permitting use of pay-setting rules for reappointments, the 2005 regulation required an employee to have been separated and subsequently reemployed. This language resulted in inconsistent application of the rule and a request that we clarify our language.

We are aware that different break-in-service rules are used for different reasons (e.g., 90 days for superior qualification appointments under 5 CFR 531.212(a)(ii)(2) and (3); break-in-service definitions also affect creditable service for benefits and are used to determine conversions to new appointments). We also note that the current definitions in DoD processing guidance are based on OPM's definitions of break-in-service for specific purposes. Our rule does not affect either of these definitions—its purpose is solely to determine the application of pay-setting rules.

For clarification, we note that our proposed rule states that a break in service is one full *workday*. Generally, this will mean an individual will be off the rolls for three full days (i.e., if the employee resigns on Friday, the break in service must include Saturday, Sunday, and Monday). Because such a break could affect the staffing processes of the

position (to include the requirement for competitive staffing processes), we expect that Components will be careful not to use this definition in a manner that would circumvent pay-setting rules for internal placement actions or merit system principles.

Finally, one commenter suggested that NSPS must offer the same salary (GS grade and step) to individuals who might otherwise go to other branches of Government that hire similar skills if it wants to get the best of the best. One of the primary advantages provided by NSPS is that it allows supervisors and managers great latitude in offering starting salaries across the range of a band based on conditions such as the labor market, special skills, and mission requirements. This market based system allows hiring officials to immediately react to market conditions and offer starting salaries that are not tied to a specific GS grade and step.

#### *Section 9901.353—Setting Pay Upon Reassignment*

This section outlines the specific rules to be applied in setting salary under a reassignment action.

Labor organization representatives suggested amending this section to include language that ensures labor unions' ability to collectively bargain the issues of setting pay upon reassignment. As previously stated, DoD is committed to fulfilling its obligations to bargain in good faith on negotiable conditions of employment related to these regulations, consistent with 5 U.S.C. chapter 71 and the requirements in 5 U.S.C. 9902 and section 1106(b) of Public Law 110–181.

Several commenters requested that the number of management-directed reassignments be limited. Other commenters expressed concern that salary increases were limited to 5 percent for reassignments. Some commenters felt that this cap was unfair, especially considering that individuals just entering Government service can negotiate up to a 20 percent increase in pay. Another commenter, while expressing confidence that the proposed regulation provides the necessary foundation for a contemporary and flexible personnel system, echoed concern about the 5 percent cap on reassignments. According to the commenter, this policy hinders the organization's ability to promote from within and retain top performers. To address this problem, the commenter recommends splitting pay band 2 to improve recruitment and retention and increase employee morale, as well as alleviate problems that the large pay band creates for the Priority

Placement Program and for establishing representative rates for reductions in force. Alternatively, the commenter proposes eliminating the 5 percent cap to allow management the needed flexibility to compensate current Federal employees for their performance and competencies. Another commenter suggested that a reassignment to a supervisory position should require that the maximum reassignment rate be given or, that the regulations be changed so that movement to the YC pay band is considered a promotion even if the employee is coming from a comparable band.

This regulation does not define pay bands including pay band 2. The classification architecture, to include pay schedules and pay bands, will be described in implementing issuances. Therefore, no change has been made to the proposed regulation with regard to recommendations to split pay band 2. In response to comments concerning adjusting the 5 percent cap on reassignments, we believe that the cap on a reassignment action is reasonable given the pay flexibilities that are available for movements within or across comparable pay bands. It is also a greater flexibility than provided on a reassignment in the GS pay system. In addition to performance payouts, employees may progress through a pay band through reassignments. A reassignment occurs when an employee moves voluntarily or involuntarily to a different position or set of duties within a pay band or to a position in a comparable pay band.

There are no limits to the number of times an NSPS employee may reassign on voluntary moves. However, an employee may only receive a total of a 5 percent cumulative increase to base salary in any 12-month period unless an authorized management official approves an exception. On a management-directed reassignment, an employee may receive a base salary increase of up to 5 percent each time that management reassigns the employee. An increase associated with a management-directed reassignment does not count toward the 12-month limit associated with voluntary reassignments.

Another flexibility that provides for faster pay progression is the Accelerated Compensation for Developmental Positions (ACDP) provision, which applies to employees in developmental or trainee level positions in Pay Band 1 of the professional and analytical pay schedules. ACDP allows management to increase the base salary of eligible employees at rates that are less than, match, or exceed career ladder

promotion rates under the GS pay system. The accelerated compensation available under ACDP recognizes the acquisition of job-related competencies that are documented in a formal training plan. The amount of the ACDP increase generally will not exceed 20 percent of an employee's base salary unless management approves a higher amount.

NSPS also recognizes that GS employees in career ladder positions below their target level at the time of conversion generally will have served some time towards the next higher grade now encompassed within the NSPS pay band to which converted. Therefore, during the first 12 months following conversion, employees who are not eligible for ACDP are eligible to receive a one-time band increase equivalent to the GS promotion increase they would have received had they not been converted into NSPS.

NSPS gives individual pay pools the flexibility to determine how employee performance ratings translate into base salary increases, bonuses, or both. Where determined appropriate, management has the authority to place a category of positions in a separate pay pool to provide employees a performance payout with a higher value on share assignments. In this manner, it is possible to offset and reduce part of the pay progression requirement for interns under ACDP via performance pay progression. It is also possible for the pay of interns to progress at different rates based on performance.

All of these pay-for-performance flexibilities provide employees with an opportunity to receive an increase to base salary based on their job performance as well as providing management the ability to progress pay consistent with labor markets.

In addition, representatives from labor organizations were concerned that supervisors have the ability under this section to reassign an employee to a higher level of duties and authorize a 5 percent pay increase with no competition for the new position. It is true that NSPS is designed to permit noncompetitive movement for reassignments including those that involve increases to base salary. The use of broad pay bands and noncompetitive movement within the bands enhances the flexibility and agility of the organization to respond to staffing requirements. At the same time, the cap on the amount of a reassignment increase preserves the intent of the merit principles by ensuring that moves involving increases similar to those associated with promotions (6 percent or more increase to base salary) remain subject to merit promotion rules.

Another commenter noted that § 9901.353(a)(2) appears to prevent an increase in base salary of an employee reassigned due to a reduction in force and suggests that this is not right if the position to which the employee was reassigned carries more responsibility. We have revised the proposed regulation to clearly state that an employee reassigned through reduction in force procedures is not eligible for an increase in base salary under these provisions, but may be eligible for a within-grade increase adjustment under § 9901.351(c)(1).

One commenter suggested that consideration should be given to describing reassignment increases under this section as “temporary pay adjustments” so that they may be used for details as well as temporary reassignments. We have not changed the proposed regulation in response to this comment because on a detail the pay should remain unchanged. On a detail, an employee is still assigned to their permanent position. If an increase is warranted in this type of movement, then management should make it a temporary reassignment as opposed to a detail. However, we did review the issue of a temporary reassignment and have made some clarifications to it. We had previously stated that if a temporary reassignment was later made permanent that the employee could not receive any additional increase. We have changed the proposed regulations so that this restriction will no longer apply.

One commenter objected to the wording of § 9901.353(a)(3)(vi), which states that one of the factors on which a reassignment increase may be based is an employee’s “past and anticipated performance and contribution.” The commenter suggested that it is improper to base pay on anticipated performance and contributions. We disagree. Performance projections based on knowledge, skills, education, duties to be performed and/or past performance is an entirely appropriate consideration in setting salaries as well as a widely employed business practice. Reassignment increase determinations are best arrived at when considering all of the factors described in this section, including any business rules the organization has established concerning the application of these factors.

Finally, we have made minor editorial changes in § 9901.353(f) for enhanced clarity and for consistency with the language in related provisions in §§ 9901.343 and 9901.355(b)(4).

#### *Section 9901.354—Setting Pay Upon Promotion*

This section outlines the specific rules to be applied in setting salary under a promotion action.

Several commenters suggested that the range of 6–12 percent for pay increases for promotions is insufficient to recruit new talent for occupational specialties such as engineering. No change has been made based on this comment. When justified, promotion increases above 12 percent can be granted with higher-level approval. Therefore, the rule retains sufficient flexibility to respond to market forces.

One commenter recommended adding an additional factor to be considered when determining the amount of a promotion increase: The long-term costs of the promotion increase and the resulting multi-year budget implications. We have not added this factor, as it can be considered under a current factor such as the business requirements of their respective organizations.

Other commenters recommended that, when an employee is promoted from a non-NSPS position, an authorized management official should set the employee’s new adjusted salary at no less than the employee’s adjusted salary (including any applicable locality pay, special rate supplement, or equivalent supplement) plus any physicians’ comparability allowance payable for the position held prior to the reassignment, provided the resulting base salary does not exceed the maximum rate of the new pay band. In response to these comments, we have revised the proposed regulation to require consideration of such factors prior to processing a promotion action. Additionally, we have incorporated language requiring use of a geographic conversion formula for such moves.

One commenter recommended that employees promoted from targeted local market supplements to lower targeted local market supplements should also have their pay set based on comparison of “adjusted salary rates.” If adjusted salary rates are used, according to the commenter, geographic conversion rates should also be applied similar to application under §§ 9901.353 and 9901.355. Another commenter recommended modification of § 9901.354 to require that pay for employees promoted from non-NSPS to NSPS positions be set using adjusted salary rather than base salary to prevent increased compensation costs when FWS employees are promoted to NSPS positions. In response to these comments, we have revised the

proposed regulation to require consideration of adjusted salary prior to processing a promotion action, use of geographic calculation formula, and the apportionment of the adjusted salary between base salary and local market supplement or targeted local market supplement after the pay setting has been completed, when applicable.

Commenting on criteria that may be considered in determining the amount of a promotion increase, as outlined in § 9901.354(b), one commenter suggested that pay should not be based on anticipated performance, other employees’ pay, or location (which is already accounted for in the local market supplement). These factors are used only to determine the amount above 6 percent (if warranted), and should be used in combination with all the factors to determine any amount of a promotion increase above 6 percent.

Regarding employees on pay retention who are re-promoted to the pay band from which they had been reduced [§ 9901.354(d)(1)], one commenter suggested that employees who have a minimum satisfactory performance rating should automatically be reinstated to the pay they otherwise would have attained, including any performance payouts and/or band adjustments. This should not be needed, as the employee is already being compensated at the higher level of work while on pay retention, without having to perform at that higher level of work.

#### *Section 9901.355—Setting Pay Upon Reduction in Band*

This section outlines the specific rules to be applied in setting salary under a reduction in band action.

Labor organization representatives objected to reductions in pay based on conduct without more information about the criteria, rules, and procedures to be used by management in making these decisions. These rules are stated under the procedures in 5 U.S.C. chapter 75. Consequently, they are not stated in this regulation.

One commenter pointed out a perceived inconsistency in language between § 9901.355(b)(4) and § 9901.353(f). When referring to setting pay upon a reduction in band in § 9901.355(b)(4), the paragraph states that, when an employee is reduced in band involuntarily as a result of adverse action, he or she may have his or her base salary reduced, and if reduced, the reduction must be between 5 percent and 10 percent. However, when referring to setting pay upon reassignment in § 9901.353(f), the language states that an employee involuntarily reduced in pay via

reassignment as a result of adverse action must have his or her base salary reduced by at least 5 percent, and may have it reduced by up to 10 percent. The commenter wonders whether the difference is intentional. Yes, the difference is intentional. In the first instance (§ 9901.355(b)(4)), a decision to reduce an employee's salary has not been made. Rather, only the decision to reduce the employee's pay band has been decided. Since a decrease in salary is discretionary upon reduction in pay band, the permissive may is used to indicate the amount of pay by which salary may be reduced. In the second instance (§ 9901.353(f)), the language indicates a decision has been made to reduce the salary of the employee ("When an employee is involuntarily reduced in pay \* \* \*"). Under NSPS, when a decision has been made to reduce the salary of an employee, it must be in an amount no less than 5 percent and no more than 10 percent of base salary. Therefore, the proposed language in § 9901.355(b)(4) has been retained except for some minor editorial revisions.

Finally, regarding factors upon which an increase in pay due to reduction in band may be based, one commenter expressed a preference for the term "performance-based considerations" in § 9901.355(c)(3) to references to "past and anticipated performance and contribution" in earlier sections. Additionally, the commenter wondered why location and the base salary of other employees factored into the determination of pay upon reduction in band. In response to this comment, since an employee can get an increase similar to a reassignment increase, the factors should be the same. These are only some of the factors to be considered in determining whether an increase is warranted on a reduction in band, and if warranted, the amount of that increase. A manager should look at all of the factors in combination, as well as any business rules, when determining if and when an increase is warranted on a reduction in band.

#### *Section 9901.356—Pay Retention*

This section describes the rules to be applied in determining an employee's entitlement to pay retention and the factors in terminating pay retention.

One commenter, noting that local market supplements are paid on top of a retained rate, while GS locality pay is included in retained rates, suggests the NSPS proposed rules should be consistent with GS system rules. While there are many similarities between NSPS and other title 5 pay policies, they are neither required to be, nor intended

to be, identical. The NSPS system of retaining base salaries supports the overall goals of the pay system while ensuring retained pay provisions like title 5. It should be noted that title 5 does not provide more protection by retaining a locality rate than NSPS, because both systems have geographic conversion procedures established to control movements between locality areas and local market supplement areas when employees are on retained pay.

Representatives of one large labor organization expressed support for the provision included in § 9901.356(m), which "grandfathers" in workers to keep people on indefinite pay retention who were already on pay retention when they converted to NSPS.

Several commenters recommended extending pay retention beyond the 104 weeks cited in the proposed regulation for various reasons. Commenters also suggested that § 9901.356(f) and (g) be amended to reflect that workers should remain on pay retention until the pay band rate range grows to encompass the retained rate. With respect to both of these comments, we believe the 104-week limitation is a fair balance between protecting an employee with pay retention to provide time to find comparably valued and compensated work while not encumbering the agency with an indefinite additional cost that compensates for work that is no longer being performed. Whereas the pay rate that may be retained under the General Schedule is capped at 150 percent of the top salary of the lower grade, NSPS does not limit pay retention salaries in this manner. Additionally, the broader NSPS pay bands accommodate more salaries, thereby reducing the number of employees required to be covered by pay retention. In recognition, however, that there may be some unique situations where a longer pay retention period is warranted, we have provided that the Secretary may issue implementing issuances describing exceptions to the 104-week pay retention limit.

One commenter, responding to language in § 9901.356(d) regarding situations triggering eligibility for pay retention, questions why an organizational realignment or reduction is cited, since reduction in force is now handled through Governmentwide rules. Governmentwide reduction in force regulations do not address pay retention. Rather, those regulations describe retention, displacement, and separation procedures.

Another commenter recommended that we clarify the language in 9901.356(f) by adding "under this authority" in recognition of the fact that

pay retention could continue under some other non-NSPS authority. We agree and have made the change to the proposed regulation.

Other commenters suggested that § 9901.356(j) be amended to ensure that employees on retained pay receive 100 percent of the GS general pay increase (GPI) during the two years they are entitled to pay retention as opposed to 60 percent of the GPI. No change has been made in response to this recommendation. Continuing to grow the salary of an employee on pay retention is not congruent with achieving a salary that fits within the assigned pay band.

Finally, one commenter suggested deleting paragraph (3) from § 9901.356(i), related to movement from a non-DoD position to an NSPS-covered position. According to the commenter, this provision impacts the organization's ability to hire quality employees from other Federal agencies and conflicts with Component discretion in § 9901.356(d)(4)(iv) to grant pay retention in situations considered appropriate. On a similar note, another commenter suggested considering allowing for extension of the pay retention time limit beyond 104 weeks for employees who are reduced in band when accepting an overseas position. The tour of duty for an overseas position is generally 2–5 years. The commenter asserted that employees are less inclined to accept overseas positions if pay retention will be terminated after 2 years. We agree that providing pay retention to someone who voluntarily applied for a position in NSPS that is lower-paying, with less responsibility, should be compensated appropriately and not retain a higher salary. Allowing pay retention in these situations would be inconsistent with the underlying concept of a pay-for-performance system.

#### *Premium Pay*

##### *Section 9901.361—General Provisions*

This section explains general areas relating to premium pay that have been waived or modified from 5 U.S.C. chapter 55, subchapter V, as well as those areas not waived or modified from the U.S. Code. A representative from the Federal Physicians Association recommends that we delete § 9901.361(e), which prohibits the payment of premium pay to physicians and dentists and include them in the definition of health care professional so that they would be eligible to receive certain premium pay. We have not adopted this suggestion.

Generally, NSPS employees may not be paid, in the aggregate, more than the annual rate of pay for Executive Level I in a given calendar year. However, NSPS physicians and dentists enjoy a higher aggregate compensation cap that is equal to the salary of the President of the United States. Moreover, NSPS has designed broader pay bands for physicians and dentists with significantly higher salary ranges than that provided under the General Schedule (\$87,742 to \$225,000 plus targeted local market supplements for medical specialties ranging from 4.45 percent to 45 percent of base salary). This enables DoD to competitively set pay for new hires and to reward valued performers through performance payouts. The higher salary structure for physicians and dentists is in recognition that premium pay will not be available and that physicians and dentists work significant overtime hours. This practice reflects compensation practices in competitive labor markets where salary structures are set at a higher level.

#### *Section 9901.362—Modification of Standard Provisions*

This section describes provisions related to premium pay, overtime pay, night pay, Sunday pay, holiday pay, law enforcement availability pay, hazardous duty pay, compensatory time off for travel, compensatory time off for religious observance, and the air traffic controller differential. A commenter suggested that FLSA-exempt employees be credited for overtime work in increments of 6 minutes or 15 minutes, depending on the agency's payroll system. We have not adopted this suggestion. Unlike the GS pay system which has separate rules to credit regularly scheduled overtime work and irregular or occasional overtime work, NSPS does not make this distinction. Rather, to establish a contemporary and flexible system of human resources management for DoD employees, NSPS has simplified the scheduling, crediting, and payment of overtime work. Under NSPS, an FLSA-exempt employee is compensated for overtime work using a quarter of an hour as the smallest fraction of an hour, with minutes rounded to the nearest full fraction of an hour.

A commenter recommended that all employees working a flexible work schedule (including FLSA-exempt employee) should have a choice to earn compensatory time off or overtime pay. We do not agree. While non-exempt NSPS employees may request compensatory time off, FLSA-exempt employees may be required to accept compensatory time off for any overtime

work, regardless of pay level. We believe this provision provides management the flexibility and the ability to manage its workforce to meet critical mission requirements.

Regarding language in § 9901.362(c) related to night pay and when it is and is not payable, one commenter pointed out that annual and sick leave must be paid at the appropriate shift differential. A GS employee receives night pay for a period of paid leave only when the leave totals less than 8 hours in a pay period. Therefore, if a GS employee takes 8 hours or more of leave in the pay period, the employee does not receive a night pay differential for those hours of paid leave. We have not adopted a similar rule. Under NSPS, employees having a tour of duty that includes night hours are not entitled to a night pay differential when on annual or sick leave. Except for a period of court leave, military leave, time off awarded under 5 U.S.C. 4502(e), compensatory time off during religious observances, or when excused from duty on a holiday, night pay is not payable during paid absences. However, NSPS employees receive night pay for each hour of work performed at night that is scheduled or ordered or approved by management between the hours of 6 p.m. and 6 a.m. Unlike the GS pay system, NSPS employees receive night pay whether the night work is scheduled before or after the administrative workweek begins. We believe that this provision is fair, equitable, and understandable to employees and that the changes we have made in night pay eases the administration of this premium pay.

One commenter asked that the administratively uncontrollable overtime (AUO) pay provision in 5 U.S.C. 5545(c)(2) be applied to NSPS employees. Pay for AUO work is a substitute form of pay for irregular, unscheduled overtime work that is paid on an annual basis instead of an hourly basis. The basis for determining positions for which AUO is payable is that a position must be one in which the hours of duty cannot be controlled administratively, which is inherent in the nature of the work assigned to the position and that the employee is generally responsible for recognizing, without supervision, circumstances that require the employee to remain on duty. Typically, a criminal investigator received AUO pay until availability pay replaced AUO in 1994. Given the specific position requirements for AUO pay, NSPS waived the administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2). We believe our rationale continues to be valid and that NSPS employees who perform

substantial amounts of overtime work are properly compensated through the NSPS overtime pay provisions.

One commenter pointed out inconsistency in claims for compensatory time off for travel (currently claims must be filed within 10 days of travel for NSPS, but within 5 days of travel for non-NSPS employees). We have not changed the proposed regulation in response to this comment because the proposed NSPS rule more favorably responds to the national security mission performed within DoD and the likelihood that employees may need additional time to file such requests due to the exigency of the mission. The goal of NSPS is not to be fully consistent with the GS system but to improve upon it where possible. Allowing employees more time to file claims for compensatory time off for travel is just one such instance.

One commenter believes that using the term "related regulations" in § 9901.362(i) is confusing for third party adjudicators. We disagree inasmuch as § 9901.362(i)(1) explains that NSPS employees are covered by 5 U.S.C. 5545(d) and the related regulations in 5 CFR part 550, subpart I, subject to the requirements and modifications delineated in § 9901.362(i)(2) through (i)(6). Thus, both the law and related regulations must be read together to determine an employee's entitlement to hazardous duty pay.

Another commenter recommended that engineering technicians be eligible for hazardous duty pay. We have not made a change based on this comment because the hazardous work involved in a position such as an engineering technician is considered in the classification process as part of determining the appropriate grade or band level.

A commenter asked for clarification of § 9901.362(j)(3) because we did not fully address the crediting of time spent commuting between home and a transportation terminal. We agree and have added a new paragraph (j)(4) to clarify that if an employee is required to travel directly between his or her home and a transportation terminal, the travel time is creditable as time in a travel status. Such travel time outside regular working hours is creditable as time in a travel status. However, normal commuting time must be deducted if the travel occurs on a day the employee is regularly scheduled to work.

Several commenters noted that the prohibition on the payment for unused compensatory time off for religious observances appears discriminatory because it applies only to those whose personal religious beliefs require the

abstention. We disagree. Section 5550a of title 5, United States Code, affords all Federal employees the opportunity to earn and use compensatory time off for religious observances without losing pay or using annual leave. However, an employee should be allowed to accumulate only the number of hours of work needed to make up for past or future absences for religious observances. If self-regulated properly, an employee should only have the appropriate number of hours needed to fulfill religious obligations and not require payment in lieu of use.

A representative of a labor organization contended that compensatory time is actually reimbursement for services provided and, as such, should not be defined as "premium pay." We have not changed the proposed regulation based on this comment. Compensatory time earned under 5 U.S.C. 5543 is considered to be premium pay and is paid out at the overtime rate that was earned, when applicable. In contrast, compensatory time off for religious observances and compensatory time off for travel are listed separately because they represent an accommodation or flexibility provided to an employee to respond to a personal need. Consequently, they are not paid out under NSPS. They are additional time and attendance flexibilities available to an employee and are not considered to be covered under the overtime provisions.

Commenters suggested that provisions related to Sunday pay, overtime pay, and compensatory time off for travel should mirror provisions of the GS system. We have chosen not to change this section of the regulation because it is not our intent to achieve full consistency with the GS system; rather, our goal is to preserve flexibility within NSPS to establish provisions that best meet the Department's national security mission.

#### *Section 9901.363—Premium Pay for Healthcare Personnel*

This section addresses treatment of premium pay for healthcare personnel to include on-call premium pay, night pay, and pay for weekend duty. Commenters questioned why, if on-call premium pay is going to be authorized for NSPS employees in covered occupations, all employees (including those in graded positions) are not covered. These commenters viewed the difference as disparate treatment between NSPS and graded systems. NSPS enabling legislation provides authority to waive certain title 5 laws and regulations for employees covered by the NSPS system. This enables DoD

to, among other things, tailor a personnel system to its unique national security mission. The law does not provide authority to waive laws or regulations for employees or positions covered by other pay systems. Therefore, no authority exists to modify the General Schedule under this regulation.

Other commenters recommended that on-call premium pay be extended to other occupations that have similar on-call requirements. The Department has this flexibility and, if needed to address its critical mission requirements, it may amend the NSPS regulations at a later time.

#### *Section 9901.364—Foreign Language Proficiency Pay*

This section outlines the provisions for a foreign language proficiency pay (FLPP) for those certified in languages identified as necessary for national security interests. One union official requested amplification of the last factor listed under "Other considerations authorized by the Secretary." We have not amplified this provision, as this leaves the Department some flexibility to address future mission requirements or needs. Increased foreign language skills within the Department are necessary for building internal relationships for coalition/multi-national operations, peacekeeping and civil/military affairs. Having a cadre of skilled language speakers will allow the Department to respond quickly to crisis requirements. For example, in the aftermath of a disaster in a foreign area where the Department is distributing food and medical supplies, it is imperative to have someone readily available who can speak the language or dialect in order to explain to the affected population the food distribution process. In this case, an employee who is being paid FLPP for the required language could provide that explanation. The last factor of the payment criteria gives an authorized management official discretion in considering the unique attributes of a specific job or assignment in determining the level of payment for a covered employee.

#### *Conversion Provisions*

##### *Section 9901.371—Conversion Into NSPS Pay System*

This section prescribes policies and procedures for converting DoD employees into NSPS. One commenter noted that information under § 9901.371(j)(7) stating that the WGI adjustment is a one-time adjustment which may not be provided on any

subsequent conversions into NSPS is inconsistent with current NSPS policy, which actually permits an adjustment each time an employee converts into NSPS, provided he or she meets the conditions for such payment. We agree and have revised this paragraph accordingly.

Another commenter responded to language in § 9901.371(l)(2), which describes how "an employee who is selected for a non-NSPS position that subsequently becomes covered by NSPS before the effective date of the employee's placement in the position is eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to the increase the employee would have received had the placement been effected prior to the position becoming covered by NSPS." In the commenter's view, this employee should receive a mandatory increase rather than be subject to the discretion of the authorized management official. Unlike the GS system, NSPS requires supervisors and managers to take responsibility for, and be held accountable for, determining the appropriate pay for their employees. Those determinations are made based on many variables. For example, an employee's pay may reflect factors such as critical mission or business requirements, the employee's past and anticipated performance and contributions, specialized skills or knowledge possessed by the employee, labor market conditions, base salary rates paid to other employees in similar positions, and the location of the position. Further, NSPS emphasizes increases in pay based on performance, not so much the up-front pay-setting when an employee is placed in a position. We do not agree that mandating pay under this provision is the right thing to do because we want supervisors and managers to have the flexibility and the tools they need to make decisions necessary to perform their work and meet the strategic missions and objectives of the Department. Therefore, we have not revised this paragraph. We note that two labor organizations agreed with the provisions that employees will not experience a pay reduction upon conversion to NSPS.

Other commenters expressed concerns regarding § 9901.371(m). According to these commenters, the physicians' comparability allowance (PCA) is not paid consistently across all DoD installations, which means that those physicians and dentists who are not receiving this payment at the time of conversion will have a lower base

salary than those who do receive this payment. They assert that this makes the Department less competitive with other agencies such as the Department of Veterans Affairs, results in continuing pay inequities, and doesn't comport with the stated objective of NSPS to set and adjust salaries based on factors such as labor market conditions. The proposed regulation provides flexibility for the Component to decide at the point of conversion whether to incorporate this payment in whole or in part into the employee's NSPS base salary if the employee was regularly receiving the allowance prior to conversion. In making this determination, the Component may take several things into consideration, e.g., access to a greater rate of pay than under the GS system, any applicable targeted local market supplement, retention of the employee, etc. We do not agree that mandating the inclusion of this allowance in the employee's NSPS base salary is desirable or prudent and have not changed this provision.

One commenter suggested that when an employee is transferred or reassigned from a non-covered position to a position already covered by the NSPS system, that employee should be provided with a copy of the new classification, position or series description, occupational group or subgroup, pay schedule, and any other relevant documentation before entering service in the position. DoD Human Resources Offices already have procedures in place to provide transferred and reassigned employees with a copy of the Notice of Personnel Action (SF-50) which includes the career group, band, series, official title, FLSA status, and salary. A copy of the position description is also available and all pay schedules are published and available on line. For these reasons we believe that including this type of information in this regulation would be redundant and unnecessary.

#### *Section 9901.372—Conversion or Movement Out of NSPS Pay System*

This section addresses pay setting when employees convert to or move out of the NSPS pay system and are placed in another Federal pay system.

Commenters objected to the provisions of the conversion-out process allowing employees who were at or near the top step in GS grade, and converted to NSPS, to be converted out from NSPS at a higher grade than the grade that they previously held, even if there have been no changes in duties and responsibilities. The procedures described in this section are similar to conversion-out procedures provided in

many of our demonstration projects. We would expect that employees who are converted out of NSPS within a few years after conversion into NSPS will typically be converted out to a virtual grade consistent with their grade at the time of conversion. However, we do acknowledge that because NSPS offers the opportunity for greater salary advancement for many employees, it is possible that their adjusted salary at the time of conversion out could result in a higher virtual GS grade. This will be particularly true for employees who have been covered for a long period under NSPS. We have not revised these procedures in response to these comments.

Another commenter suggested that the entire section should be deleted, since the receiving agency, not DoD, should establish the GS equivalent rate for their employees. We do not agree. This section was added in direct response to requests from DoD Components and many DoD employees. Initially, we designed NSPS with the goal of covering the vast majority of DoD employees in a relatively short period of time. That has not materialized at this time and, instead, there is considerable movement within the Department back and forth between NSPS and non-NSPS positions. A major impact of this situation has been that NSPS employees are often disadvantaged when they are promoted to a GS position because the rules of that system apply to the action. Because we presently have no conversion out procedure, these employees must have their pay set in accordance with the GS highest previous rate rule rather than the two-step promotion rule that applies to GS employees who move from one GS grade to a higher GS grade. This results in the NSPS employee receiving a smaller promotion increase.

Other commenters requested that this section include provisions allowing civilian employees the option to transfer back into the GS system. We have not revised this section in response to these comments. DoD civilians complement and support the military around the world and to meet the interests of the United States in today's national security environment, DoD needs an integrated, flexible, and responsive team. To meet today's challenges, DoD needs a workforce whose performance and contributions are linked to strategic mission objectives and who can be more fully recognized and rewarded. DoD needs a classification and pay system that allows us to attract and retain employees. At the same time, DoD needs a system that protects the fundamental rights of its employees.

The GS system cannot adequately address the 21st century national security environment and, although it is based on important core principles, those principles are operated in an inflexible, one-size-fits-all system. This inherent weakness makes supporting the DoD's mission complex, costly, and ultimately risky. With NSPS, we've designed a modern, contemporary, and flexible system that will generate more opportunities for DoD civilians by easing the administrative burden routinely required by the GS system. While DoD employees may move back and forth between the NSPS and GS systems, as well as other personnel systems within the Department, the objective is to cover as many positions and employees under NSPS as possible and to fully allow and encourage DoD employees to take advantage of the opportunities available under the new system.

One commenter observed that § 9901.372(a) should be revised to say that when a GS virtual grade and rate are established, they "will be" (rather than "may be") used to apply GS pay-setting rules. We agree and have revised this paragraph accordingly. Another commenter suggested that § 9901.372(d)(1) should be revised to state that intervening (unused) grades for two-grade interval occupations should be considered when determining the GS virtual grade of an employee who is converting or moving from an NSPS position to a GS position. For example, in the case of the YA-2 pay band that covers grades GS-9 through GS-13, the commenter believed that GS-10 should be considered in setting the GS virtual grade even if that grade was not actually available to the position in the GS pay system because the position was in a GS two-grade interval occupation that used only grades GS-9, GS-11, GS-12, and GS-13. As a result of this comment, we carefully reviewed this matter and determined that intervening grades in two-grade interval occupations should not be considered in setting a GS virtual grade. We identified certain anomalies that would result if the intervening grade were considered. For example, if a GS occupation had special rates at the GS-9 and 11 levels, setting the GS virtual grade at GS-10 would require the GS virtual rate be set within the GS-10 rate range, but there would be no established special rate for that grade. This would produce inappropriate results in applying the maximum payable rate rule or the promotion rule. Furthermore, we determined that the established policy of various pay-

banding demonstration projects (including several DoD demonstration projects) was to exclude unused intervening grades in determining GS converted grades when employees leave the system. Accordingly, we have revised § 9901.372(d)(1)(i) to expressly provide that an intervening grade for two-grade interval occupations may not be considered in setting the GS virtual grade.

Another commenter expressed concern that the requirement in § 9901.372(d)(2) that, when an employee's adjusted salary falls between two GS steps, his or her virtual rate must be set at the next higher step, may prove unnecessarily costly, because if the employee's actual rate (based on the virtual rate) later also falls between steps, pay will have to again be set at the next higher step if he or she is promoted to a GS position and the 2-step rule is applied. The commenter suggests that DoD set the virtual rate at the employee's existing actual adjusted salary under NSPS so that the 2-step rule can be applied directly to that rate. This is consistent with OPM's own rule at 5 CFR 531.243(c) relating to the promotion of a GM employee to a GS position. We have revised this paragraph accordingly.

A commenter asked that we change § 9901.372(d)(2)(iii) or add another paragraph to reflect grade retention upon movement out of NSPS to be consistent with the GS system. They stated that if the movement out results from a RIF or a realignment, the NSPS employee deserves the same pay protection as his or her GS counterparts. We understand this concern; however, upon movement or conversion out of NSPS it is the pay administration rules of the gaining system which determine how pay is set and whether or not an employee is entitled to or eligible to receive grade and/or pay retention. Because NSPS employees are not in a "covered pay system," they are not eligible for grade retention when they move from NSPS to the GS system in accordance with 5 CFR 536.102(d). When an NSPS employee is placed in a GS position as a result of a RIF, he or she may be entitled to indefinite pay retention.

Finally, we have made a few minor edits to § 9901.372 either to conform to publishing requirements for the **Federal Register** or to add clarity to the proposed rule.

#### 4. Subpart D—Performance Management General Comments

Subpart D regulates performance management for NSPS employees.

This subpart inspired a large number of comments during the public comment period. Since many of the comments related to both subparts C and D, we addressed them under the heading "Major Issues." However, one general comment remains. Many commenters expressed concern that the linking of pay to performance would dampen discourse between supervisor and employee. These commenters were inclined to believe that employees seeking favor with their leadership, as well as larger increases, would censor or inappropriately alter any dissenting opinions they held concerning work processes or products, which would result in less than desirable outcomes. Such behavior, however, may exist whether or not performance and pay are directly linked. No changes have been made based on these comments.

#### Comments on Specific Sections of Subpart D

##### *Section 9901.403—Waivers*

Section 9901.403 specifies the waiver of 5 U.S.C. chapter 43 with regard to that employee or category of employees covered by this subpart.

One commenter expressed concern that waiver of chapter 43 will lead to greater uncertainty among DoD employees about what their supervisor and management in general expect, which will result in workplace disruptions, confusion, lowered employee morale, organizational inefficiencies, and performance deficiencies. We have concluded that the waiver of 5 U.S.C. chapter 43 is appropriate and necessary to implement NSPS performance management. No change has been made to the proposed regulation based on this comment.

##### *Section 9901.404—Definitions*

This section contains definitions for the performance management process under NSPS.

Commenters suggested a change to the definition of *unacceptable performance*. Commenters objected to requiring an unacceptable rating for failure to meet a single performance expectation. Similar to other performance management systems in the Federal Government, NSPS applies a generally accepted practice of identifying unacceptable performance as failure to meet one or more performance expectations. In recognition of the consequences of unacceptable performance, the regulation stresses the need for clear communication of performance expectations, monitoring performance, and addressing performance that does not meet expectations (see

§§ 9901.406(b), 9901.409, and 9901.410). No change has been made to the proposed regulation based on these comments.

Several commenters also expressed concern that requirements related to the definition in § 9901.103 of *performance* as it relates to demeanor, conduct, and behavior are irrelevant to accomplishing performance objectives unless management establishes a direct link between the required demeanor and accomplishment of the assignment.

Performance assessments would not be complete without considering many factors, including employees' behaviors in carrying out assigned work. Employee behaviors can be objectively observed and evaluated against established performance expectations. Supervisors also may consider how underlying misconduct negatively impacts the execution of an employee's duties, that of the team, and/or that of the organization under NSPS. All applications of performance management under NSPS continue to provide employees with protection against prohibited personnel practices, whistleblower protections, and appeal rights. Any disagreement with the assessment of an employee's professionalism, conduct, or respect, to the extent it impacts his or her rating, is subject to the reconsideration process as defined in § 9901.413. No change has been made to the proposed regulation based on this comment.

One commenter requested that a definition of "rating official" be added to § 9901.404. We agreed and revised the section to include this definition. In addition, we made a small revision to the definition of *minimum period* to specify that only performance under an approved NSPS performance plan qualifies for completion of the minimum period.

##### *Section 9901.405—Performance Management System Requirements*

Section 9901.405 specifies that NSPS regulations establish the performance management system required under 5 U.S.C. 9902 and that this subpart contains mandatory requirements for all employees covered by NSPS. It also provides that the Secretary has the authority to further define the system through implementing issuances.

Several members of labor organizations objected to the summary rating levels included under § 9901.405 and suggested that we revise the proposed regulation to include specific language indicating the impact of ratings on job retention. The regulation identifies the summary rating levels that will be used in NSPS. We explained the

rating level descriptors in the implementing issuances currently in use. The descriptors are not the exclusive means of determining a rating but rather serve as a guide when supervisors determine the ratings for each job objective. NSPS, like all performance management systems, assesses employee performance upon which management may base decisions for employee retention. This is consistent with the merit system principles described under 5 U.S.C. 2301. No change was made to the proposed regulation based on these comments.

A commenter expressed concern that NSPS is ignoring the value of experience in the performance management system. Under NSPS, an employee is rated based on his or her demonstrated performance, which generally is directly impacted by his or her experience and which is assessed on what the employee has accomplished and how well he or she has met performance expectations. This assessment is measured in terms of the quality of the employee's experience, as reflected in his or her performance. No change was made to the proposed regulation based on this comment.

A few commenters expressed concern at the limited scale available for rating an employee's performance. While one commenter suggested using a 10-point scale instead of the current 5-point scale, most commenters found no issue with the rating scale. During the past 2 years, DoD has tested the NSPS 5-level rating system and found it to adequately enable distinctions in levels of performance. There is no indication that the scale unfairly restricts a supervisor's ability to rate an employee's performance accurately. No change has been made to the proposed regulation based on these comments.

Two commenters suggested that, to achieve uniformity in rules used for rounding raw performance scores to derive adjective ratings of record, the rules should be included in the regulation. Another commenter asserted that organizations rounded down performance scores in an attempt to lower employee ratings. Standardized rounding rules specific to NSPS performance ratings were developed to support distinctions in performance and ensure uniformity of rating practices across NSPS. Under NSPS, higher-level performance has been determined to be performance above an even split between two rating levels (i.e., above the rounded score of "x.50"). To ensure uniformity and consistency regarding the application of rounding rules and in response to the above comment, we

added § 9901.405(b)(6) to specify these rounding rules.

One commenter indicated that the proposed regulation did not permit an accurate evaluation of job performance based on objective job-related criteria. NSPS uses a multi-level system that makes distinctions in levels of employee performance and links employee achievements, contributions, knowledge, and skills to organization results. The system ensures that performance expectations are clearly communicated to employees and that they are linked to the organization's strategic goals and objectives. This provides the ability to evaluate employees based on these objective job-related criteria, recognize valid distinctions in performance, and reward employees based on those distinctions. No change was made to the proposed regulation based on this comment.

One commenter indicated that if he had identified fewer job objectives his rating would have been higher and thus he would have received a higher share. Job objectives can be identified based only on the requirements of the position and reflect the responsibilities and expectations associated with the position. Ratings are assigned in accordance with the summary rating levels provided in the regulation and the implementing issuances. However, these rating level descriptors are not the exclusive means for determining a rating, but rather serve as a guide when supervisors determine the ratings for each job objective. The rating and the resultant share assignment are a product of an evaluation of an employee's overall performance based on criteria defined for each rating level that are clearly identified in the regulation and implementing issuances. No change has been made to the proposed regulation based on this comment.

Finally, a commenter indicated that some military supervisors with NSPS responsibilities are not of sufficient rank to supervise civilians and do not have the required knowledge to perform their NSPS duties. The commenter suggested that NSPS establish a crosswalk to identify equivalent military and civilian ranks to determine who can supervise Federal employees. It is not within the scope of this regulation to determine which military ranks can supervise which NSPS pay bands. However, the regulation clearly identifies supervisory responsibilities and specifies that supervisors and managers will be held accountable for effectively managing the performance of employees under their supervision. Further, DoD is committed to training managers and supervisors, including military members, on how to

establish and communicate performance expectations, how to assess employee performance, and how to appropriately translate that assessment into pay adjustments. No change has been made to the proposed regulation based on this comment.

#### *Section 9901.406—Setting and Communicating Performance Expectations*

Section 9901.406 provides the requirements and guidelines for communicating with employees regarding their performance through the use of "performance expectations."

One commenter suggested simplifying the definition of performance expectations while several other commenters indicated a need to safeguard against imposition of impossible performance expectations. We believe the existing definition and the requirements identified in this section clearly describe the parameters for setting performance expectations. In addition, the regulation specifies that employees will be involved in the development of performance expectations, which provides an opportunity for dialog between the supervisor and the employee during the development process. Further, safeguards are in place to preclude the imposition of impossible expectations since performance expectations are subject to higher or second-level review to ensure consistency and fairness within and across the organization. Additionally, NSPS job-objective training for supervisors and managers stresses the use of "SMART" objectives. "SMART" is an acronym for the following criteria: Specific—means observable action, behavior, or achievement is described; Measurable—means the method or procedure must exist to measure the quality of the outcomes; Aligned—means linking (or drawing a line of sight from) objectives to organizational mission and goals; Realistic and Relevant—means the objective is achievable and relevant means important to the organization; and Timed—means there is a point in time when the objective (or assignments covered by the objective) will start or when it will be completed. These measures ensure employees will not be expected to accomplish "impossible expectations." We have made no change to the proposed regulation based on these comments.

One commenter suggested revising § 9901.406(b) to state that a performance expectation must be communicated to an employee in writing before the employee is expected to accomplish a related work assignment. Section

9901.406(b) already states that an employee will receive performance expectations in writing before being held accountable for them. No change has been made to the proposed regulation based on this comment.

Another commenter requested clarification regarding § 9901.406(b)(1), which refers to performance expectations that will be communicated to the employee in writing “including those that may affect an employee’s retention in the job.” The commenter indicates that this seems to imply that there are expectations that may not affect an employee’s job retention. Like all performance management systems, NSPS assesses an employee’s performance based on an evaluation of the performance expectations communicated to the employee in writing and amplified verbally as described in § 9901.406(f). This assessment of an employee’s performance is the basis upon which management may make decisions regarding employee retention. We agree with the commenter that this phrase does not clearly portray our intent and it has therefore been removed.

Commenters suggested that § 9901.406(c) be deleted from the proposed regulation, as it holds employees accountable for subjective standards of professionalism and conduct but does not hold supervisors accountable for the same professionalism and conduct standards. These comments indicate a lack of understanding that the term “employee” also pertains to supervisors and managers. We believe the misunderstanding occurs because a paragraph addressing criteria pertaining only to supervisors and managers is preceded by a paragraph addressing criteria for all employees, which includes supervisors and managers. To avoid the potential for such a misunderstanding, we added language to § 9901.406(d) to clearly indicate that the requirements specific to supervisors and managers are in addition to those in § 9901.406(c).

One commenter suggested adding to § 9901.406(e) a requirement for supervisors and managers to meet with employees they supervise at the beginning of the appraisal period and at scheduled times thereafter. The regulation clearly states in § 9901.405 that supervisors and managers are held accountable for effectively managing the performance of their employees. This responsibility includes setting and communicating performance expectations, monitoring performance and providing feedback. We believe the regulation defines supervisor and

manager responsibilities in this area without being overly prescriptive in the manner and number of times they should meet with employees. The regulation preserves a certain amount of discretion in recognition of the breadth of work and variety of work situations (including varied levels of independence and geographic dispersion) prevalent in DoD. No change has been made to the proposed regulation based on this comment.

One commenter suggested specifically including occupational peer involvement in the factors to be considered when developing performance expectations. Peer involvement, however, is normally part of a process rather than a factor. Section 9901.406(e) indicates that performance expectations should include organizational, occupational, or other work requirements as well as competencies that an employee is expected to demonstrate or contributions that he/she is expected to make. We believe this description allows the flexibility to include necessary occupational requirements when developing performance expectations. No change was made to the proposed regulation based on this comment.

Several commenters noted that the option for supervisors to amplify performance expectations via oral instructions under § 9901.406(f) is especially problematic as this could likely lead to a number of misunderstandings and disputes between supervisors and employees over how the expectation is expressed or understood, or whether it is even expressed as a performance expectation on which an employee may be appraised. Others noted that this section may conflict with the requirement for clear communication in § 9901.405(c)(1). We believe that the regulations sufficiently address concerns about communication of performance expectations. The language in § 9901.406(b) clearly requires the communication of performance expectations to employees in writing prior to holding them accountable for these expectations. It is neither feasible nor functional to require the written communication of every assignment and instruction used to amplify performance expectations. Non-written communication can still be considered clear and can be accomplished through dialog regarding performance expectations. The attributes identified in § 9901.406(f) relate to the day-to-day communication between supervisors and employees regarding work assignments, including specific goals or

metrics that are a project-specific extension of already established performance expectations. No change has been made to the proposed regulation based on these comments.

Commenters expressed concern over the establishment of performance expectations by supervisors. Many commenters stated that performance expectations should be subject to an appeals process by the employee, and not simply set by the supervisor according to the process in § 9901.406. Insofar as practical, employees are to be involved and their participation sought in the development of performance expectations as stated in § 9901.406(g). However, similar to performance management systems under 5 U.S.C. chapter 43, managers need to retain the sole and exclusive authority to define the work to be performed via performance expectations. The regulations do require the safeguard that all performance expectations receive a higher-level review as specified in § 9901.406(h) and thus secondary review is already part of the expectation setting process. No change has been made to the proposed regulation based on these comments.

Other commenters specifically requested that the term “insofar as practicable” be deleted from § 9901.406(g) as 5 U.S.C. 9902(b)(7)(D) requires the Department of Defense to “provide a means” for ensuring employee participation in the implementation of the system. While we believe the importance of involving employees in the setting of performance expectations is paramount, we acknowledge that there may be cases when an employee is not involved to the fullest extent (e.g., development of standardized objectives for a group of employees performing similar work). Mandating complete and uniform involvement would unnecessarily hinder the development and administration of uniform expectations, where appropriate. No change has been made to the proposed regulation based on these comments.

Finally, one commenter suggested substituting “pay pools” for “organizations” in § 9901.406(h). Such a change would require higher- or second-level reviews to reconcile performance expectations across a pay pool rather than an organization. This section appropriately addresses the higher-level review of performance expectations from a broader organizational perspective. However, to the extent a majority of pay pools are structured along organizational lines, this review often has the effect of reconciling expectations across pay pool structures.

No change has been made to the proposed regulation based on this comment.

*Section 9901.407—Minimum Period of Performance*

Section 9901.407 addresses the minimum performance period and eligibility for conducting appraisals leading to performance payouts. It describes the requirements for the minimum period of performance under an NSPS performance plan to qualify for an NSPS rating of record.

One commenter suggested that the language included in § 9901.407 is misleading. The commenter believes that the language could be interpreted erroneously to mean that an employee with NSPS-covered service related to § 9901.342(i) through (l) may be credited with service performed prior to breaks in service and meet the minimum performance period even if the breaks were not related to a reason expressed in § 9901.342(i) through (l). In response to this comment, we have modified the language to clarify that only service performed prior to a § 9901.342(i) through (l) break in service may be counted towards a minimum period.

One commenter recommended changing § 9901.407(b)(1) to indicate only periods of unpaid leave may not be applied toward the 90-day minimum. The proposed regulation intended that paid leave as well as unpaid leave would not be credited toward meeting the requirements of the minimum performance period. NSPS provides for using the modal rating within a pay pool to ensure payouts for employees who do not meet the minimum period due to approved paid leave. While we made no change to the proposed regulation based on this comment, we modified § 9901.342(k) to cover any employee who did not meet the minimum period of performance as a result of approved paid leave. The former language in § 9901.432(k) limited special payouts to employees on “extended leave.” The qualifying language, “extended leave”, was removed. We also note that under § 9901.411, performance periods can be extended to permit an employee who is close to meeting the 90-day minimum to meet that requirement.

Another commenter suggested adding that the minimum period of performance must be 90 consecutive calendar days. The regulation accurately provides for allowable breaks (such as leave) and provides credit for nonconsecutive service toward meeting the minimum period. No change has been made to the proposed regulation based on this comment.

*Section 9901.408—Employees on Time-Limited Appointments*

Section 9901.408 allows evaluation and thereby coverage of NSPS employees in time-limited appointments not expected to exceed 90 days. It permits supervisors to issue performance plans and performance expectations to employees on time-limited assignments appointed for less than 90 days when these plans and expectations are linked to the assigned organization’s mission. Supervisors are expected to engage these employees in a dialog relative to performance expectations for the appointment and conduct an evaluation of employees at the end of their appointment consisting of a narrative description of their performance, accomplishments, and contributions. This narrative may serve as documentation and justification for recognition under 5 U.S.C. chapter 45, consistent with and subject to applicable criteria and approval procedures.

One commenter requested clarification of the distinction between yearly evaluations and time-limited appointment evaluations that can occur in the same year. The commenter questioned how management would treat the two in relation to pay for performance. Section 9901.408 clearly indicates that a supervisor may give an evaluation to an employee on a time-limited appointment of less than 90 days. Any recognition for performance would be under 5 U.S.C. chapter 45. These employees, for the most part, would not be eligible for pay pool payouts. Section 9901.407 provides the requirement to meet the minimum period of performance of 90 days to be eligible for a rating of record and possible performance payout. Conceivably, an individual could gain eligibility for an NSPS rating of record and pay pool payout by moving to a time-limited appointment of longer duration. However, there is no conflict or overlap between the two processes as they involve different eligibility requirements. No change has been made to the proposed regulation based on this comment.

*Section 9901.409—Monitoring and Developing Performance*

Section 9901.409 establishes the basic responsibility for supervisors to monitor employee and organizational performance and inform employees of their progress in meeting their performance expectations. Comments on this section were generally favorable, with most commending the section’s inclusion.

One commenter suggested adding to § 9901.409(a)(3) a requirement for an interim performance review during periods of performance of less than 180 days if it is determined that an employee is not meeting performance expectations. Section 9901.410 provides requirements and criteria for addressing performance that does not meet expectations. That section clearly requires identification and communication of specific performance deficiencies whenever an employee’s performance is not meeting expectations. This guidance is applicable without regard to the length of the appointment. Since a requirement for similar communication is already provided, no change has been made to the proposed regulation based on this comment.

One commenter requested clarification as to how the developmental process detailed in § 9901.409(b) can be a shared responsibility between management and employees. While we recognize that § 9901.409 has a management focus as it pertains to performance development, all identified processes require dialog between both the supervisor and the employee. Both parties must apply and be receptive to constructive collaboration. In addition, it is incumbent on employees to initiate conversation with their supervisors to pursue development options when needed to improve their performance, as well as to independently pursue education and training that may help them advance. In recognition of these employee-initiated actions for developing performance, the proposed regulation has been modified to reflect that performance development options are “not limited to” those described in this section of the regulation.

Another commenter requested revised language requiring ongoing feedback to employees, in addition to the one required by the interim review, to be in writing. This commenter indicated the purpose of requiring all feedback occur in writing was to ensure employee participation in his/her own performance development and avoid confusion that may result from only oral feedback. Face-to-face and oral communications serve to enhance supervisor/employee relationships as well as minimize misunderstanding as the give-and-take in oral communication allows for immediate feedback and clarification of confusing points. Feedback might be as simple as “good job on the briefing.” These short feedback communications may periodically occur in writing, but to require all such feedback to be written

diminishes the opportunity for the kind of face-to-face communication that helps clarify communication and enhance the supervisor/employee relationships. No change has been made to the proposed regulation based on this comment.

*Section 9901.410—Addressing Performance That Does Not Meet Expectations*

Section 9901.410 establishes the process for addressing poor performance under NSPS and the responsibility of the supervisor to address such situations.

Comments on this section criticized the perceived focus on negative alternatives available to a supervisor for addressing performance that does not meet performance expectations. Suggestions include adding a list that details the developmental options available to the supervisor. The proposed regulation provides positive alternatives for developing performance as identified in § 9901.409. These are viable options for managers to consider but may not be appropriate in all situations. Additionally, among the options described in § 9901.410 are such positive steps as training, improvement periods and reassignments. No change has been made to the proposed regulation based on this comment.

Another commenter suggested that there is not enough distinction between addressing poor performance and taking outright adverse action against an employee. The commenter noted that language should be added stating that employees will be provided a reasonable opportunity to improve performance prior to initiation of an adverse action. The commenter suggested adding a section regarding periods for employee improvement. Section 9901.410(a)(2) lists the range of options available to a supervisor, among which adverse action is but one option available. Because this section already lists an employee improvement period among the options available to a supervisor, we feel that NSPS provides sufficient options alongside the developmental alternatives in § 9901.409 to give the supervisor appropriate tools with which to address poor performance. No change has been made to the proposed regulation based on this comment.

*Section 9901.411—Appraisal Period*

Section 9901.411 sets forth the dates to be associated with annual appraisal periods and ratings of record.

One commenter requested the inclusion in § 9901.411(a)(3) of applicable circumstances when an

employee can receive an early annual recommended rating. We agree with this recommendation and have added § 9901.412(l) to identify situations when an early annual recommendation rating of record will be issued.

In addition, a commenter recommended using July 3 rather than July 1 as the beginning of the time period for early annual recommended ratings, since July 3 is the exact beginning of the 90-day minimum period prior to the end of the appraisal period. We agree and have modified § 9901.411(a)(3) to make this change.

Another commenter expressed concern regarding the circumstances for extending the appraisal period. In particular, the commenter questioned whether the extension could be used to give favored employees an unfair amount of time to improve performance, and whether the funds to pay the affected employee alter the pay pool funds available for the following year. The language in § 9901.411 clearly outlines the requirements for using an extended appraisal period. These criteria limit the extension of an appraisal period to the purpose of allowing an employee to meet the minimum period. Further, the regulation specifies that an extension of the appraisal period cannot delay the payout for the applicable pay pool. Therefore, current year funding will be used for payouts provided to employees who complete extended appraisal periods and receive ratings of record. No change has been made to the proposed regulation based on this comment. However, to ensure a clear understanding of the effective date for this type of action, we added § 9901.411(d) to the regulation.

*Section 9901.412—Rating and Rewarding Performance*

Section 9901.412 identifies responsibilities of the rating official and the Pay Pool Panel and specifies the requirements associated with accomplishing employee ratings of record to reward employee performance.

Many commenters felt that the authority granted to the Pay Pool Manager and the Pay Pool Panel to adjust recommended ratings of record is inappropriate and that the authority for an employee's rating of record should rest solely with individuals directly aware of the employee's performance. Many expressed concern that the proposed regulations do not require pay pool authorities to have any exposure to the employee being rated, which could result in changing ratings to ease the organizational payout structure without providing justification for such changes.

Another commenter suggested that Pay Pool Manager authority may violate the system requirement for a fair, credible, and transparent employee performance system. One commenter specifically suggested revising § 9901.412(e) so that a Pay Pool Manager must afford the rating official and the employee due process to review any proposed change in rating, and that the Pay Pool Manager must base any subsequent change on review of written documentation from both the official and the employee.

The Pay Pool Manager is given final authority to assign ratings of records to employees in NSPS in accordance with merit system principles. Per the discussion under Major Issues, the ability of Pay Pool Panels and Pay Pool Managers to adjust recommended ratings of record reinforces equity across and within pay pools and is a necessary safeguard when rewarding performance from a shared performance fund (i.e. pay pool). Because the nature of NSPS jobs necessitates use of narrative performance standards, it is possible for supervisors to interpret the performance criteria differently, to the advantage or disadvantage of others in the pay pool. Using a multi-member Pay Pool Panel to reconcile ratings ensures a common understanding of criteria across the pay pool and ensures equity and fairness of ratings within the pay pool. Any employee who disagrees with the Pay Pool Manager's determination may request reconsideration of the rating or job objective rating in accordance with § 9901.413. If an employee disagrees with the reconsideration decision of the Pay Pool Manager, the Performance Review Authority provides an extra level of review and will make the final decision on all reconsideration requests pertaining to job objective ratings or ratings of record. The Performance Review Authority only applies performance-related criteria, in a manner consistent with its application throughout the rest of the pay pool, in making decisions on reconsideration requests. Requiring criteria be applied in the same manner across the pay pool ensures that employees working at the same level are rated equitably. In response to comments to ensure the level of management in the best position to observe an employee's work is "heard" before a recommended rating is changed, we added a new paragraph at § 9901.412(f) to specify the Pay Pool Panel responsibility for affording the rating official an opportunity to justify a recommended rating of record before it is changed by the Pay Pool Panel.

Some commenters questioned the absence of an independent review authority to identify and remedy

malfeasance by the applying agency. The commenter expressed concern that a review will go to the same people making the initial rating. The Performance Review Authority provides an additional level of review beyond those involved in making the initial rating, functions as the ultimate administrative review authority, and makes the final decisions in the rating process. No change has been made to the proposed regulation based on this comment.

Some commenters lauded the inclusion of § 9901.412(a) as needed protection for NSPS employees. Others, however, felt that the rating process encouraged the forced distribution of ratings as employees are advised that most will receive a Level 3 rating of record. While NSPS designs performance criteria to make distinctions in performance, the regulations and agency practice prohibit requiring any specified number of ratings at a particular rating level. Rather, the distribution of ratings has shifted as a result of standards that challenge employees and set a higher bar for higher-level performance. These standards enable more meaningful distinctions among performers. The past 2 years have demonstrated that the NSPS criteria successfully distinguish and reward multiple levels of performance. Identified performance indicators, upon which rating determinations are based, define and provide further amplification of performance levels. The change in the distribution of ratings as a result of the new criteria, however, does not equate to the concept of "forced rating distribution". Forced rating distribution occurs when management requires a certain percent of the population to be placed in a certain rating level regardless of how employee performance compares to performance criteria. This is not how NSPS functions. No change has been made to the proposed regulation based on these comments.

While the implication by at least one commenter was that a Level 3 rating of record reflects average performance, in fact, Level 3 performance recognizes those employees who performed their identified responsibilities in a "valued" manner and in doing so effectively met all of their performance expectations. NSPS reserves higher-level ratings for employees who have significantly exceeded performance expectations. No change has been made to the proposed regulation based on these comments.

Some commenters requested more guidance in § 9901.412(d), renumbered as § 9901.412(e). The concern was that

the current guidance led supervisors to believe they did not need to connect a committed misconduct to the employee's ability to perform up to expectations in order to use it to affect an employee's rating of record. Such an understanding is inconsistent with the Department's own guidance on the matter. Another commenter stated that after-the-fact determinations that other conduct had an adverse "impact on the execution" of an employee's duties is not a proper basis for reducing a rating of record below that warranted by the extent to which the employee met or exceeded the written performance expectations, and that if the conduct could be classified as misconduct it should be handled as a disciplinary matter.

Under NSPS, to consider the impact of employee misconduct on performance, there must be a nexus between the impact of the misconduct and the execution of the employee's duties or those of the team or organization. While the supervisor will not reference the misconduct on the employee's rating of record, the supervisor may consider how the underlying misconduct negatively impacts the employee's performance, that of his or her co-workers, or the organization's productivity. In response to these comments, and to provide clarity, we revised the regulation at § 9901.412(d), renumbered as § 9901.412(e), to capture essentially what occurs today when considering the impact of work-related misconduct on an employee's job performance in any performance management system.

One commenter suggested revising § 9901.412(f), renumbered as § 9901.412(h), requiring the rating official to communicate the payout distribution to the employee along with the final rating of record and number of shares. The commenter also requested adding a sentence to this section indicating that this information will not be communicated to the employee until the final rating of record has been approved by the Pay Pool Manager. We agree with part of the recommendation and revised § 9901.412(f), renumbered as § 9901.412(h), to add payout distribution to the information communicated to the employee by the rating official. However, we believe the regulation is clear that a rating is only a recommendation until it becomes final upon completion of all appropriate review and signatures and have made no change to the proposed regulation based on this comment.

A commenter indicated confusion between language not allowing leave to be credited toward meeting the

minimum period and the requirement that the rating of record cannot be lowered based on approved absence from work. To avoid such confusion, we modified § 9901.412(g), renumbered as § 9901.412(i) to clarify that this requirement only pertains after the minimum period has been met.

One commenter suggested the inclusion of language prohibiting the use of roll-over ratings from preceding reviews for subsequent review periods. Similar to other Governmentwide performance management systems, the definitions of "performance" and "rating of record" reflect that a rating of record involves evaluation of an employee's performance of assigned duties. Roll-over ratings are inappropriate as they provide employees ratings of record for work not performed during the period being evaluated. We revised § 9901.412(h), renumbered as § 9901.412(j), to add that ratings of record prepared for a previous appraisal period will not be carried over to subsequent appraisal periods without an actual evaluation of the employee's performance during the subsequent appraisal period.

A few commenters noted that § 9901.412(h)(3)(iii), renumbered as § 9901.412(j)(3)(iii), gives leeway to the Secretary to use ratings of record for unspecified purposes in the future. The commenters requested that the Department either delete these authorities or specify these purposes in the regulation as opposed to implementing issuances. The Secretary will identify these purposes as the Department develops future programs and policies. These purposes will be identified in implementing issuances. No change was made to the proposed regulations based on these comments.

Finally, a commenter suggested that § 9901.412(j), renumbered as § 9901.412(m), needed clarification to show how the ratings discussed in this section differed from a close-out rating. This section permits a supervisor or rating official to prepare an assessment for an employee at any time after the employee has completed the minimum period. An example of such an assessment would be the close-out assessment developed for informational purposes by a supervisor or rating official when they leave a position for which they had rating responsibility for an employee. This assessment is provided to the new supervisor as input for use in determining the employee's rating of record at the end of the appraisal period. We agree with the comment and revised this paragraph to clarify our intent.

One commenter noted that, at present, the proposed regulation does not list specific guidance for those employees in environments where supervisor turnover is frequent. The commenter expresses concern that an NSPS employee would not be given a fair rating by an interim supervisor and that a new permanent supervisor, once appointed, would not have adequate information to rate the employee correctly. DoD is committed to extensive training for managers, supervisors, and employees so that they understand the requirements of the performance management system. Further, DoD is committed to training managers and supervisors, including military members, on how to establish and communicate performance expectations, how to assess employee performance, and how to appropriately translate that assessment into pay adjustments. In addition, under § 9901.412(j), renumbered as § 9901.412(m), we added the requirement that supervisors and rating officials may prepare a performance assessment to provide continuity of ratings upon transfer of a supervisor or employee, which helps to ensure that the new supervisor has a clear understanding of employee performance and contributions.

#### *Section 9901.413—Reconsideration of Ratings*

Section 9901.413 specifies the roles and responsibilities of the officials with authority to make reconsideration decisions.

One commenter suggested that a fair appeals process be established for employees to appeal their payout or lack of payout. Another commenter indicated a concern that employees have no appeal or grievance rights. Also a commenter suggested revising § 9901.413(a) to give MSPB jurisdiction and stated that MSPB must be given the authority to review performance rating reconsideration requests and grievances by employees who have a good reason to believe that their employing organizations have violated merit system principles. This section clearly states the process for an employee to challenge his or her rating of record or job objective through the NSPS reconsideration process. This reconsideration process does not preclude appropriate challenges in statutory forums or exclude appeals through other avenues. No changes have been made to the proposed regulation based on these comments.

Commenters noted that § 9901.413(b) indicates that bargaining unit employees may only challenge a rating of record under negotiated grievance procedures.

One commenter noted that this condition was a violation of the NDAA 2008 and that the language should be clarified to not exclude appeals filed under Equal Employment Opportunity Commission, Office of Special Counsel, or Federal Labor Relations Authority domain. This section of the regulation recognizes the requirements of 5 U.S.C. 7121(a)(1) and does not violate the NDAA 2008. The other avenues mentioned are still open to employees. This provision does not prevent an employee from using any statutory appeals procedure, if appropriate, and does not prevent bargaining unit employees from using the agency reconsideration process if these matters are excluded in the negotiated grievance procedure. It simply notes that the negotiated grievance procedure is the exclusive “administrative” procedure available to bargaining unit employees where such procedures exist. No change has been made to the proposed regulation based on these comments.

Another commenter requested that the language be amended to include payouts under the jurisdiction of the negotiated grievance process. This provision does not impact the ability of the parties to negotiate on a negotiated grievance procedure. Payout decisions are not explicitly excluded from, nor are they covered by, negotiated grievance procedures because of any provision of the regulation. To the extent that matters related to NSPS payout decisions can be covered by a negotiated grievance procedure they are, but any grievance arbitration decision must be consistent with these regulations and 5 U.S.C. 9902, a requirement of 5 U.S.C. 7122. No change has been made to the proposed regulation based on these comments.

A commenter requested clarification in § 9901.413(c) regarding whether a payout recalculation is based only on a change to the rating of record. Another commenter expressed concern that the language in § 9901.413(c) does not state clearly that the payout will be recalculated based on the share range for the rating of record assigned upon reconsideration. We agree and revised this section to add language clarifying that, in the event a reconsideration results in an adjusted job objective rating or rating of record, the Pay Pool Manager will recalculate the employee’s performance payout amount and distribution; and salary adjustments will be based on the share range appropriate for the adjusted rating of record as identified in § 9901.342(f).

Another commenter noted that this paragraph does not provide enough information about the authority of the

Pay Pool Manager. No change has been made to the proposed regulation based on this comment since the authority and responsibilities of the Pay Pool Manager do not vary during the reconciliation process.

Finally, one commenter recommended adding a paragraph to § 9901.413 suggesting the use of alternative dispute resolution techniques to resolve disputes regarding reconsideration of ratings. We agree and revised this section to add language clarifying the use of alternative dispute resolution is permissible within the reconsideration process.

#### **VI. Next Steps**

The National Defense Authorization Act for Fiscal Year 2008 requires that this rule be considered a major rule for the purpose of section 801 of title 5, United States Code. As such, before it can take effect, the Department will submit to each House of the Congress and to the Comptroller General a report containing the rule, a general statement relating to the rule, and the proposed effective date of the rule. The rule may not be effective until the date occurring 60 days after the later of (1) Congressional receipt of the report, or (2) the date the rule is published in the **Federal Register**. Congress has the opportunity to delay implementation of the rule based on the procedures set forth in 5 U.S.C. 801–808.

DoD intends to continue implementing the new NSPS HR system in phases or spirals. The Act provides that not more than 100,000 employees may be added to the System in any calendar year. As has been the case from the beginning, NSPS continues to be an event-driven system, and no decisions have been made at this time regarding when or whether additional groups or organizations will be converted to NSPS during calendar year 2009 and beyond. Such decisions will be based on the best interests of the Department.

The Act also requires the Comptroller General to conduct annual reviews in calendar years 2008, 2009, and 2010. The reviews will address—

(1) Employee satisfaction with the National Security Personnel System, and

(2) The extent to which the Department of Defense has effectively implemented accountability mechanisms and internal safeguards. DoD will fully support the Comptroller General in any review of the System.

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

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive

Order 12866 because there is significant public interest in the National Security Personnel System. DoD and OPM have analyzed the expected costs and benefits of the revised HR system, and that analysis is presented below.

Among the NSPS requirements is to maintain a system that is competitive, cost effective, and fiscally sound, while also being flexible, credible, and trusted. NSPS will allow DoD to move towards market-sensitive pay, to continue pay increases based on performance, and to have the flexibility to offer competitive salaries. While these flexibilities will improve DoD's ability to attract and retain a high-performing workforce, actual payroll costs under this system are constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system.

The continuing implementation of NSPS will result in some additional program implementation costs. This includes delivering training specifically for NSPS, conducting outreach to employees and other parties, and improving automated systems associated with NSPS performance management.

As has been the practice with implementing NSPS and other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This includes a within-grade increase (WGI) "buyout," in which an employee's basic pay, upon conversion, is adjusted by the amount of the WGI earned to date. While this increase is paid earlier than scheduled, it represents a cost that would have been incurred under the current system at some point. However, under NSPS, WGIs no longer exist. Once covered employees are under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI "buyout" is not treated as a "new" cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system. The portion of the WGI buyout cost attributable to NSPS implementation is the marginal difference between paying out the earned portion of a WGI upon conversion and the cost of paying the same WGI according to the current schedule. The marginal cost of the accelerated payment of earned WGIs is difficult to estimate, but is not a significant factor in the cost benefit analysis for regulatory review purposes.

DoD estimates the overall costs associated with continuing to implement NSPS to all eligible employees will be approximately \$143

million from Fiscal Years 2009 through 2011. If it is determined that a category of eligible employees will not be converted to NSPS, these costs will decrease significantly. Accordingly, these estimates are based upon past experience, guidance from the Comptroller General, and ensuring that implementation costs are determined in the same way across the services and Defense Agencies and captured in official accounting systems.

The primary benefit to the public of NSPS resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. Taken as a whole, the changes included in these proposed regulations will improve upon the original NSPS regulations and result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

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

#### *Regulatory Flexibility Act*

DoD and OPM have determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

#### *Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35)*

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### *E.O. 12988, Civil Justice Reform*

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

#### *E.O. 13132, Federalism*

DoD and OPM have determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship

between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

#### *Unfunded Mandates*

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

#### **List of Subjects in 5 CFR Part 9901**

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

**Michael W. Hager,**

*Acting Director, Office of Personnel Management.*

Department of Defense.

**Gordon England,**

*Deputy Secretary of Defense.*

■ Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are revising part 9901 of title 5, Code of Federal Regulations to read as follows:

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

#### **Subpart A—General Provisions**

Sec.

- 9901.101 Purpose.
- 9901.102 Eligibility and coverage.
- 9901.103 Definitions.
- 9901.104 Scope of authority.
- 9901.105 OPM coordination and approval.
- 9901.106 Relationship to other provisions.
- 9901.107 Program evaluation.

#### **Subpart B—Classification**

##### **General**

- 9901.201 Purpose.
- 9901.202 Coverage.
- 9901.203 Waivers.
- 9901.204 Definitions.

##### **Classification Structure**

- 9901.211 Career groups.
- 9901.212 Pay schedules and pay bands.

##### **Classification Process**

- 9901.221 Classification requirements.
- 9901.222 Review of classification decisions.
- 9901.223 Appeal to DoD for review of classification decisions.
- 9901.224 Appeal to OPM for review of classification decisions.

##### **Transitional Provisions**

- 9901.231 Conversion of positions and employees to NSPS classification system.

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- 9901.301 Purpose.
- 9901.302 Coverage.
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- 9901.305 Rate of pay.

**Overview of Pay System**

- 9901.311 Major features.
- 9901.312 Maximum rates of base salary and adjusted salary.
- 9901.313 Aggregate compensation limitations.
- 9901.314 National security compensation comparability.

**Rate Ranges and General Salary Increases**

- 9901.321 Structure.
- 9901.322 Setting and adjusting rate ranges.
- 9901.323 Eligibility for general salary increase.

**Local Market Supplements**

- 9901.331 General.
- 9901.332 Standard and targeted local market supplements.
- 9901.333 Setting and adjusting local market supplements.
- 9901.334 Eligibility for pay increase associated with a supplement adjustment.

**Performance-Based Pay**

- 9901.341 General.
- 9901.342 Performance payouts.
- 9901.343 Pay reduction based on unacceptable performance and/or conduct.
- 9901.344 Other performance payments.
- 9901.345 Accelerated Compensation for Developmental Positions (ACDP).

**Pay Administration**

- 9901.351 General.
- 9901.352 Setting an employee's starting pay.
- 9901.353 Setting pay upon reassignment.
- 9901.354 Setting pay upon promotion.
- 9901.355 Setting pay upon reduction in band.
- 9901.356 Pay retention.

**Premium Pay**

- 9901.361 General provisions.
- 9901.362 Modification of standard provisions.
- 9901.363 Premium pay for health care personnel.
- 9901.364 Foreign language proficiency pay.

**Conversion Provisions**

- 9901.371 Conversion into NSPS pay system.
- 9901.372 Conversion or movement out of NSPS pay system.

**Subpart D—Performance Management**

- 9901.401 Purpose.
- 9901.402 Coverage.
- 9901.403 Waivers.
- 9901.404 Definitions.
- 9901.405 Performance management system requirements.
- 9901.406 Setting and communicating performance expectations.

- 9901.407 Minimum period of performance.
- 9901.408 Employees on time-limited appointments.
- 9901.409 Monitoring and developing performance.
- 9901.410 Addressing performance that does not meet expectations.
- 9901.411 Appraisal period.
- 9901.412 Rating and rewarding performance.
- 9901.413 Reconsideration of ratings.

**Authority:** 5 U.S.C. 9902; sec. 1106(b), Pub. L. 110–181, 122 Stat. 3.

**Subpart A—General Provisions****§ 9901.101 Purpose.**

(a) This part contains regulations governing the National Security Personnel System (NSPS) within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, as amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008), these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM). The Secretary may establish implementing issuances to supplement any matter covered by these regulations.

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law; support the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS, which these regulations are designed to facilitate, are as follows: *High-Performing Workforce and Management*—employees and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian

payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded; and *Schedule*—NSPS will be operational and demonstrate success prior to November 2009.

**§ 9901.102 Eligibility and coverage.**

(a) Pursuant to the provisions of 5 U.S.C. 9902, civilian employees of DoD are eligible for coverage under one or more of subparts B through D of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may decide to apply subparts B through D to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902, except that no more than 100,000 employees per year may be moved into NSPS. However, no category of employees may be covered by subparts B or C of this part unless that category is also covered by subpart D of this part. DoD will advise OPM in advance regarding the extension of NSPS coverage to specific categories of DoD employees under this paragraph. The Secretary will notify affected employees and labor organizations in accordance with the requirements of 5 U.S.C. chapter 71 regarding a decision to extend NSPS coverage to any bargaining unit employees.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees will continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, and performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, and performance management provisions that differ substantially from the Governmentwide

SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may decide to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit, subject to § 9901.372 and any related implementing issuances. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to paragraphs (f)(2) and (3) of this section, the Secretary may, at his or her sole and exclusive discretion, decide to apply one or more subparts of this part as of a specified effective date to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code.

(2) Paragraph (f)(1) of this section applies only if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a separate system established by the Secretary.

(3) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from their current pay system. The conversion of such employees into NSPS will be governed by the rules in §§ 9901.231 and 9901.371 and applicable implementing issuances prescribed by the Secretary under §§ 9901.231(b) and 9901.371(b).

#### § 9901.103 Definitions.

In this part:

*Appraisal period* means the period of time for reviewing employee performance (as described in § 9901.411).

*Band* means *pay band*.

*Basic pay* means an employee's pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.331(d) only, basic pay includes any local market supplement. In subpart C, when basic pay is exclusive of any additional pay, the term "base salary" is used, and when basic pay includes a local market

supplement, the term "adjusted salary" is used.

*Career group* means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

*Comparable pay band* or *comparable level of work* means pay bands with the equivalent level of work, based on the NSPS classification structure, within and across varying pay schedules and career groups, regardless of the specific earning potential of the bands. When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a comparable level of work to the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

*Competencies* means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

*Component* means the Office of the Secretary of Defense (OSD), the Military Departments, Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense.

*Contributing factor* means attributes of job performance that are significant to the accomplishment of individual job objectives.

*Contribution* means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

*Day* means a calendar day, unless expressly provided otherwise under applicable law or regulations.

*Department* or *DoD* means the Department of Defense.

*Director* means the Director of the Office of Personnel Management.

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

*General Schedule* or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

*Higher pay band* or *higher level of work* means a pay band designated to be a higher level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When

moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a higher level of work than the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

*Implementing issuance(s)* means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries and Under Secretaries of the Military Departments to establish or carry out a policy or procedure implementing this part. These issuances may apply Department-wide or to any part of DoD as determined by the Secretary.

*Job objective* means an expression of performance expectations in the performance plan that is aligned with the organization's goal(s) and mission(s).

*Lower pay band* or *lower level of work* means a pay band designated to be a lower level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a lower level of work than the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

*Military Department* means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

*National Security Personnel System (NSPS)* means the human resources management system established under 5 U.S.C. 9902(a) and the regulations in this part.

*Occupational series* means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (e.g., 0110, Economist Series; 1410, Librarian Series).

*OPM* means the Office of Personnel Management.

*Pay band* or *band* means a work level and associated pay range within a pay schedule.

*Pay pool* means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also refers to the funds designated for performance payouts to employees covered by a pay pool.

*Pay Pool Manager* means the management official designated to manage the pay pool, resolve discrepancies, ensure consistency and equity within the pay pool, and approve recommendations concerning employee rating of record, share assignment, and payout distribution between base salary increases and bonuses.

*Pay Pool Panel* means management officials of the organizations or functions represented in the pay pool who assist the Pay Pool Manager in the reconciliation of recommended ratings of record, share assignments, and payout distribution. The Pay Pool Panel includes the Pay Pool Manager.

*Pay schedule* means a set of related pay bands for a specified category of employees within a career group.

*Performance* means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

*Performance Review Authority* means one or more management officials who manage and oversee the operation of one or more pay pools and ensure procedural and funding consistency among pay pools under its authority.

*Principal Staff Assistants* means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

*Promotion* means the movement of an employee from one pay band to a higher pay band while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a higher level of work.

*Rating of record* means the final numerical rating and associated narrative justification assigned to a performance appraisal by a Pay Pool Manager—

(1) After completion of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record.

*Reassignment* means the movement of an employee, either employee-initiated or management-directed, to a different position or set of duties in the same or a comparable pay band while continuously employed. This includes

the movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a comparable level of work.

*Reduction in band* means the voluntary or involuntary movement of an employee from one pay band to a lower pay band on a permanent basis while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a lower level of work.

*Secretary* means the Secretary of Defense, consistent with 10 U.S.C. 113.

*SES* means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

*SL/ST* refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

*Unacceptable performance* means performance of an employee which fails to meet one or more performance expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

#### **§ 9901.104 Scope of authority.**

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, and pay for certain other employees, except as provided in § 9901.303; and

(d) Chapter 55, subchapter V, dealing with premium pay, except sections 5544 and 5545b.

#### **§ 9901.105 OPM coordination and approval.**

(a) The Secretary will coordinate with or request approval from OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Pre-

decisional coordination under paragraph (b) of this section is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of DoD pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. chapter 11. Approval from OPM is required in certain circumstances, as provided in paragraph (c) of this section.

(b) DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) that significantly differ from Governmentwide standards;

(3) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(4) Establishing alternative or additional classification criteria for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards;

(5) Establishing maximum rates of base salary under § 9901.312(a);

(6) Establishing a higher adjusted salary rate cap for a designated category of positions under § 9901.312(d);

(7) Approving waivers under § 9901.313(a)(3) of the normally applicable aggregate compensation limit;

(8) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a) and 9901.322;

(9) Determining targeted general salary increases under § 9901.323(a)(2); and

(10) Establishing and adjusting targeted local market supplements under §§ 9901.332(c) and 9901.333(b).

(c) The Secretary will request approval from the Director prior to—

(1) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts and service commitments;

(2) Approving waivers of normally applicable premium pay limitations, as authorized under § 9901.362(a)(2);

(3) Determining pay bands for which an FLSA-exempt employee is paid overtime at an hourly rate equal to the employee's adjusted base salary hourly rate, as authorized under § 9901.362(b)(6)(i); and

(4) Establishing new hazardous duty pay categories under § 9901.362(i)(3).

(d) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(e) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination or approval and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

#### **§ 9901.106 Relationship to other provisions.**

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary.

(b)(1) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, and 55 (subchapter V only), of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances.

(2) If another provision of law or Governmentwide regulations require coverage under one of the chapters modified or waived under this part (i.e., chapters 43, 51, 53, and 55 (subchapter

V only) of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through D of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b; and

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754.

(c)(1) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(2) Physicians' comparability allowances under 5 U.S.C. 5948 do not apply to employees covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

#### **§ 9901.107 Program evaluation.**

The Secretary will evaluate the regulations in this part and their implementation.

### **Subpart B—Classification**

#### **General**

##### **§ 9901.201 Purpose.**

(a) This subpart establishes a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51, in accordance with the merit system principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and with appropriate incentives and recognition provided for excellence in performance.

(b) The basis for determining the appropriate classification under NSPS is the primary duties and responsibilities of the position, level of difficulty, occupational qualifications, competency

requirements, mission of the organization, and relationship of the position to other positions or organizational levels.

(c) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

##### **§ 9901.202 Coverage.**

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

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

(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

##### **§ 9901.203 Waivers.**

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.106, and 9901.222(d) (with respect to OPM's authority to act on requests for classification decisions under 5 U.S.C. 5112(b) and review of pay plans under 5 U.S.C. 5103).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived for the purpose of defining and allocating Senior Executive Service (SES) positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—e.g., 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards), 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions), and 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the SES and employees in SL/ST positions).

##### **§ 9901.204 Definitions.**

In this subpart:

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

*Basic pay* has the meaning given that term in § 9901.103.

*Career group* has the meaning given that term in § 9901.103.

*Classification*, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, official title, career group, pay schedule, and pay band for pay and other related purposes.

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

*Occupational series* has the meaning given that term in § 9901.103.

*Official title* means the position title prescribed in an NSPS classification standard or by supplemental Component guidance.

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

*Pay schedule* has the meaning given that term in § 9901.103.

*Position* or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee.

## Classification Structure

### § 9901.211 Career groups.

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

### § 9901.212 Pay schedules and pay bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility, qualifications or competencies, or other characteristics of the work encompassed by the pay band.

(d) The Secretary will—

(1) Use qualification standards established or approved by OPM, or establish qualification standards for positions covered by NSPS, subject to § 9901.105(b)(2); and

(2) Designate qualification standards and requirements for each career group,

occupational series, pay schedule, and/or pay band.

## Classification Process

### § 9901.221 Classification requirements.

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as he or she considers necessary for the purpose of this section.

(d) A classification action is implemented by a personnel action, which, for encumbered positions, must be taken within a reasonable period of time following the effective date of the position classification action. For classification actions resulting from a DoD appeal decision, the personnel action must occur within four pay periods following the effective date of the decision, except when a subsequent date is specifically provided in the decision. If a classification action results in a reduction in an employee's pay band or adjusted salary, the employee must be advised, in writing, of the action and proposed effective date of the personnel action at least 7 days before the personnel action is taken. The written notice will inform the employee of the reason for the reclassification, the right to appeal the classification decision, and the time limitations in § 9901.223 within which the appeal must be filed to preserve applicable retroactive benefits.

(e) Except as otherwise provided in this paragraph or required by law, the effective date of a classification action is the date the authorized management official certifies the classification decision (i.e., signs or electronically validates the position description).

(1) A retroactive effective date for a classification action and the implementing personnel action is permitted only if the action resulted in a reduction in pay band or adjusted salary and if that action is subsequently reversed on appeal.

(2) In order for a corrective action to be retroactive, the employee must file an initial request for review of the classification action with DoD or OPM not later than 15 calendar days after the personnel action effective date for the reduction in pay band or adjusted salary.

(3) A retroactive date may be established only if the appeal reversal is based on the duties and responsibilities performed at the time of reduction. Retroactive action is mandatory under these circumstances.

### § 9901.222 Review of classification decisions.

(a) An individual employee may request that DoD or OPM review the classification (i.e., pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) Under this section, an employee may not appeal to either DoD or OPM the issues designated as nonappealable to the Office of Personnel Management in 5 CFR 511.607 or the accuracy of NSPS pay schedule and pay band classification criteria. Additional nonappealable issues covered under NSPS include—

(1) Classification of a proposed position or one to which the employee is not officially assigned;

(2) Classification of a position to which an employee is detailed, temporarily reassigned, or temporarily promoted, except for employees serving under a time-limited promotion or reassignment for 2 years or more;

(3) Accuracy of the official position description, including the inclusion or exclusion of a duty (subject to paragraph (c) of this section);

(4) Classification of a position based on position-to-position comparisons rather than the NSPS classification criteria;

(5) Classification of a position for which a DoD or an OPM appeal decision was previously rendered unless there is a later change in the governing classification criteria or a material change in the requirements of the position; and

(6) The accuracy of career group, pay band, or pay schedule classification criteria or standards contained in DoD issuances.

(c) When the accuracy of the official position description is questioned by the employee, the employee will be advised to raise this issue informally with the employee's supervisor or file a grievance using the applicable administrative or negotiated grievance procedure. If the employee elects to first raise this issue with the employee's

supervisor and the employee and the supervisor cannot resolve this issue, the accuracy of the position description may be determined using the applicable administrative or negotiated grievance procedure. If, after completing this procedure, the issue is not resolved, the classification appeal, if any, will be decided on the basis of the actual duties and responsibilities assigned by management and performed by the employee.

(d) An employee may request that OPM review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM review, DoD's classification determination is final and not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary.

#### **§ 9901.223 Appeal to DoD for review of classification decisions.**

(a) *Employee representation.* An employee may designate in writing a representative of his or her choice to assist in the preparation and presentation of an appeal. A management official may disallow an employee's representative when—

(1) An individual's activities as a representative would cause a conflict of interest or position;

(2) An employee cannot be released from his or her official duties because of the priority needs of the Government; or

(3) An employee's release would give rise to unreasonable costs to the Government.

(b) *DoD classification appeal process.*

(1) Employee appeals to DoD must be submitted through the employee's servicing Human Resources Office.

(2) An employee may file a classification appeal at any time. When the issue involves a classification action that resulted in a reduction in band or adjusted salary, to preserve any entitlement to retroactive pay, the employee must file any DoD classification appeal no later than 15 calendar days after the effective date of the personnel action. When an employee shows that he or she did not receive notice of the applicable time limit, or personnel action, or was prevented from timely filing by circumstances beyond the employee's control, the deciding official may grant an extension of the appeal period.

(3) An employee must provide the following documentation when filing an appeal:

(i) The employee's name, mailing address, and office telephone and fax numbers;

(ii) The employing Component and the exact location of the employee's position within the Component (installation name, mailing address, organization, division, branch, section, unit);

(iii) The name, address, and business telephone and fax numbers of the employee's representative, if any;

(iv) A statement of the employee's requested pay system, official position title, occupational series, pay schedule, and/or pay band; and

(v) Reasons why the employee believes the position is incorrectly classified.

(4) The employee must refer to classification standards that support the appeal and state specific points of disagreement with the current classification. The employee may also include a statement of facts that he or she thinks may affect the final classification decision.

(c) *Binding decisions.* DoD appeal decisions constitute certificates that are binding on all administrative, certifying, payroll, disbursing, and accounting offices within DoD.

(d) *Cancellation.* (1) An employee or representative may cancel an appeal at any time before DoD issues a decision by providing written notification to the DoD deciding official.

(2) DoD may cancel an appeal if any of the following occur:

(i) The employee, or his or her representative, does not furnish requested information within the required time period;

(ii) The employee is no longer officially assigned to, or is removed from, the position and there is no entitlement to retroactive benefits;

(iii) The duties and responsibilities of the position are significantly changed while the case is pending and there is no entitlement to retroactive benefits; or

(iv) The position is abolished and there is no entitlement to retroactive benefits.

#### **§ 9901.224 Appeal to OPM for review of classification decisions.**

(a) An employee's request for OPM review of DoD classification determination will follow the procedures in 5 CFR part 511, subpart F—Classification Appeals.

(b) Effective dates of OPM classification appeal decisions will be consistent with 5 CFR 511.702.

(c) Employee appeals to OPM may be submitted directly to OPM.

(d) OPM's final determination on an appeal made under this section is not subject to further review or appeal.

### **Transitional Provisions**

#### **§ 9901.231 Conversion of positions and employees to NSPS classification system.**

(a) *Introduction.* This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under this subpart. (See § 9901.371 for conversion rules related to setting an employee's pay.) Positions and employees in affected organizational or functional units may convert from the GS system, the SL/ST system, the SES system, or such other DoD systems as may be designated by the Secretary, as provided in § 9901.202. For the purpose of this part, the terms "convert," "converted," "converting," and "conversion" refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b) and excludes employees who move from a noncovered position to a position already covered by NSPS.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Those issuances will establish the work level conversion tables used to place an employee in a pay band based on the level of work of the employee's position in the formerly applicable pay system.

(c) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. That official position of record (including occupational series and grade) is used in determining the employee's career group, pay schedule, and band upon conversion.

(d) *Grade retention prior to conversion.* For an employee who is entitled to grade retention immediately before conversion, the grade of the actual position of record (not the grade being retained) is used in determining the employee's band upon conversion.

### **Subpart C—Pay and Pay Administration**

#### **General**

#### **§ 9901.301 Purpose.**

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53

and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902 (subject to the limitations on waivers in § 9901.303). Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

#### **§ 9901.302 Coverage.**

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

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

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

#### **§ 9901.303 Waivers.**

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. chapter 53 are waived with respect to that category of employees, except as provided in § 9901.106 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except sections 5544 and 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions established by the Secretary under §§ 9901.361 through 9901.364 in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Sections 5341 through 5349, dealing with prevailing rate systems;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS classification and pay system established under this part or the following provisions of title 5, U.S. Code: chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to "chapter 51" in section 5371(c) is deemed to include a classification system established under subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5379 continues to apply but is modified to allow the Secretary to modify the minimum service period and the limitations on the amount of student loan benefits in order to address critical hiring needs, subject to § 9901.105.

#### **§ 9901.304 Definitions.**

In this subpart:

*Adjusted salary* means an NSPS employee's base salary plus any local market supplement paid to that employee. For an employee moving into NSPS from a non-NSPS position, *adjusted salary* also refers to non-NSPS base salary plus any applicable locality pay under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, or any equivalent supplement.

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

*Base salary* means an NSPS employee's pay, as set by the authorized management official, before deductions and exclusive of additional pay of any kind (e.g., local market supplement). For an employee moving into NSPS from a non-NSPS position, *base salary* also refers to non-NSPS pay, before deductions and exclusive of additional pay of any kind (e.g., locality pay or a special rate supplement).

*Basic pay* has the meaning given that term in § 9901.103.

*Bonus* means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay for any purpose.

*Career group* has the meaning given that term in § 9901.103.

*Comparable pay band* or *comparable level of work* has the meaning given in § 9901.103.

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

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

*Contributing factor* has the meaning given that term in § 9901.103.

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

*Contribution assessment* means the determination made by the Pay Pool Manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

*CONUS* or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

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

*Department* or *DoD* has the meaning given in § 9901.103.

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

*General Schedule* or *GS* has the meaning given that term in § 9901.103.

*Implementing issuance(s)* has the meaning given that term in § 9901.103.

*Local market supplement* means a geographic- and occupation-based supplement paid in addition to an employee's base salary, including a standard local market supplement or a targeted local market supplement, as described in § 9901.332.

*Modal rating* means, for the purpose of pay administration, the most frequent rating of record assigned to employees within a particular pay pool for a particular rating cycle.

*National Security Personnel System (NSPS)* has the meaning given that term in § 9901.103.

*Occupational series* has the meaning given that term in § 9901.103.

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

*Official worksite* has the meaning given that term in 5 CFR 531.605.

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

*Pay pool* has the meaning given that term in § 9901.103.

*Pay Pool Manager* has the meaning given that term in § 9901.103.

*Pay Pool Panel* has the meaning given that term in § 9901.103.

*Pay schedule* has the meaning given that term in § 9901.103.

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

*Performance payout* means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

*Performance Review Authority* has the meaning given that term in § 9901.103.

*Performance share* means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples based on the employee's rating of record and specified factors, as provided in § 9901.342(f).

*Performance share value* means a calculated value for each performance

share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage of base salary.

*Premium pay* means payments for work performed under special conditions or circumstances, as authorized under 5 U.S.C. chapter 55, subchapter V, or §§ 9901.361 through 9901.364 (including compensatory time off).

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

*Rate range* means the range of base salary rates applicable to employees in a particular pay band, as described in § 9901.321. Each rate range is defined by a minimum and maximum base salary rate.

*Rating of record* has the meaning given that term in § 9901.103.

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

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

*Retained rate* means a retained base salary rate (i.e., excluding any local market supplement) above the applicable pay band maximum rate as established for an NSPS employee under the pay retention provisions in § 9901.356. For GS employees, *retained rate* has the meaning given that term in 5 CFR part 536.

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

*Standard local market supplement* means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies. Standard local market supplements are generally administered for covered employees in the same manner as locality-based comparability payments under 5 U.S.C. 5304 and 5304a.

*Sub pay pool* means a subset of a pay pool that is defined for the purpose of reconciling ratings of record, share assignments, and payout determinations.

*Targeted local market supplement* means a local market supplement established to address recruitment or retention difficulties or for other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of any lower standard local market supplement that would otherwise apply.

*Unacceptable performance* has the meaning given that term in § 9901.103.

#### **§ 9901.305 Rate of pay.**

(a) The term “rate of pay” in 5 U.S.C. 9902(e)(9) means—

(1) An individual employee’s base salary rate, local market supplement rate, and overtime and other premium pay rates (including compensatory time off); and

(2) The rates comprising the structure of the pay system that govern the setting and adjusting of the individual employee rates identified in paragraph (a)(1) of this section, including, but not limited to—

(i) Band rate range minimum and maximum rates;

(ii) Control points within a band rate range;

(iii) Local market supplement rates;

(iv) Maximum rates of base salary and adjusted salary;

(v) Premium pay rates; and

(vi) The percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees’ base salary rates.

(b) For the purpose of 5 U.S.C. 9902(e)(9), the establishment or adjustment of a rate of pay includes the establishment or adjustment of the amount or level of the rate and of the eligibility requirements associated with the type and level of pay in question. Illustrative examples of actions that establish or adjust a rate of pay include, but are not limited to, the following:

(1) Establishing the starting base salary rate for a newly hired employee;

(2) Establishing a retained rate for an employee under § 9901.356(e);

(3) Adjusting an employee’s base salary rate through various pay actions, including general salary increases, targeted general salary increases, performance pay increases, extraordinary performance recognition increases, organizational or team achievement recognition increases, pay reductions for unacceptable performance or conduct, reassignment increases and decreases, promotion increases, within-grade increase adjustments, and accelerated compensation for developmental positions (ACDP) increases;

(4) Establishing or adjusting the minimum or maximum rate of a band rate range or control points within that range;

(5) Establishing or adjusting the percentage amount of a targeted local market supplement, as well as the geographic area and other coverage requirements associated with that supplement;

(6) Establishing a higher premium pay limit under § 9901.362(a)(2);

(7) Establishing an overtime rate equal to an employee’s adjusted salary rate under § 9901.362(b)(6)(i);

(8) Establishing a new hazardous duty premium rate under 9901.362(i)(3); and

(9) Establishing the percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees’ base salary rates.

#### **Overview of Pay System**

##### **§ 9901.311 Major features.**

Through the issuance of implementing issuances, the Secretary will further define a pay system that governs the setting and adjusting of covered employees’ rates of base salary and adjusted salary and the setting of covered employees’ rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees’ eligibility for general salary increases and adjustments in local market supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on base salary administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees’ ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §§ 9901.361 through 9901.364.

##### **§ 9901.312 Maximum rates of base salary and adjusted salary.**

(a) Subject to § 9901.105, the Secretary may establish a limitation on the maximum rate of base salary provided under authority of this subpart.

(b) No employee may receive, under authority of this subpart, an adjusted salary rate greater than the rate for level IV of the Executive Schedule plus 5 percent. The payable local market

supplement for an employee must be reduced as necessary to comply with this limitation.

(c) Paragraphs (a) and (b) of this section do not apply to physicians and dentists (in occupational series 0602 and 0680, respectively).

(d) Subject to § 9901.105, the Secretary may establish a higher adjusted salary rate limitation for a specified category of positions in lieu of the limitation in paragraph (b) of this section based on mission requirements, labor market conditions, availability of funds, and any other relevant factors.

**§ 9901.313 Aggregate compensation limitations.**

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, no additional payment (premium pay, allowance, differential, bonus, award, or other similar cash payment) may be paid to an employee in a calendar year if, or to the extent that, when added to the adjusted salary paid to the employee for service performed as an employee in the Department or in another Federal agency, the payment would cause the total aggregate compensation to exceed the annual rate for Executive Level I as in effect on the last day of that calendar year.

(2) In the case of physicians and dentists (in occupational series 0602 and 0680, respectively) payment to the employee may not cause aggregate compensation received in a calendar year to exceed the salary of the President of the United States as in effect on the last day of that calendar year.

(3) Subject to § 9901.105, the Secretary may provide for a higher aggregate compensation limitation equal to the annual rate payable to the Vice President under 3 U.S.C. 104 as in effect on the last day of the calendar year in the case of specified categories of employees for whom a waiver has been authorized under § 9901.362(a)(2).

(4) The limitation described in this paragraph (a) applies to the total amount of aggregate compensation actually received by an employee during the calendar year without regard to the period of service for which such compensation is earned.

(b) *Types of compensation.* For the purpose of this section, aggregate compensation is the total of—

(1) Adjusted salary received as an employee of the Department;

(2) Premium pay under 5 U.S.C. chapter 55, subchapter V, and this subpart;

(3) Incentive awards and performance-based cash awards under 5 U.S.C. 4501–4523 and this part;

(4) Recruitment and relocation incentives under 5 U.S.C. 5753;

(5) Retention incentives under 5 U.S.C. 5754;

(6) Supervisory differentials under 5 U.S.C. 5755;

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

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

(9) Extended assignment incentives under 5 U.S.C. 5757;

(10) Post differentials based on environmental conditions for employees stationed outside the continental United States or in Alaska under 5 U.S.C. 5941(a)(2);

(11) Foreign language proficiency pay under 10 U.S.C. 1596 and 1596a;

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

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

(i) Back pay due to an unjustified personnel action under 5 U.S.C. 5596 (but only if the back payments were originally payable in a previous calendar year);

(ii) Overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201–219 and 5 CFR part 551);

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

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

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

(14) Payments received from another agency during the calendar year, prior to employment with the Department, that are subject to 5 U.S.C. 5307.

(c) *Administration of aggregate limitation.* (1) At the time a payment covered by paragraph (b) of this section (other than adjusted salary) is authorized for an employee, the employee may not receive any portion of such payment that, when added to the estimated aggregate compensation the employee is projected to receive, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the limitation applicable to the employee under this section at the end of the calendar year.

(2) Payments that are creditable for retirement purposes (e.g., law enforcement availability pay (LEAP) or standby premium pay) and that are paid to an employee at a regular fixed rate each pay period may not be deferred or

discontinued for any period of time in order to make another payment that would otherwise cause an employee's pay to exceed any limitation described in or established by this section.

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), if the estimated aggregate compensation to which an employee is entitled exceeds the applicable limitation under this section for the calendar year, the Department must defer all authorized payments (other than adjusted salary) at the time when otherwise continuing such payments would cause the aggregate compensation actually received by any employee during the calendar year to exceed the applicable limitation. Any portion of a payment deferred under this paragraph will become available for payment as provided in paragraph (d) of this section. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(4) If the Department makes an incorrect estimate of aggregate compensation at an earlier date in the calendar year, the sum of an employee's remaining payments of adjusted salary (which may not be deferred) may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable limitation under this section. In this case, the employee will become indebted to the Department for any amount paid in excess of the aggregate limitation. To the extent that the excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, the debt must be nullified on January 1 of the next calendar year. As part of the correction of the error, the excess amount will be deemed to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment as described in paragraph (c)(3) of this section and must be considered part of the employee's aggregate compensation for the new calendar year.

(d) *Payment of excess amounts.* (1) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), any amount that is not paid to an employee because of the annual aggregate compensation limitation under this section must be paid in a lump-sum payment at the beginning of the following calendar year. Any amount paid the following calendar year will be taken into account for purposes of applying the limitations with respect to such calendar year. For

physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(2) If a lump-sum payment causes an employee's estimated aggregate compensation to exceed the applicable limitation under this section, the Department must consider only the employee's adjusted salary and payments that are creditable for retirement purposes (e.g., LEAP or standby pay) in determining the extent to which the lump-sum payment may be paid and will defer all other payments, in order to pay as much of the excess amount as possible. Any payments deferred under this paragraph, including any portion of the excess amount that was not payable, will become payable at the beginning of the next calendar year.

(3) If an employee moves to another Federal agency or to another position within the Department not covered by NSPS, and, at the time of the move, the employee has received payments in excess of the aggregate limitation under 5 U.S.C. 5307, the employee's indebtedness for the excess amount received will be deferred from the effective date of the transfer until the beginning of the next calendar year. Effective January 1 of the new calendar year, the debt will be nullified and the excess amount will be considered in applying that year's aggregate limitation.

(4) If an employee transfers to another agency and, at the time of transfer, the employee has excess payments deferred to the next calendar year, the provisions of 5 U.S.C. 5307 are applicable.

(5) The following conditions permit payment of excess aggregate compensation without regard to the calendar year limitation:

(i) If an employee dies, the excess amount is payable immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If an employee separates from Federal service, the entire excess amount is payable following a 30-day break in service. If the individual is reemployed in the Department under NSPS in the same calendar year as separation, any previous payment of an excess amount will be considered part of that year's aggregate compensation for the purpose of applying the limitations described in this section for the remainder of the calendar year.

#### **§ 9901.314 National security compensation comparability.**

(a) To the maximum extent practicable, for fiscal years 2004 through 2012, the overall amount allocated for

compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on, at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2012 for compensation of the civilian employees included in the NSPS. The formula will ensure that, in the aggregate, employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, "compensation" for civilian employees means adjusted salary, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.

#### **Rate Ranges and General Salary Increases**

##### **§ 9901.321 Structure.**

(a) Subject to § 9901.105, the Secretary will establish ranges of base salary rates for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

(c) The Secretary may establish and adjust control points within a pay band to manage compensation (e.g., limitations on pay setting and pay progression within a pay band that apply to specified positions). The Secretary may consider only the following factors in developing control points: mission requirements, labor market conditions, and benchmarks against duties, responsibilities, competencies, qualifications, and performance.

##### **§ 9901.322 Setting and adjusting rate ranges.**

(a) Subject to § 9901.105, the Secretary may set and adjust the rate ranges (i.e., range minimums and maximums) established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

(e) The maximum rate of each band must be adjusted at the time of a general salary increase under § 9901.323(a)(1) by no less than the percentage amount of the General Schedule annual adjustment under 5 U.S.C. 5303.

##### **§ 9901.323 Eligibility for general salary increase.**

(a) Employees with a current rating of record above "unacceptable" (Level 1) and employees who do not have a current rating of record for the most recently completed appraisal period are eligible to receive an approved general salary increase in their base salary rate subject to the following requirements:

(1) A general salary increase must be provided to eligible employees in all NSPS pay bands at the same time that a General Schedule annual adjustment takes effect under 5 U.S.C. 5303. The amount of such general salary increase is determined by the Secretary but may not be less than 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 (unless a lesser percentage is allowed by law). Such general salary increase must be the same percentage amount for all eligible employees under NSPS, except that the increase for employees receiving a retained rate is limited to the lowest permitted amount (i.e., 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 unless a lesser percentage is allowed by law).

(2) In addition to the general salary increase under paragraph (a)(1) of this section, and subject to § 9901.105, a targeted general salary increase may be provided to all eligible employees (excluding employees receiving a retained rate under § 9901.356) in a

designated occupational series or specialty in a pay band if the Secretary determines that such an increase is necessary considering only labor market conditions, staffing difficulties, cost, and mission priorities. Different targeted general salary increases may be provided under this paragraph (a)(2) to employees in different occupational series, specialties, and/or pay bands.

(b) Employees with a current rating of record of "unacceptable" will not receive a general salary increase under this section. If such an employee receives a rating of record above unacceptable for a subsequent appraisal period, the employee is eligible for any general salary increase taking effect on or after the date the employee is given a rating of record above unacceptable.

(c)(1) The Secretary may provide an additional increase in the base salary rate equal to the difference between the percent of the General Schedule annual adjustment under 5 U.S.C. 5303 and the amount of the NSPS general salary increase under paragraph (a)(1) of this section to employees ineligible for performance payout under § 9901.342. This increase is effective at the same time as the NSPS general salary increase.

(2) The increase under paragraph (c)(1) of this section does not apply to employees who—

(i) Are ineligible for a performance payout due to an NSPS rating of record of Level 1 or Level 2;

(ii) Move from a non-NSPS to an NSPS position, or who are newly hired or reappointed to an NSPS position, on the effective date of the performance payment; or

(iii) Are receiving a retained rate under § 9901.356.

(d) A general salary increase under paragraph (a)(2) or paragraph (c) of this section may be applied only to the extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.

(e) If the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable (Level 1) to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.

### Local Market Supplements

#### § 9901.331 General.

(a) *Introduction.* The base salary ranges established under §§ 9901.321 through 9901.322 may be supplemented in appropriate circumstances by local market supplements, as described in this section. These supplements are set

and adjusted as described in § 9901.333. The sum of an employee's base salary plus any applicable local market supplement constitutes the employee's adjusted salary.

(b) *Computation.* Standard local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar. Targeted local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar, or by inclusion of the applicable supplement constant whole dollar amount for eligible employees. A local market supplement is payable only to the extent that it does not cause an employee's adjusted salary rate to exceed the rate limitation described in § 9901.312(b).

(c) *Official worksite.* When a local market supplement is linked to a geographic area, the employee's entitlement to the local market supplement is contingent on the employee's official worksite (as defined in 5 CFR 531.605) being located in that geographic area.

(d) *Treatment as basic pay.* Local market supplements are considered basic pay only for the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

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

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. chapter 59, subchapter III, to the extent authorized by the Department of State;

(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment incentives under 5 U.S.C. chapter 57, subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, subpart L;

(9) Determining whether an employee's rate of basic pay is reduced at the point of conversion or movement into or out of the NSPS pay system for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), consistent with §§ 9901.351(g), 9901.371(d), and 9901.372(f);

(10) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(11) Any other provisions for which DoD local market supplements are expressly treated as basic pay by law or under this part.

#### § 9901.332 Standard and targeted local market supplements.

(a) *General.* NSPS employees may receive standard or targeted local market supplements as described in paragraphs (b) and (c) of this section. Consistent with 5 U.S.C. 9902(e)(8), the full amount of standard and targeted local market supplements must be provided to employees who receive a rating of record above unacceptable (Level 1) or who do not have a rating of record for the most recently completed appraisal period. As provided in § 9901.334, an employee with an unacceptable rating of record may not receive an increase in a standard or targeted local market supplement. Standard local market supplements are designed to satisfy the requirements of 5 U.S.C. 9902(e)(8)(A), while targeted local market supplements are the "other local market supplements" referenced in 5 U.S.C. 9902(e)(8)(B).

(b) *Standard local market supplements.* Employees are entitled to standard local market supplements that are generally equivalent to locality payments under 5 U.S.C. 5304 and 5304a, subject to the following requirements:

(1) The percentage values of standard local market supplements must be identical to the percentage values of locality payments established under 5 U.S.C. 5304 and 5304a, except as provided in § 9901.334 with respect to employees with an unacceptable rating of record;

(2) The geographic areas in which standard local market supplements apply must be identical to the corresponding geographic areas established for locality payments under 5 U.S.C. 5304;

(3) An employee's entitlement to a standard local market supplement is based on whether the employee's official worksite (defined consistent with the requirements in 5 CFR 531.605) is located in the given local market area;

(4) The applicable standard local market supplement is paid on top of a retained rate (consistent with the NSPS modification of the pay retention rules);

(5) The cap on an adjusted salary rate that includes a standard local market supplement is the rate for level IV of the

Executive Schedule plus 5 percent (consistent with the NSPS extension of the highest band base rate ranges by 5 percent), as provided in § 9901.312(b), except as otherwise provided under § 9901.312(d);

(6) A standard local market supplement does not apply if an employee is entitled to a higher targeted local market supplement; and

(7) Standard local market supplements are not applicable to physicians and dentists (in occupational series 0602 and 0680, respectively), since they receive higher base salary and adjusted salary rates (including any applicable targeted local market supplements) to achieve comparability with physicians and dentists paid under 38 U.S.C. chapter 74 and since their adjusted salary rates apply on a worldwide basis.

(c) *Targeted local market supplements.* Subject to § 9901.105, the Secretary may establish targeted local market supplements for specifically defined categories of employees in order to address significant recruitment or retention problems. This authority is subject to the following:

(1) The conditions for coverage under a targeted local market supplement may be based on occupation, band, organizational unit, geographic location of official worksite, specializations, special skills or qualifications, or other appropriate factors;

(2) A targeted local market supplement applies to an employee eligible for a standard local market supplement only if the targeted local market supplement is a larger amount; and

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively) or as otherwise provided under § 9901.312(d), an employee's adjusted salary that includes an applicable targeted local market supplement may not exceed the rate cap equal to the rate for Executive Level IV plus 5 percent, as provided in § 9901.312(b).

#### **§ 9901.333 Setting and adjusting local market supplements.**

(a) Standard local market supplements are set and adjusted consistent with the setting and adjusting of corresponding General Schedule locality payments under 5 U.S.C. 5304 and 5304a.

(b) Subject to § 9901.105, the Secretary may set and adjust targeted local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, cost, and pay

adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors. The Secretary may determine the effective date of newly set or adjusted targeted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

#### **§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.**

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with current ratings of record above "unacceptable" (Level 1), and employees who do not have current ratings of record for the most recently completed appraisal period, are eligible to receive any pay increase resulting from that adjustment.

(b) An employee with a current rating of record of "unacceptable" will not receive a pay increase under this section (i.e., the employee's local market supplement percentage will not be increased). Once such an employee has a new rating of record above "unacceptable," the employee is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of the new rating of record as specified in § 9901.411(d), or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).

#### **Performance-Based Pay**

##### **§ 9901.341 General.**

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions authorize payments to employees based on individual performance or contribution, or team or organizational performance, as a means of fostering a high-performance culture that supports mission accomplishment.

##### **§ 9901.342 Performance payouts.**

(a) *Overview.* (1) The NSPS pay system will be a performance-based pay system and will result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance

payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance payout is the one assigned for the most recently completed appraisal period. Unless otherwise provided in this section, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (i) through (l) of this section, such employee will not be eligible for a performance payout under this part.

(b) *Performance pay pools.* (1) Pay pools and pay pool oversight will be established and managed in accordance with implementing issuances published by the Secretary, in such a manner as to ensure employees are treated fairly and consistently, and in accordance with merit system principles.

(2) Consistent with paragraph (b)(1) of this section, pay pool composition will be based on organization structure, classification structure, function of work, location, and/or organization mission. The decision on pay pool composition will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(3) Where determined appropriate, management may establish one or more subsets of a pay pool population (i.e., sub pay pools) for the purpose of reconciling ratings of record, share assignments, and payout determinations. Sub pay pools share in the common fund of the overall pay pool and operate within the requirements and guidelines established for the pay pool to which they belong.

(4) The Secretary may determine a percentage of pay to be included in pay pools and paid out, in accordance with accompanying implementing issuances, as—

- (i) A performance-based pay increase;
- (ii) A performance-based bonus; or
- (iii) A combination of a performance-based pay increase and a performance-based bonus.

(5) The decision to apply a funding floor or ceiling to a pay pool, including the amount of such floor or ceiling, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(c) *Pay Pool Panel.* (1) Consistent with this section, the Pay Pool Panel—

(i) Reviews rating of record, share assignment, and payout distribution recommendations;

(ii) Makes adjustments, which in the Panel's view would result in equity and consistency across the pay pool; and

(iii) Elevates any disagreement between the Pay Pool Panel and the employee's supervisory chain to the Pay Pool Manager as applicable, for resolution.

(2) The Pay Pool Panel members may not participate in payout deliberations or decisions that directly impact their own ratings of record or pay.

(d) *Pay Pool Manager.* The Pay Pool Manager—

(1) Provides oversight of the Pay Pool Panel;

(2) Consistent with this section, is the final approving authority for performance ratings; and

(3) May not participate in payout deliberations or decisions that directly impact his or her own rating of record or pay.

(e) *Performance Review Authority (PRA).* Consistent with this section, the PRA—

(1) Oversees the operation of pay pools established under NSPS;

(2) Ensures procedural and funding consistency among pay pools under NSPS; and

(3) May not participate in payout deliberations or decisions that directly impact his or her own rating of record or pay.

(f) *Performance shares.* (1) Performance shares will be used to determine performance pay increases and/or bonuses. The range of shares which may be assigned for each rating level is as follows:

PERFORMANCE SHARE RANGES TABLE

| Rating of record | Share range available for assignment |
|------------------|--------------------------------------|
| Level 5 .....    | 5 or 6 shares.                       |
| Level 4 .....    | 3 or 4 shares.                       |
| Level 3 .....    | 1 or 2 shares.                       |
| Level 2 .....    | No shares.                           |
| Level 1 .....    | No shares.                           |

(2) The only factors that may be used in determining share assignment are complexity of the work, level of responsibility, compensation (e.g., recent salary increases, current salary in relation to control points or pay band maximum, current salary in relation to labor market), overall contribution to the mission of the organization, organizational success, and raw performance scores. Pay Pool Managers and/or Pay Pool Panels will review share assignment recommendations to ensure that factors are applied

consistently across the pay pool and in accordance with the merit system principles.

(g) *Performance payout.* (1) A performance share is expressed as a percentage of an employee's rate of base salary and is a common value throughout the pay pool. The percent value of a performance share is calculated by dividing the pay pool fund (expressed in dollars) by the summation of the products of multiplying each employee's base salary times the number of shares earned by the employee.

[Share Value(%) = Pay Pool Fund(\$)/  
Σ(base salary of each pay pool member × shares assigned each pay pool member)]

(2) An employee's performance payout is calculated by multiplying the employee's base salary as of the end of the pay pool's appraisal period times the number of shares earned by the employee times the share value.

[Employee Performance Payout = Base Salary × Shares × Share Value]

(3) A performance payout may be an increase in base salary, a bonus, or a combination of the two. An increase in base salary may not cause the employee's rate of base salary to exceed the maximum rate or applicable control point of the employee's band rate range. The decision to pay a bonus, including the amount of such bonus, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(4) The factors management may consider in determining the amount to be paid out as a bonus versus an increase in the rate of base salary are limited to the following:

(i) Current base salary in relation to appropriate rate range;

(ii) Current base salary, level of responsibility and complexity of work performed in comparison with others in similar work assignments;

(iii) Performance-based compensation received during the rating cycle associated with promotions, reassignments, or awards;

(iv) Salary levels of occupations in comparable labor markets;

(v) Attrition and retention rates of critical shortage skill personnel;

(vi) Expectation of continued performance at that level;

(vii) Overall contribution to the mission of the organization; and

(viii) Composition of the pay pool fund.

(5) When an employee's base salary is not increased because the employee's

base salary has reached the maximum of the pay band or an applicable control point, any remaining performance payout will be paid as a bonus in lieu of the increase to base salary.

(6) The effective date of an increase in base salary made under this section will be the first day of the first pay period beginning on or after January 1 of each year.

(7) Unless otherwise specified in this section, employees who are no longer covered by NSPS on the effective date of the payout, or who moved out of NSPS on a permanent move after the end of their rating cycle but before the effective date of the payout, are not entitled to a performance-based payout.

(8) For employees receiving a retained rate above the applicable pay band maximum, the entire performance payout must be in the form of a bonus payment. Any performance payout in the form of a bonus for a retained rate employee will be computed based on the maximum rate of the assigned pay band.

(9)(i) NSPS employees shall be evaluated and assigned a rating of record by the appropriate official associated with the pay pool of record on the last day (normally September 30) of the appraisal period when the employee—

(A) Changes jobs within NSPS after the last day of the appraisal period and before the effective date of the payout;

(B) Is eligible for a rating of record; and

(C) Moves to a position that falls under the authority of a different NSPS pay pool.

(ii) For an employee covered by paragraph (g)(9)(i) of this section, the payout will be calculated and paid based on the pay pool funding and share valuation of the gaining pay pool except when the employee transfers to an NSPS position that does not have a fully constituted pay pool in which case the payout is based on the share valuation of the losing pay pool. In all cases, the gaining pay pool will determine the share assignment and payout distribution between salary increase and bonus.

(10) To the extent permitted by law, NSPS organizations will share the results of the performance management process with NSPS employees. At a minimum, these pay pool results will include the following: Average rating, ratings distribution, share value (or average share value), and average payout (expressed as a percentage). Organizations will ensure that the sharing of these or any other pay pool results will be presented in a manner that does not violate the Privacy Act.

(h) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding prorating of performance payouts for employees who, during the appraisal period, are—

(1) Hired, transferred, reassigned, or promoted into NSPS;

(2) In a leave-without-pay status (except as provided in paragraphs (i) and (j) of this section); or

(3) In other circumstances where prorating is considered appropriate.

(i) *Adjustments for employees returning after performing honorable service in the uniformed services—(1) General.* The rate of base salary for an employee who is absent from an NSPS position to perform service in the uniformed services (in accordance with 38 U.S.C. 4301 et seq. and 5 CFR 353.102) and who has the right to be reemployed or restored to duty by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316) will be set in accordance with this paragraph (i) and supplementary instructions in applicable implementing issuances.

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary rate increases as provided under § 9901.323 and under this section based on the employee's NSPS rating of record for that appraisal period. These rate adjustments are effective on the normal date for each adjustment (in accordance with §§ 9901.323 and 9901.342(g)(6)); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed through the exercise of a reemployment right. An employee covered by this paragraph (i)(2) is eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, rate adjustments will be made based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with

base salary rate increases under § 9901.323 consistent with the provisions of that section. These rate adjustments are effective on the normal date for each adjustment in accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed through the exercise of a reemployment right. The employee is not eligible for bonus payments for periods covered by this paragraph (i)(3), except as otherwise required by law.

(4) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(5) *Proration prohibited.* Proration of base salary rate adjustments is prohibited in the case of employees covered by this paragraph (i).

(j) *Adjustments for employees returning to duty after being in workers' compensation status—(1) General.* The rate of base salary for an employee who is absent from an NSPS position while receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee), and who has rights under 5 U.S.C. 8151 will be set in accordance with this paragraph (j) and applicable implementing issuances.

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary rate increases as provided under § 9901.323 and under this section based on the employee's NSPS rating of record for that appraisal period. These rate adjustments are effective on the normal date for each adjustment in accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated at the time of the adjustments, no adjustment will be processed until the employee is reemployed. An employee covered by this paragraph (j)(2) is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, rate adjustments will be made based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the

employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with base salary rate increases under § 9901.323 consistent with the provisions of that section. These rate adjustments are effective on the normal date for each adjustment in accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed. The employee is not eligible for bonus payments for periods covered by this paragraph (j)(3).

(4) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(5) *Proration prohibited.* Proration of base salary adjustments is prohibited in the case of employees covered by this paragraph (j).

(k) *Adjustments for employees in special circumstances—(1) General.* The Secretary will adjust the rate of base salary in accordance with the provisions in this paragraph for an NSPS employee who is in an NSPS covered position on the effective date of the payout and who is unable to meet the minimum performance period during the given appraisal period as a result of—

(i) Performing activities on "official time" (as defined in 5 U.S.C. 7131);

(ii) Serving on a long-term training assignment; or,

(iii) Approved paid leave.

(2) *Base salary increases.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee.

(3) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(1) *Adjustments for employees returning from temporary assignments outside of NSPS for which no NSPS performance plan was assigned—(1) General.* The Secretary will set the rate of base salary prospectively for an employee who returns from a temporary assignment (including a supervisory probationary assignment) outside of NSPS for which no NSPS performance plan was assigned in accordance with this paragraph (1).

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary increases as provided under § 9901.323 and this section based on the employee's NSPS rating of record for that appraisal period. When an employee returns to an NSPS position, these adjustments will be processed in determining the employee's prospective base salary rate. An employee covered by this paragraph (1)(2) is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, the employee will be credited with base salary rate adjustments based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with base salary rate increases under § 9901.323 consistent with the provisions of that section. The base salary rate adjustments under this paragraph (1)(3) will be used solely in determining the prospective NSPS base salary rate upon return to the NSPS position. The employee is not eligible for bonus payments for periods covered by this paragraph (1)(3).

(4) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

**§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.**

An employee's rate of base salary may be reduced based on a determination of

unacceptable performance, conduct, or both after applying applicable adverse action procedures. Such a reduction will be at least 5 percent of base salary and may not exceed 10 percent of base salary. However, a reduction in base salary may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also §§ 9901.353(f) and 9901.355(b)(4).) An employee's rate of base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

**§ 9901.344 Other performance payments.**

(a) The decision to grant other performance payouts, including the amount of such payouts, will be reviewed and approved by an official of the employee's Component who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no official at a higher level in the organization. In accordance with implementing issuances, authorized officials may make other performance payments to—

(1) Reward extraordinary individual performance, as described in paragraph (b) of this section;

(2) Recognize organizational or team achievement, as described in paragraph (c) of this section; and

(3) Provide for other special circumstances.

(b)(1) Extraordinary Performance Recognition (EPR) is an increase to base salary, a bonus, or a combination of these intended to reward employees when the payout formula does not adequately compensate them for their extraordinary performance and results. The EPR payment is in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. When an EPR payout is made in the form of an increase to base salary, the future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

(2) Only employees who have achieved a Level 5 NSPS rating of record for the most recently completed appraisal period are eligible for an EPR.

(3) The amount of an EPR awarded in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point, unless the

criteria for exceeding the control point are met.

(c)(1) Organizational/Team Achievement Recognition (OAR) payments may be made in the form of an increase to base salary, a bonus, or a combination of these in order to recognize the members of a team, organization or branch whose performance and contributions have successfully and directly advanced organizational goals. The OAR payment is made in conjunction with the annual performance payout.

(2) To receive an OAR, an employee must have an NSPS rating of record of Level 3 or higher for the most recently completed appraisal period.

(3) The amount of the OAR payment provided in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point, unless the criteria for exceeding the control point are met.

**§ 9901.345 Accelerated Compensation for Developmental Positions (ACDP).**

(a) Accelerated Compensation for Developmental Positions (ACDP) is an increase to base salary that may be provided to employees participating in Component training programs or in other developmental capacities as determined by Component policy. ACDP recognizes growth and development in the acquisition of job-related competencies combined with successful performance of job objectives.

(b) The use of ACDP is limited to—

(1) Employees in the lowest pay band of a nonsupervisory pay schedule who are in developmental or trainee level positions; and

(2) Employees in positions which are assigned to a Student Career Experience Program and which are in a pay schedule established exclusively for students.

(c) Components choosing to provide ACDP increases must establish and document standards by which such employees will be identified and growth and development criteria by which additional pay increases will be determined.

(d) The amount of the ACDP increase generally will not exceed 20 percent of an employee's base salary. The decision to grant an ACDP exceeding 20 percent of an employee's base salary must be made on a case-by-case basis and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no

official at a higher level in the organization.

(e) The amount of the ACDP increase may not cause the employee's base salary to exceed the top of the employee's pay band or any applicable control point, unless the criteria for exceeding the control point are met.

(f) To qualify for an ACDP, an employee must have a rating of record of Level 3 (or equivalent non-NSPS rating of record) or higher, consistent with § 9901.405. An ACDP may be awarded to an employee who does not have a rating of record if an authorizing official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or higher. This performance assessment does not constitute a rating of record.

(g) An ACDP increase may not be granted unless the employee is in a pay and duty status in an NSPS-covered position on the effective date of the increase.

(h) The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

#### Pay Administration

##### § 9901.351 General.

(a) *Introduction.* The pay administration provisions in §§ 9901.351 through 9901.356 are applied using base salary rates, except when specifically otherwise provided.

(b) *Geographic recalculation.* When an employee covered by a targeted local market supplement moves to a position in a new location where a different local market supplement and/or pay schedule applies, the employee's adjusted salary before the move will be recalculated to reflect a local market supplement (standard or targeted, as appropriate) for the employee's existing position—as if that position were at the same location as the position to which the employee is moving, consistent with the geographic conversion principle described at 5 CFR 531.205. For employees moving from a non-NSPS position to an NSPS position in a different location covered by a different salary supplement, the employee's adjusted salary under the former system will be recalculated as if the former position were located in the new location, consistent with the geographic conversion principle described at 5 CFR 531.205 or 5 CFR 536.303(b), as applicable.

(c) *Within-grade increase (WGI) adjustment equivalent.* (1) When an employee is permanently placed (not by conversion under § 9901.371 or by

promotion under § 9901.354) in an NSPS position from a GS or FWS position through a management-directed action (except for actions taken for misconduct or unacceptable performance), including a management-directed reassignment or realignment, or any placement as a result of a reduction in force (RIF), or placement via the Priority Placement Program (PPP), Reemployment Priority List (RPL), or Interagency Career Transition Assistance Plan (ICTAP), the employee will receive an increase to base salary equivalent to the amount he or she would have received as a WGI adjustment if the employee had converted into NSPS with his or her organization, as provided in § 9901.371.

(2) An employee who is placed in an NSPS position from a GS or FWS position through an employee-initiated reassignment may, at the discretion of the authorized management official, receive this same WGI adjustment equivalent increase described in paragraph (c)(1) of this section. The decision to grant this increase will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component. At a minimum, the higher-level approval level may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at a higher level in the organization.

(3) An increase provided under paragraphs (c)(1) and (c)(2) of this section occurs before any other discretionary reassignment increases provided under NSPS, may not cause the employee's base salary to exceed the maximum rate of the assigned pay band, and is in addition to any other discretionary reassignment increase the employee may be eligible to receive.

(d) *Minimum rate.* Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's base salary may not be less than the minimum rate of the employee's pay band.

(e) *Maximum rate.* Except as provided in § 9901.356, an employee's base salary may not exceed the maximum rate of the employee's band rate range.

(f) *Pay periods and hourly rates.* The establishment of pay periods and the computation of rates of pay will conform to 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of base salary will be converted to hourly rates of base salary in computing payments received by covered employees.

(g) *Rate comparisons upon movement to an NSPS position.* An employee who moves to an NSPS position from a non-NSPS position by management-directed action (excluding conversion under § 9901.371) will receive a rate of basic pay that is not less than the employee's rate of basic pay immediately before movement (after making adjustments consistent with those made under § 9901.371(e) for employees who convert to NSPS). For this purpose and for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), at the point of movement into NSPS, an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent payment under other legal authority.

(h) *Adjustment of annual rates for employees leaving certain teaching positions.* When an individual leaves a teaching position as defined in 20 U.S.C. 901 and moves to a position covered by NSPS, the individual's existing annual base salary rate for the teaching position may be adjusted for the purpose of setting pay under NSPS. The adjustment will take into account the shorter work year applicable to the teacher position. The adjustment may not exceed 20 percent of the existing annual base salary rate of the teaching position.

##### § 9901.352 Setting an employee's starting pay.

(a) Subject to the requirements of this section, the Secretary may set the starting base salary rate for individuals who are newly appointed or reappointed to the Federal service anywhere within the rate range of the assigned pay band (subject to any applicable control points). Pay will be set based upon the following considerations:

(1) Labor market considerations (i.e., availability of candidates and labor market rates);

(2) Specialized skills, knowledge, and/or education possessed by the employee in relation to the requirements of the position;

(3) Critical mission or business requirement(s);

(4) Salaries of other employees in the organization performing similar work; and

(5) Current salary of the candidate.

(b) For the purposes of this section, "newly appointed" means those individuals who have not previously been employed in the Federal service—i.e., this is their first Federal appointment. The term "reappointed"

means those individuals who have been previously employed in the Federal service and have been separated from the Federal service for at least 1 full workday immediately before employment in an NSPS position. The term "Federal service" includes civilian service as an employee of any entity of the Federal Government, including the judicial branch, legislative branch, and executive branch (including Government corporations, the Postal Regulatory Commission, the U.S. Postal Service and any nonappropriated fund (NAF) instrumentality described in 5 U.S.C. 2105(c)).

**§ 9901.353 Setting pay upon reassignment.**

(a)(1) A reassignment occurs when an employee moves, voluntarily or involuntarily, to a different position or set of duties within his/her pay band or to a position in a comparable pay band, or from a non-NSPS position to an NSPS position at a comparable level of work, on either a temporary or permanent basis. In NSPS, employees may be eligible for an increase or decrease to base salary upon temporary or permanent reassignment as described in this section.

(2) An employee who is reassigned through reduction-in-force (RIF) procedures is not eligible for an increase to base salary under this section (except as necessary to set the employee's rate at the band minimum), but is eligible for an increase under § 9901.351(c)(1). An employee's base salary will be protected by applying pay retention under § 9901.356, if applicable.

(3) A decision to increase an employee's pay under this section will be based on one or more of the following factors:

- (i) A determination that an employee's responsibilities will significantly increase;
  - (ii) Critical mission or business requirements;
  - (iii) Need to advance multi-functional competencies;
  - (iv) Labor market conditions (i.e., availability of candidates and labor market rates);
  - (v) Reassignment from nonsupervisory to supervisory position;
  - (vi) Employee's past and anticipated performance and contribution;
  - (vii) Location of position;
  - (viii) Specialized skills, knowledge, or education possessed by the employee in relation to those required by the position; and
  - (ix) Salaries of other employees in the organization performing similar work.
- (b)(1) Except as otherwise provided in paragraph (c) of this section, when an

employee is voluntarily reassigned within his/her pay band or to a comparable pay band, an authorized management official may reduce the employee's base salary in any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range. In appropriate circumstances, an authorized management official may make approval of a reassignment contingent on the employee's acceptance of a reduced rate. Subject to paragraph (b)(2) of this section, an authorized management official may also increase the employee's current base salary by up to 5 percent (not to exceed the rate range maximum).

(2) The decision to grant a decrease or increase, including the amount of such decrease or increase, as applicable under paragraph (b)(1) of this section, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at the higher level in the organization. There are no limits to the number of times an employee may be reassigned; however, an employee may only receive up to a total of a 5 percent cumulative increase to base salary in any 12-month period as the result of an employee-initiated action, unless an exception to the 12-month limitation is approved by an authorized management official. The increase will be calculated as a percentage of the employee's base salary at the time the increase takes effect.

(c)(1) Subject to paragraphs (b)(2) and (c)(2) through (c)(5) of this section, as applicable, when an employee is voluntarily reassigned from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment.

(2) An authorized management official may—

- (i) Set the employee's new adjusted salary equal to the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, received prior to the reassignment;

- (ii) Decrease the employee's adjusted salary by any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range; or

- (iii) Increase the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, by up to 5 percent (subject to the limitation that the resulting base salary may not exceed the rate range maximum).

(3) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(4) If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation under paragraph (b) of this section.

(5) When an employee covered by paragraph (c)(1) of this section moves geographically in conjunction with a voluntary reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b) before setting pay under paragraph (c)(2) of this section.

(d)(1) Except as otherwise provided in paragraphs (e) or (f) of this section, when an employee is reassigned via management-directed action within his/her current pay band or to a comparable pay band, an authorized management official will set pay at an amount no less than the employee's current base salary and may increase the employee's current base salary by up to 5 percent. (If the employee's current base salary exceeds the maximum of the new pay band, no increase is provided, and the employee's rate will be set at that maximum rate, or if the employee is eligible, converted to a retained rate as provided in § 9901.356.)

(2) The decision to grant an increase under paragraph (d)(1) of this section, including the amount of such increase, is discretionary and will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization. There is no limit to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation

described in paragraph (b) of this section.

(e)(1) Subject to paragraphs (d)(2), (e)(2), (e)(3), and (f) of this section, as applicable, when an employee is reassigned via management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set the employee's new adjusted salary at no less than the employee's adjusted salary (including any applicable locality pay, special rate supplement, or equivalent supplement) plus any physicians' comparability allowance payable for the position held prior to the reassignment, provided the resulting base salary does not exceed the maximum rate of the new pay band. Subject to the same maximum limitation, an authorized management official may also increase the employee's adjusted salary by up to 5 percent.

(2) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(3) When an employee covered by paragraph (e)(1) of this section moves geographically in conjunction with a management-directed reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules in § 9901.351(b) before setting pay under such paragraph (e)(1).

(4) For the purpose of determining whether an employee experienced a reduction in pay under 5 U.S.C. chapter 75 when reassigned from a non-NSPS position under paragraph (e)(1) of this section, § 9901.351(g) applies.

(f) When an employee is involuntarily reduced in pay via reassignment to a comparable pay band through adverse action procedures (as a result of unacceptable performance and/or conduct), the pay reduction must be at least 5 percent, but no more than 10 percent, of an employee's base salary. However, a reduction may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both. (See also § 9901.343.)

(g) When an employee returns to an NSPS position from a temporary reassignment to another NSPS position,

the employee's current base salary rate must be reconstructed as if the employee had not been temporarily reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary reassignment. A reassignment increase is not authorized when the employee returns to the position from which temporarily reassigned. (See § 9901.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(h) If an employee's temporary reassignment is made permanent, the permanent reassignment is treated as a new reassignment for purposes of applying this section.

(i) When an employee is reassigned to an NSPS supervisory position but later returns to the NSPS position held before that reassignment (or comparable position) because of failure to complete a supervisory probationary period, the employee's base salary rate must be reconstructed as if the employee had not been reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the reassignment (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that reassignment. A reassignment increase upon return to the previous position (or comparable position) under this paragraph is not

authorized. (See § 9901.342(l) for rules governing pay setting for an employee who returns to an NSPS position after failure to complete a supervisory probationary period for a non-NSPS supervisory position.)

#### **§ 9901.354 Setting pay upon promotion.**

(a)(1) Except as otherwise provided in this section, upon an employee's promotion, the employee will receive an increase in his or her base salary equal to at least 6 percent, but the resulting base salary rate may not be lower than the minimum rate or higher than the maximum rate of the new pay band. The decision to grant a promotion increase exceeding 12 percent must be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless a higher increase is necessary to reach the minimum rate of the new pay band or there is no official at a higher level in the organization.

(2) When an employee from a non-NSPS position is promoted to an NSPS position, the authorized management official shall first apply § 9901.353(e)(1) through (e)(3) to determine the employee's adjusted salary rate as if reassigned without a discretionary increase or decrease in pay. After apportioning the employee's adjusted salary between base salary and local market supplement or targeted local market supplement, the authorized management official will then increase the employee's salary rate as provided in § 9901.354(a)(1).

(b) The authorized management official may consider only the following criteria in determining the amount of the promotion increase:

(1) Critical mission or business requirements;

(2) Employee's past and anticipated performance and contribution;

(3) Specialized skills or knowledge possessed by the employee;

(4) Labor market conditions (including availability of candidates and the labor market rates for similar types of employees at the level represented by the pay band to which the employee is being promoted);

(5) Base salary rates paid to other employees in similar positions in the higher pay band; and

(6) Location of position.

(c)(1) If an employee's temporary promotion is made permanent without a break, the employee's base salary will remain unchanged. No additional promotion increase may be provided.

(2) When an employee returns from a temporary promotion to another NSPS position, the employee's current base

salary rate must be reconstructed as if the employee had not been temporarily promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary promotion (i.e., using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary promotion that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(d)(1) An employee on pay retention who is re-promoted to the pay band from which reduced (or a comparable band) is not automatically entitled to have his/her pay set in accordance with the promotion rules described in paragraphs (a) and (b) of this section. If the employee's retained rate falls within the rate range of the newly assigned pay band, the authorized management official may maintain the same base salary upon re-promotion, or increase the employee's base salary to a rate above his or her retained rate. However, the employee's new base salary may not exceed the rate that would be provided using the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating any increase approved by an authorized management official. If the employee's retained rate falls below the minimum rate of the newly assigned pay band, the employee's base salary must be set at least at the minimum rate of the band. If the employee's retained rate is higher than the maximum rate of the newly assigned pay band, pay retention will continue (subject to the requirements of § 9901.356).

(2) An employee who is promoted to a pay band higher than the one from which previously reduced in band will be covered by the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained

rate will be used when calculating the 6 percent (or higher) increase.

**§ 9901.355 Setting pay upon reduction in band.**

(a) *General.* When an employee is reduced in band, either voluntarily or involuntarily, the setting of the employee's base salary rate is subject to the rules in this section. As applicable, pay retention provisions established under § 9901.356 will apply. If pay retention does not apply, the employee's base salary may be reduced, subject to the requirements in paragraph (b) of this section. The employee may be eligible for an increase to base salary, subject to the requirements in paragraph (c) of this section.

(b) *Pay reduction.* An employee's base salary may be reduced upon reduction in band, subject to the following requirements:

(1) No base salary reduction is made when pay retention is applicable, except under paragraph (b)(4) of this section.

(2) The reduction in base salary may not cause the rate to fall below the minimum rate of the employee's new band.

(3) The base salary must be reduced as necessary to ensure that the new base salary is no greater than the maximum rate of the employee's new band.

(4) Adverse action procedures in 5 U.S.C. chapter 75 must be applied when an employee is involuntarily placed in a position in a lower pay band for unacceptable performance and/or conduct. In this circumstance, the authorized management official may reduce the employee's base salary. If such a reduction is made, it must be at least 5 percent, but no more than 10 percent, of an employee's base salary after applying adverse action procedures. However, a reduction in base salary under this paragraph may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's new pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also § 9901.343.)

(5) If an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, the pay reduction is applied using adjusted salary rates, consistent with the reassignment rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the decrease, consistent with the provisions of § 9901.351(b)).

(c) *Pay increase.* An employee's base salary may be increased by an

authorized management official upon reduction in band, subject to the following requirements:

(1) An employee who is reduced in band involuntarily—e.g., through reduction-in-force (RIF) procedures or by placement through the DoD Priority Placement Program (PPP) or Reemployment Priority List (RPL)—is not eligible for an increase to base salary (except if necessary to set the employee's base salary at the minimum rate of the new pay band).

(2) When an employee voluntarily moves to a lower pay band, the authorized management official may increase the employee's base salary, but must set the employee's base salary within the rate range for the employee's band. An increase in base salary may be up to 5 percent of the employee's current base salary (not to exceed the maximum of the rate range). This increase of up to 5 percent is deemed to be a "reassignment increase" for the purpose of applying the 12-month limitation in § 9901.353(b)(2). Also, in applying this increase, adjusted salary rates will be used when an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, consistent with the reassignment increase rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the increase, consistent with the provisions of § 9901.351(b)). This increase is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reduction in band, unless there is no higher-level management official.

(3) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(4) A decision to increase an employee's pay under paragraph (c)(2) of this section will be based on—

- (i) Critical mission or business requirements;
- (ii) The need to advance multi-functional competencies;
- (iii) The labor market conditions (i.e., availability of candidates, labor market rates for similar types of employees);
- (iv) Reassignment from nonsupervisory to supervisory position;
- (v) Location of position;
- (vi) Required specialized skills, knowledge, or education possessed by the employee;
- (vii) Performance-based considerations; and

(viii) The base salary rates paid to other employees in similar positions in the lower pay band.

(d) *Termination of temporary promotion.* This section does not apply to a reduction in band associated with the termination of a temporary promotion. Instead, the rules in § 9901.354(c)(2) apply.

(e) *Failure to complete probationary period.* When an employee who fails to complete a supervisory probationary period is reduced in band upon return to the position held before the probationary period (or a comparable position), the employee's current base salary rate must be reconstructed as if the employee had not been promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the promotion (*i.e.*, using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the promotion that would have been applied to the employee if he or she had remained in the position held immediately before that promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(l) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

#### **§ 9901.356 Pay retention.**

(a) Pay retention prevents a reduction in base salary that would otherwise occur by preserving the former rate of base salary within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of base salary in applying pay retention.

(b) Pay retention will be based on the employee's rate of base salary in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of base salary applicable to the employee's position.

(c) Pay retention will be granted for a period of 104 weeks. The Secretary may issue implementing issuances describing exceptions to the 104-week retention limit.

(d) Under NSPS, pay retention will be granted when an employee's base salary would otherwise be reduced in the following situations:

(1) As the result of reduction in force or reclassification;

(2) When an otherwise eligible employee is placed through the Priority Placement Program (PPP), including placement resulting from early registration, even though the employee does not have a specific reduction in force (RIF) notice;

(3) When an organization undergoes realignment or reduction, and

(i) An employee who would not be affected personally requests a reduction in band;

(ii) Management determines the employee's reduction in band results in placement in a more suitable position; and

(iii) That action lessens or avoids the impact of the RIF on other employees;

(4) When an employee accepts a position in a lower pay band designated in advance by the component as being hard-to-fill using any of the following criteria:

(i) Rates of pay offered by non-Federal employers are significantly higher than those payable under NSPS for the area, location, occupational group, or other class of positions involved;

(ii) The remoteness of the area or location involved;

(iii) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(iv) Any other circumstances the Component considers appropriate, subject to review and approval by an official who is at a higher level than the official who made the initial decision;

(5) When an employee is reduced in band on return from an overseas assignment under the terms of a pre-established agreement including—

(i) An employee released from a period of service specified in his or her current transportation agreement due to an involuntary, management-initiated action other than for unacceptable performance and/or misconduct;

(ii) An employee, who has completed more than one year of service under a current agreement, released from a transportation agreement for compelling humanitarian or compassionate reasons; and

(iii) A non-displaced overseas employee under no obligation to return to the United States who is otherwise eligible for PPP registration in accordance with DoD Instruction 1400.20;

(6) When an employee declines an offer to transfer with his or her function

to a location outside the commuting area, or is identified with such function but does not receive an offer at the gaining activity, and is placed in a position in a lower pay band at the losing activity or any other DoD activity;

(7) When an employee accepts a position in a lower pay band offered by an activity to accommodate a disabling medical condition similar to the circumstances described in 5 CFR 831.1203(a)(4);

(8) When an employee occupying a position under a Schedule C appointment (authorized under 5 CFR 213.3301) is placed, other than for unacceptable performance and/or misconduct or at the employee's request, in a position in a lower pay band in the competitive service or in another Schedule C position, provided that such action is not solely the result of a change in agency leadership (change in administration);

(9) When an employee occupying an Army or Air Force dual status military technician position lost, or is scheduled to lose, eligibility for dual status technician employment through no fault of his or her own and accepts placement without a break in service to a non-dual status technician position in a lower pay band;

(10) When an employee occupying a National Guard dual status technician position is involuntarily separated, through no fault of his or her own, and accepts placement, without a break in service, to a non-dual or dual status technician position in a lower pay band or a competitive service NSPS position in a lower pay band;

(11) When an employee whose job is abolished declines an offer within the competitive area, but outside the commuting area, and is placed in a lower pay band position in the commuting area, provided the employee is not serving under a mobility agreement;

(12) When an employee's base salary is reduced as the result of the movement of his or her position from a DoD nonappropriated fund (NAF)

instrumentality to coverage by the DoD civil service system without a break in service of more than three days; or

(13) When an employee's base salary would exceed the maximum of the rate range because the maximum of the rate range decreased or as a result of a management-directed reassignment.

(e) An authorized management official may grant pay retention for circumstances other than those detailed in paragraphs (d)(1) through (d)(13) of this section. This determination is discretionary, and appropriate use is subject to higher-level approval. At a

minimum, the higher-level approval may be no lower than one level above the authorized management official who recommended the determination. These circumstances may be specified in advance or may be approved on a case-by-case basis. This authority applies to personnel actions initiated by management, not at the employee's request, and other than for unacceptable performance and/or misconduct, and only if those actions would further the agency's mission in accordance with applicable law and regulation.

(f) Pay retention under this authority will terminate—

(1) At the end of the 104-week period (except as otherwise provided under paragraphs (c) and (m) of this section);

(2) When the employee moves to another position with a rate range that encompasses the employee's retained rate;

(3) When an increase in the maximum rate for the employee's pay band causes the maximum rate to equal or exceed his/her retained rate, or the employee's base salary is encompassed within his or her assigned rate range as a result of a pay reduction based on unacceptable performance and/or conduct, subject to adverse action procedures;

(4) When the employee is no longer covered by an NSPS position or has a break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under another section of this regulation;

(5) When the employee is reduced in band for unacceptable performance and/or conduct; or

(6) When the employee is reduced in band at his or her request in circumstances other than stated in paragraph (d) of this section.

(g) An employee whose pay retention terminates at the end of the 104-week period will have his or her pay set at the maximum rate of the pay band in which he/she is currently assigned.

(h) Upon termination of pay retention, the employee immediately becomes eligible for any applicable general salary increase and performance payout which may include an increase to base salary, unless otherwise ineligible.

(i) Pay retention does not apply in the following circumstances:

(1) Declination of a position offer under RIF procedures set forth in 5 CFR part 351;

(2) Break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under paragraph (d) of this section;

(3) Movement from a non-DoD position to an NSPS-covered position;

(4) Failure to satisfactorily complete a supervisory probationary period;

(5) Return to an employee's former position at the end of a temporary promotion or temporary reassignment;

(6) Reassignment or reduction in band for unacceptable performance and/or conduct; or

(7) Reassignment or reduction in band at the employee's request in circumstances other than stated in paragraph (d) of this section.

(j) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than base salary adjustments, as provided in § 9901.342(g)(8).

(k) An employee receiving a retained rate will receive any general salary increase under § 9901.323(a)(1), subject to the conditions in § 9901.323, and will receive any applicable local market supplement adjustment, subject to the conditions in § 9901.334.

(l) The 104-week time limit established under paragraphs (c) and (f)(1) of this section will be extended by a period of time equal to the length of time an employee is deployed away from his or her regular duty station in support of a contingency operation as defined in 10 U.S.C. 101, or an emergency as determined in accordance with DoD Directive 1400.31, "DoD Civilian Work Force Contingency and Emergency Planning and Execution" (or any successor regulation).

(m) Any employee with a preexisting entitlement to pay retention under 5 CFR part 536 immediately before becoming covered by NSPS through a management-directed action, or who obtains entitlement to pay retention upon becoming covered by NSPS through a management-directed action, will be entitled to a retained rate under this section without regard to the 104-week limit (as described in paragraphs (c) and (f)(1) of this section). Pay retention will terminate under the conditions in paragraphs (f)(2) through (f)(6) of this section.

#### **Premium Pay**

##### **§ 9901.361 General provisions.**

(a) *Introduction.* As provided in § 9901.303(a)(2), the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are waived or modified as provided in paragraph (e) of this section and §§ 9901.362 through 9901.364 (except as provided in paragraph (b) of this section). To the extent that the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are not waived or modified, NSPS employees and positions remain subject to those provisions. Sections

9901.363 and 9901.364 establish new types of premium payments in addition to those found in 5 U.S.C. chapter 55, subchapter V.

(b) *Provisions not waived or modified.* The following provisions of 5 U.S.C. chapter 55, subchapter V, are not waived or modified:

(1) 5 U.S.C. 5544 (relating to prevailing rate employees); and

(2) 5 U.S.C. 5545b (relating to firefighter pay).

(c) *Applicability of Fair Labor Standards Act.* The Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 201 et seq.) and OPM regulations in 5 CFR part 551 apply to NSPS employees. DoD must determine whether an employee is exempt or nonexempt under the FLSA minimum wage and overtime pay provisions in accordance with the FLSA and OPM regulations. In applying FLSA overtime pay provisions, local market supplements are treated the same as locality pay under 5 U.S.C. 5304 and are included in computing total remuneration, the hourly regular rate, and straight time rate under 5 CFR part 551.

(d) *Applying regulations in 5 CFR part 550, subpart M.* In applying the regulations in 5 CFR part 550, subpart M (dealing with firefighter pay) to NSPS employees, the reference to "locality pay" in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Consistent with 5 CFR 550.1306(a), a firefighter compensated under 5 CFR part 550, subpart M, may not receive additional premium pay except for compensatory time off for travel under § 9901.362(j) or for religious observances under § 9901.362(k) and foreign language proficiency pay under § 9901.364.

(e) *Physicians and dentists.* Physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances under § 9901.362(k).

(f) *Senior Executive Service.* Members of the Senior Executive Service under NSPS are not eligible for premium pay, except for compensatory time off for religious observances under § 9901.362(k).

##### **§ 9901.362 Modification of standard provisions.**

(a) *Premium pay limitations.* (1) An employee is covered by the premium pay limitations established under 5 U.S.C. 5547 and related regulations, except as provided in paragraph (a)(2) of this section. Notwithstanding the modification of various premium

payments under this section, those payments are still considered to be payments in 5 U.S.C. chapter 55, subchapter V, for the purpose of applying 5 U.S.C. 5547 (including the purpose of determining the covered premium payments under 5 U.S.C. 5547(a)).

(2) Subject to § 9901.105, the Secretary may waive the limitations established by 5 U.S.C. 5547 and related regulations and instead apply an annual limitation equal to the rate payable under 3 U.S.C. 104 in the case of specified categories of employees and situations on a time-limited basis. Such a waiver may not apply with respect to additional compensation that is normally creditable as basic pay for retirement or any other purpose.

(b) *Overtime pay.* (1) An employee is covered by the overtime pay (including compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations, subject to the requirements and modifications described in paragraphs (b)(2) through (b)(6) of this section.

(2) Consistent with 5 U.S.C. 5542(c), an employee who is subject to section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, is covered by OPM's FLSA overtime regulations in 5 CFR part 551.

(3) Compensation for irregular or overtime work performed by National Guard Technicians is governed by 32 U.S.C. 709(h) and policies issued by the National Guard Bureau.

(4) Firefighters covered by 5 U.S.C. 5545b are subject to special overtime pay rules as described in that section and in 5 U.S.C. 5542(f) and in related regulations. (See also § 9901.361(d).)

(5) Compensatory time off earned under 5 U.S.C. 5543 must be used by the end of the 26th pay period after that in which it was earned. Compensatory time off not used within 26 pay periods will be paid at the overtime rate at which it was earned. Employees with unused compensatory time earned before June 8, 1997 (January 5, 1997, for Defense Logistics Agency employees), have had a separate "old compensatory time" account established for their use. Old compensatory time is charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested. Within each category of compensatory time, the oldest will be charged first. When a DoD employee separates, moves to another Component, or transfers to another Federal agency, any unused compensatory time off balance will be paid at the overtime rate at which it was earned. Also, when an employee moves to a pay system that

does not provide for compensatory time off (e.g., Senior Executive Service), any unused compensatory time off balance will be paid at the overtime rate at which it was earned.

(6) The following modifications to 5 U.S.C. 5542 and 5543 and related regulations apply:

(i) The overtime hourly rate cap for FLSA-exempt employees based on the rate of basic pay for the minimum rate for GS-10 does not apply; instead, an FLSA-exempt employee is entitled to an overtime hourly rate equal to 1.5 times the employee's adjusted salary hourly rate unless the employee is in a pay band for which the overtime hourly rate is set equal to the employee's adjusted salary hourly rate based on a determination by the Secretary, subject to § 9901.105;

(ii) An FLSA-exempt employee will be compensated for overtime work (whether regular or irregular or occasional) using a quarter of an hour as the smallest fraction of an hour, with minutes rounded to the nearest full fraction of an hour;

(iii) An FLSA-exempt employee may not be credited with overtime hours of work for travel time unless that travel involves the performance of actual work while traveling; instead, any such noncreditable travel hours may be credited as earned compensatory time off for travel, subject to the requirements in paragraph (j) of this section; and

(iv) An FLSA-exempt employee may be required to receive compensatory time off under 5 U.S.C. 5543 in lieu of overtime pay, regardless of the type of overtime work or the amount of the employee's adjusted salary rate.

(c) *Night pay.* An employee is covered by the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations, except for the following modifications:

(1) Night pay is payable for irregular or occasional overtime work in the same manner it is payable for regularly scheduled work; and

(2) Night pay is not payable during paid absences, except for a period of court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off during religious observances, or when excused from duty on a holiday.

(d) *Sunday pay.* An employee is covered by the Sunday pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Work for which Sunday pay is payable (i.e., Sunday work) is limited to applicable hours of work that are actually performed on Sunday (i.e., the definition of "Sunday work" in 5 CFR 550.103 applies except that non-Sunday hours are excluded even if those hours

are within a daily tour of duty that includes Sunday hours); and

(2) Consistent with section 624 of the Treasury and General Government Appropriations Act, 1999 (as found in section 101(h) of Division A of Public Law 105-277, October 21, 1998), Sunday pay is not payable unless an employee actually performed work during the time corresponding to such pay (i.e., no Sunday pay for periods of paid leave, compensatory time off, credit hours, paid excused absence, or other paid time off).

(e) *Pay for holiday work.* An employee is covered by the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Holiday premium pay is paid at twice an employee's adjusted salary hourly rate for each hour (including overtime hours) an employee is ordered or approved to work on a holiday;

(2) For FLSA-exempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under paragraph (b) of this section for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate; and

(3) For FLSA-nonexempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under 5 CFR 551.512 for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate.

(f) *Standby duty pay.* (1) An employee is covered by the standby duty pay provisions in 5 U.S.C. 5545 (c)(1) and related regulations, subject to the requirements and modifications in paragraphs (f)(2) through (f)(6) of this section.

(2) Except as provided in paragraph (f)(3), eligibility for regularly scheduled standby duty is limited to firefighters classified to the 0081 occupation who are not eligible for coverage under 5 U.S.C. 5545b, and to emergency medical technicians not involved in fire protection activities who are required to perform standby duty.

(3) The Secretary may approve extending standby duty premium pay coverage to occupations other than those cited in paragraph (f)(2) of this section. Component proposals to extend coverage will explain why employees within the specified occupational group must regularly remain at the duty station longer than ordinary periods of duty, a substantial part of which involves remaining in a standby status

rather than performing actual work, and must address how the criteria in 5 CFR 550.143 are met.

(4) The standby percentage is always multiplied by an employee's adjusted salary rate regardless of the amount.

(5) Standby pay attributable to use of an adjusted salary rate exceeding the applicable GS-10, step 1, rate limitation is not considered to be paid under 5 U.S.C. 5545(c)(1) and thus is not creditable basic pay for retirement purposes.

(6) No additional premium pay for hours of overtime work (whether regularly scheduled or irregular or occasional), including compensatory time off, is payable to an employee receiving standby duty pay.

(g) *Administratively uncontrollable overtime pay.* The administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and will not be applied to NSPS employees. Compensation for such work will be made under the applicable provisions of this section.

(h) *Law enforcement availability pay.* An employee is covered by the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations, except that the reference to "premium pay" in 5 CFR 550.186 will be interpreted to refer to the applicable title 5 premium payments and to the corresponding modified provisions in this section. In addition, the reference to "limitation on premium pay" in 5 CFR 550.185(a)(2) will be construed to refer to the limitations under 5 U.S.C. 5547 and to the corresponding modified provision in paragraph (a) of this section.

(i) *Pay for duty involving physical hardship or hazard.* (1) An employee is covered by the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations, subject to the requirements and modifications described in paragraphs (i)(2) through (i)(6) of this section.

(2) In determining eligibility for hazardous duty pay, an authorized management official will apply occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in Subtitle B, Chapter XVII, of title 29, United States Code, or, in the absence of a permissible exposure limit issued by the Secretary of Labor, other applicable standard promulgated by the Secretary.

(3) Subject to § 9901.105, the Secretary may establish new categories of hazardous duty pay in addition to those found in Appendix A to subpart

I of 5 CFR part 550. Components may request a new category of hazardous duty pay be established and must submit, with their request, the information required in 5 CFR 550.903(b).

(4) Except as provided in paragraphs (i)(5) and (i)(6) of this section, an employee is paid a hazard pay differential when he or she is assigned to and performs a duty specified in Appendix A to subpart I of 5 CFR part 550 or as provided under paragraph (i)(3) of this section.

(5) An employee will be eligible to receive hazardous duty pay when an authorized management official determines—

(i) One or more of the conditions requisite for such payment exist; and

(ii) Safety precautions, protective or mechanical devices, protective or safety clothing, protective or safety equipment, or other preventive measures have not reduced the element of hazard below the permissible exposure limits promulgated by the Secretary of Labor or any applicable standard promulgated by the Secretary, consistent with paragraph (i)(2) of this section.

(6) Hazard pay differentials are not payable to employees in occupations or jobs in which unusual physical risk is an inherent characteristic of the occupation or job, such as police officer, emergency medical technician, test pilot, ordnance/explosives/incendiary inspector, and engineering technician performing inspection functions inside fuel storage tanks, tunnels, or shafts. The classification of the employee's position (i.e., determination of pay band level) includes a consideration of the hazardous duty or physical hardship. For the purposes of this paragraph, the phrase "includes a consideration of the hazardous duty" means that the duty is one element considered in determining the pay band level of the position—i.e., the knowledge, complexities, skills and abilities required to perform that duty are considered in the classification of the position. Such consideration does not require the hazardous duty or physical hardship to be pay band controlling.

(j) *Compensatory time off for travel.*

(1) An employee is covered by the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations, subject to the requirements and modifications described in paragraphs (j)(2) through (j)(7) of this section.

(2) The term "official duty station" as defined in the related regulations is not applicable; instead, the term "official worksite" is used to determine an employee's entitlement to compensatory

time off for travel. The term "official worksite" has the meaning given in 5 CFR 531.605.

(3)(i) Time spent commuting between an employee's residence and the workplace (official or temporary worksite) is not creditable for the purpose of compensatory time off for travel, except as provided in paragraph (j)(3)(ii) of this section.

(ii) If an employee is required to travel to a temporary worksite and if the one-way commuting time exceeds the employee's normal one-way commuting time by more than 1 hour, the commuting time beyond 1 hour may be credited.

(4) If an employee is required to travel directly between his or her residence and a transportation terminal, the travel time is creditable as time in a travel status. The travel time outside regular working hours directly to or from a transportation terminal is creditable as time in a travel status. However, if the travel occurs on a day that the employee is regularly scheduled to work, the time the employee would have spent in normal home-to-work or work-to-home commuting must be deducted.

(5) An employee earns compensatory time off for time spent in a travel status away from the official worksite when such time is not otherwise compensable.

(6) Employees must file requests for credit of compensatory time off for travel within 10 workdays after returning to the official duty station, or within 10 workdays of returning from temporary duty (TDY) assignment or approved leave which immediately follows the TDY during which the compensatory time off for travel was earned, by submitting a travel itinerary, or any other documentation acceptable to the employee's supervisor, in support of the request. If not submitted within 10 workdays, the employee will forfeit his or her claim to the compensatory time off for travel. Compensatory time off for travel will be credited in increments of 6 minutes or 15 minutes and will be tracked and managed separately from other forms of compensatory time off.

(7)(i) When an employee moves from an NSPS position to a non-NSPS position within the Department, in which the employee will be eligible for compensatory time off for travel under 5 CFR part 550, subpart N, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage in 5 CFR part 550, subpart N.

(ii) When an employee moves from a non-NSPS position to an NSPS position within the Department, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage established under 5 CFR 550.1407.

(k) *Compensatory time off for religious observances.* An employee is covered by the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations, subject to the following requirements and modifications:

(1) An employee's request for time off should not be granted without simultaneously scheduling the hours during which the employee will work to make up the time (unless the employee earned the needed hours in advance); and

(2) An employee may not receive payment for any unused compensatory time off for religious observances under any circumstances. This prohibition against payment applies to surviving beneficiaries in the event of the individual's death.

(l) *Air traffic controller differential.* (1) The air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for subsections (a)(1) and (d) of that section.

(2) An employee is covered by the air traffic controller differential provisions in subsections (a)(1) and (d) of 5 U.S.C. 5546a, subject to the modification described in paragraph (1)(3) of this section.

(3) The reference to the grade levels of GS-9 and GS-11 in 5 U.S.C. 5546a(a)(1) must be construed to mean a comparable level of work as determined under the NSPS classification structure.

#### **§ 9901.363 Premium pay for health care personnel.**

(a) *Coverage.* (1) This section applies to DoD health care personnel covered under NSPS who may be eligible for premium pay, as described in paragraphs (b), (c), and (d) of this section. For the purpose of this section, *health care personnel* means employees providing direct patient care services or services incident to direct patient care services. Examples include employees in the following occupations: nurse, biomedical engineer, dietitian, dental hygienist, psychologist, and medical records technician.

(2) Premium pay under this section is not considered part of basic pay for any

purpose, nor is it used in computing a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(b) *On-call premium pay.* (1) When health care personnel are not otherwise compensated for on-call time, heads of Components may authorize on-call premium pay under this section for officially scheduled "on-call" time which requires these employees to restrict their activities sufficiently to be available to return to the worksite promptly when it is necessary.

(2) To be paid on-call premium pay, an employee must be officially scheduled to be on-call outside his or her regular duty hours or during hours on a holiday when the employee is excused from regular duty.

(3) An employee may not be scheduled to be on-call unless it is essential for the employee to be immediately available to return to the worksite.

(4) An employee officially scheduled to be on-call will be paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status.

(5) An employee may not receive on-call pay during periods of actual work. When an employee on-call is required to return to work status, on-call pay will be suspended. When released from the requirement to perform actual work, the employee will return to the remaining scheduled on-call status.

(6) An employee may not be charged leave during periods of regularly scheduled on-call duty; nor may such an employee receive on-call premium pay when, because of leave or other authorized absence, the employee is not expected to be able to return to the worksite immediately.

(c) *Night pay for health care personnel.* (1) Health care personnel working a tour of duty, any part of which falls between 6 p.m. and 6 a.m., with 4 or more hours falling between 6 p.m. and 6 a.m., will be paid additional pay for each hour of work on such tour. When fewer than 4 hours of work fall between 6 p.m. and 6 a.m., health care personnel will be paid additional pay for each hour of work performed between 6 p.m. and 6 a.m. Night pay for health care personnel is 10 percent of the employee's hourly rate of adjusted salary. An employee receiving night pay under this section may not also receive night pay under § 9901.362(c).

(2) Health care personnel are entitled to pay for night duty for a period of paid absence only for a period of court leave, military leave, time off awards under 5 U.S.C. 4502(e), or compensatory time off for religious observances.

(3) When excused from work because of a holiday or in-lieu-of holiday, health

care personnel are entitled to the night pay that would have applied had they not been excused from work.

(d) *Pay for weekend duty for health care personnel.* (1) Health care personnel who work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday, will be paid additional pay for each hour of work during such tour. Health care personnel who have two separate tours of duty, each of which qualify as weekend duty, will be paid additional pay for each hour of both tours. Additional pay for weekend duty is 25 percent of the employee's hourly rate of adjusted salary. An employee receiving pay for weekend duty may not also receive pay for Sunday work under § 9901.362(d).

(2) When on court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off for religious observances, health care personnel are entitled to pay for weekend duty they otherwise would have received.

#### **§ 9901.364 Foreign language proficiency pay.**

(a) *General provisions.* (1) This section applies to employees who may be paid Foreign Language Proficiency Pay (FLPP) if they are certified as proficient in a foreign language the Secretary has determined to be necessary for national security interests, and if they are not receiving FLPP as provided in 10 U.S.C. 1596 and 10 U.S.C. 1596a.

(2) The Secretary is authorized to publish an annual list of foreign languages necessary for national security interests and to establish overall policy for administration of the Defense Language Program.

(3) Employees may be certified as proficient in a necessary foreign language using criteria and procedures established by the Secretary and receive FLPP.

(b) *Eligibility Criteria.* An authorized management official delegated the authority for approving payment must document that an employee meets eligibility criteria before authorizing FLPP. The documentation includes—

(1) Certification within the last 12 months of the employee's proficiency in a foreign language the Secretary has determined necessary for national security interests;

(2) Affirmation that the employee does not currently receive comparable pay under 10 U.S.C. 1596 or 1596a;

(3) Certification of the employee's foreign language proficiency level renewed annually; and

(4) Certification based on an annual test that is part of the Defense Language Proficiency Test System.

(c) *Amount and method of payment.* The decision to grant FLPP, including the amount, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no official at a higher level in the organization. The amount of FLPP received by the employee, not to exceed \$500 per pay period, will be determined based on the following considerations:

(1) The employee's measured proficiency level in the necessary language;

(2) The need for the employee's particular language skills;

(3) The difficulty of recruiting or retaining employees with the same proficiencies;

(4) The extent to which the employee performs tasks requiring proficiency;

(5) The number of necessary languages in which the employee is proficient; and

(6) Other considerations authorized by the Secretary.

(d) *Treatment for other purposes.* FLPP is not considered part of basic pay for any purpose and does not count towards retirement, insurance, or any other benefit related to basic pay. FLPP is not pay for purposes of a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(e) *Termination.* The authorized management official as determined by the Component may reduce or terminate FLPP at any time when the official determines—

(1) The need for the employee's language capability has been reduced or eliminated; or

(2) The employee no longer meets the certification requirements.

(f) *Miscellaneous.* (1) The minimum qualifying level may not be less than Interagency Language Roundtable Level 2 proficiency in at least two skills (listening, reading, speaking, or writing, as required).

(2) FLPP may be paid for proficiency in multiple languages; however, the total amount may not exceed \$500 per pay period.

## Conversion Provisions

### § 9901.371 Conversion into NSPS pay system.

(a) *Introduction.* This section describes the pay-setting provisions that apply when DoD employees are converted into the NSPS pay system established under this subpart. (See § 9901.231 for conversion rules related

to determining an employee's career group, pay schedule, and band.) An affected employee may convert from the GS system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this part (except § 9901.372), the terms "convert," "converted," "converting," and "conversion" refer to employees who become covered by the NSPS pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these conversion provisions.

(c) *Bar on pay reduction.* Subject to paragraph (e) of this section, employees will be converted into the NSPS pay system without a reduction in their adjusted salary rate. (As defined in § 9901.304, the term "adjusted salary" means base salary plus any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.)

(d) *Rate comparison.* For the purpose of determining whether conversion into NSPS constitutes an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. The rate of basic pay immediately before conversion must be adjusted as described in paragraph (e) of this section before comparing that rate of basic pay to the initial NSPS rate of basic pay.

(e) *Simultaneous actions.* If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, the other action will be processed under the rules pertaining to the employee's former system before processing the conversion action.

(f) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to

processing the conversion (as provided in § 9901.231(c)), and pay will be set consistent with the pay-setting rules of the pay system that applies prior to conversion. For GS employees, pay in the permanent position of record must be reconstructed to reflect any increase that would have otherwise occurred if the employee had not been temporarily promoted, as provided in GS pay-setting regulations. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system. (See also paragraph (k) of this section.)

(g) *Grade retention prior to conversion.* An employee on grade retention immediately before conversion must be converted to a pay band based on the grade of his or her assigned permanent position of record (not the retained grade), as provided in § 9901.231(d), but the employee's base and adjusted salary while in grade retention status will be used in applying this section (e.g., in setting the initial NSPS base and adjusted salary and in determining the amount of any within-grade increase adjustment). After conversion and any within-grade increase adjustment under paragraph (j) of this section, if the employee's base salary exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(h) *Pay retention prior to conversion.* For an employee on pay retention under 5 U.S.C. 5363 immediately before conversion, the employee's pay will be realigned so that the employee's NSPS adjusted salary (consisting of base salary plus any applicable local market supplement) equals the employee's retained rate before conversion. If the employee's base salary (after realignment) exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in § 9901.356.

(i) *Conversion adjustments.* The only NSPS base salary adjustments that may be made in conjunction with an employee's conversion into NSPS are those identified in paragraphs (j) through (m) of this section.

(j) *Within-grade increase (WGI) adjustment.* (1) Upon conversion to NSPS, a General Schedule (GS) employee (regardless of work schedule) who would otherwise be eligible for a within-grade increase (WGI), and who is paid below the maximum rate for their grade, will receive a prorated WGI adjustment to his or her NSPS base salary rate to account for the time (measured in calendar days) since the employee's last equivalent pay increase.

(2) The WGI adjustment is calculated based on the number of calendar days between the effective date of the employee's last equivalent increase and the date of conversion into NSPS, regardless of the number of days in a non-pay status (if any). The maximum adjustment may not exceed a full WGI.

(3) For an employee on a temporary promotion immediately before conversion, the employee's GS pay entitlements must be determined as provided in paragraph (f) of this section before calculating the WGI adjustment.

(4) For an employee entitled to grade retention immediately before conversion, the WGI adjustment is determined using the employee's retained grade and step.

(5) The WGI adjustment is not applicable to an employee entitled to pay retention immediately before conversion.

(6) The WGI adjustment is not applicable to an employee whose performance has been determined to be below an acceptable level of competence under 5 CFR part 531, subpart D.

(7) An employee is entitled to a WGI adjustment in accordance with paragraphs (j)(1) through (6) of this section each time he or she occupies a position that is converted into NSPS under this part.

(k) *Special increase for employees on temporary promotion prior to conversion*—(1) *General*. If an employee had a temporary promotion immediately before conversion, and if the position to which the employee was temporarily promoted becomes covered by NSPS, an authorized management official may temporarily reassign or temporarily promote the employee back to that position, subject to the same terms and conditions as the initial temporary promotion (e.g., if the temporary promotion was not to exceed 5 years and the action is a temporary reassignment under NSPS, the temporary reassignment may not exceed 5 years). When the employee is temporarily placed back into the position immediately after conversion, the pay-setting rules in paragraphs (k)(2) and (k)(3) of this section apply.

(2) *Temporary reassignment*. If the post-conversion action would be a temporary reassignment, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) in lieu of setting pay under the reassignment rules under § 9901.353. This is a one-time exception to the limitations on reassignment

increases imposed under § 9901.353. Upon expiration of the temporary reassignment, pay will be set as specified in § 9901.353(g) or paragraph (k)(4) of this section, as applicable.

(3) *Temporary promotion*. (i) If the post-conversion action would be a temporary promotion, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) or may set pay according to the promotion rules under § 9901.354 to provide a greater increase. Upon expiration of the temporary promotion, pay will be set as specified in § 9901.354(c) or paragraph (k)(4) of this section, as applicable.

(ii) The increase described in paragraph (k)(3)(i) of this section may also apply to an employee who is on a temporary promotion at the time that temporary promotion position converts to NSPS, even if the employee's permanent position of record has not yet converted. In this case, upon expiration of the temporary promotion, pay will be set under the rules of the applicable pay system.

(4) *Temporary placement becomes permanent*. If a temporary reassignment or promotion to an NSPS position under this paragraph (k) becomes permanent with no break, the employee's base salary will not change, but will continue at the rate received at the end of the temporary reassignment or promotion.

(l) *Special increases equivalent to GS promotion increase*. (1) During the first 12 months following conversion, employees who are not eligible for the Accelerated Compensation for Developmental Positions (ACDP) under § 9901.345 are eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to a noncompetitive promotion increase the employee would have received but for conversion to NSPS. This paragraph may be applied only when the grade level of the promotion is encompassed within the same pay band, the employee's performance warrants the pay increase, and the promotion would have otherwise occurred during that period.

(2) An employee who is selected for a non-NSPS position that subsequently becomes covered by NSPS before the effective date of the employee's placement in the position is eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to the increase the employee would have received had the placement been effected prior to the position becoming

covered by NSPS. This paragraph may be applied only when the employee is not already in an NSPS-covered position on the effective date of the placement, and the effective date is within 12 months of the position becoming covered by NSPS. An employee who receives an increase under this paragraph is not eligible for the WGI adjustment described in paragraph (j) of this section.

(m) *Adjustment for physicians and dentists*. For a GS physician or dentist who was regularly receiving a physicians' comparability allowance or premium pay, the Component may increase the base salary after conversion to NSPS to account for the loss of such allowance or premium pay (since such payments are not authorized for physicians and dentists under NSPS). The Component must also consider the additional pay represented by any applicable targeted local market supplement in determining the rate at which the base salary should be set under this paragraph.

#### **§ 9901.372 Conversion or movement out of NSPS pay system.**

(a) *General*. (1) This section applies to the conversion or movement of employees out of the NSPS pay system to a different pay system. Under this section, when an NSPS employee is converted or moved to a GS position, a GS virtual grade and rate is established for the NSPS employee so that the employee is treated as a GS employee in applying GS pay-setting rules.

(2) For the purpose of this section (unless otherwise specified)—

(i) The terms “convert,” “converted,” “converting,” and “conversion” refer to NSPS employees who become covered by a different pay system without a change in position (as a result of a determination made by the Secretary under § 9901.102(e) or as otherwise provided by law); and

(ii) The terms “move,” “moved,” “moving,” and “movement” refer to NSPS employees who become covered by a different pay system through a change in position, rather than by conversion.

(b) *Classification of converted position*. Prior to converting an employee out of NSPS, an authorized management official, as defined by the Component, will review the duties of the employee's current permanent position of record and classify the position's duties in accordance with Office of Personnel Management (OPM) classification guidance and/or other appropriate criteria to determine the appropriate title, series, and grade or pay band of the position in the new pay

system. Employees occupying positions classified to NSPS-unique occupational series at the time of conversion out cannot be retained in those series, but must be assigned to the series that most closely represents the employee's current duties (i.e., the duties of the former NSPS position).

(c) *Determining pay under new pay system.* When converting or moving an employee out of NSPS to another pay system, the pay-setting rules of the gaining system will apply. For the purpose of applying those rules, the employee's final pay under NSPS is determined based on the employee's NSPS permanent position of record (including band), official worksite, and pay as of the day immediately before the date of conversion or movement out of NSPS. An employee on a temporary reassignment or temporary promotion will be returned to his or her permanent position of record prior to conversion or movement. No personnel or pay action that, but for the conversion or movement out of NSPS, would have occurred under NSPS on the date of conversion or movement may be considered. Any personnel or pay action occurring on the date of conversion or movement must be processed under the rules of the gaining system. In the case of a conversion or movement to the General Schedule (GS) pay system, the supplemental rules in paragraph (d) of this section must be followed to determine a virtual GS grade and rate (as of the date before the employee's conversion or movement out of NSPS) that will be used in apply GS pay-setting rules.

(d) *Virtual GS grade and rate—(1) Virtual GS grade.* (i) Before an employee converts or moves out of NSPS under this paragraph, a virtual GS grade will be established for the purpose of applying GS pay-setting rules (e.g., a promotion increase if the actual GS grade is higher than the virtual GS grade). This virtual GS grade will be based on a comparison of the NSPS employee's current adjusted salary to the highest applicable GS rate range that would apply to the employee's NSPS permanent position of record considering only those GS grade levels and associated rate ranges that are included in the employee's assigned NSPS pay band. For the purpose of this section, a highest applicable GS rate range includes the following rate ranges: The GS locality rate schedule for the locality pay area in which the employee's NSPS official worksite is located; the special rate schedule based on the employee's position of record, official worksite, or other established conditions; the law enforcement officer

special base rate schedule; or the GS base pay schedule. The grade-band conversion tables established in DoD's NSPS implementing issuances for the purpose of converting employees into NSPS must be used in determining which GS grades are covered by the employee's assigned NSPS pay band. For two-grade interval occupations, conversion may not be made to an intervening (even) grade level below GS-11.

(ii) If the employee's pay band covers one GS grade, the employee's virtual grade will be that grade.

(iii) For an employee in a pay band encompassing more than one GS grade, if the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for the highest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be that grade. If the employee's adjusted salary is lower than the step 4 rate, the adjusted salary is compared with the step 4 rate of the highest applicable GS rate range for the second highest GS grade encompassed within the employee's pay band. If the employee's adjusted salary equals or exceeds the step 4 rate of the second highest grade, the employee's virtual grade will be that grade. This process is repeated for each successively lower grade encompassed within the assigned band until a grade is found at which the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for that grade.

(iv) Notwithstanding paragraph (d)(1)(iii) of this section, if the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the assigned GS grade determined under paragraph (d)(1)(iii) of this section but fits in the highest applicable GS rate range for the next higher grade (i.e., is greater than or equal to the rate for step 1 but less than the rate for step 4), then the employee's virtual GS grade will be that higher grade.

(v) Notwithstanding paragraph (d)(1)(iii) of this section, an employee's virtual GS grade may not be less than the permanently assigned GS grade the employee held upon conversion into NSPS (for an employee who was converted as described in § 9901.371), unless, since that time, the employee has undergone—

(A) A voluntary reduction in band or reduction in base salary;

(B) An involuntary reduction in band or reduction in base salary based on unacceptable performance and/or conduct; or

(C) A reduction in band based on a reduction in force (RIF) or classification action.

(vi) If the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the highest grade encompassed by his or her assigned pay band, the employee's virtual grade will be that highest GS grade.

(vii) If the employee's adjusted salary is less than the step 4 rate of the highest applicable GS rate range for the lowest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be the lowest GS grade in the band.

(2) *Virtual GS rate.* (i) Once a virtual GS grade has been established, a virtual GS rate will be set (before any pay-related action that would take effect on the date of the employee's conversion or movement out of NSPS). As of the day before the date of conversion or movement out of NSPS, the employee's NSPS adjusted salary will be compared to the highest applicable GS rate range for the established virtual grade. If the employee's adjusted salary rate falls within that range, the virtual rate will be set equal to that adjusted salary rate. (Since this virtual GS rate is used only as a basis for setting the employee's rate in a new non-NSPS position, it is not necessary to set it at a GS step rate at this stage.) If an employee's adjusted salary is less than the minimum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the minimum step rate. If the employee's adjusted salary is greater than the maximum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the maximum step rate or at a retained rate set using GS pay retention rules in 5 CFR part 536 (if the employee is eligible for pay retention under those rules).

(ii) If the virtual rate derived under paragraph (d)(2)(i) of this section is an adjusted salary rate that includes a locality payment or special rate supplement, an employee's virtual GS base salary rate will be derived based on that adjusted salary rate.

(iii) The virtual GS grade and rates established under this paragraph (d) will be used in applying GS pay administration rules in setting pay in the new GS position (e.g., the GS promotion rules, pay retention rules, and the maximum payable rate rule). (Since the NSPS system did not continue coverage under the grade retention provision in 5 U.S.C. 5362, grade retention is not applicable to NSPS employees who convert or move to a GS position.) As required by

paragraph (c) of this section, any pay action effective on the date of conversion or movement from NSPS to the GS pay system will be processed under GS pay administration rules.

(e) *GS within-grade increases.* Service under NSPS is creditable for within-grade increase purposes upon conversion or movement to a GS position under this section to the extent provided under 5 CFR part 531, subpart D.

(f) *Comparison of rates of basic pay.* For the purpose of determining whether the conversion or movement out of NSPS under this section is an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. This comparison is made before any pay-related action (e.g., geographic movement) under the gaining system that takes effect on the date of conversion or movement.

## Subpart D—Performance Management

### § 9901.401 Purpose.

(a) This subpart establishes a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture. The implementation and operation of the system will provide for the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance and provide an equitable method for appraising and compensating employees.

### § 9901.402 Coverage.

(a) This subpart applies to eligible employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102.

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

(1) Employees and positions that would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) Except as provided in § 9901.408, this subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as described in § 9901.407) during a single 12-month period.

### § 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system established under this subpart, the provisions of 5 U.S.C. chapter 43 are waived with respect to that category of employees.

### § 9901.404 Definitions.

In this subpart—

*Appraisal* means the review and evaluation of an employee's performance.

*Appraisal period* has the meaning given that term in § 9901.103.

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

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

*Contributing Factors* has the meaning given that term in § 9901.103.

*Job Objectives* has the meaning given that term in § 9901.103.

*Minimum period* means the period of time during which an employee will perform under one or more approved NSPS performance plans before receiving a rating of record.

*Pay-for-performance evaluation system* means the performance

management system established under this subpart to link individual pay to performance and provide an equitable method for evaluating performance and compensating employees.

*Pay Pool Manager* has the meaning given that term in § 9901.103.

*Pay Pool Panel* has the meaning given that term in § 9901.103.

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

*Performance expectations* means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406.

*Performance management* means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

*Performance management system* means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates and operationalizes the elements set forth in § 9901.401(b).

*Performance Review Authority* has the meaning given that term in § 9901.103.

*Rating official* means a representative of management, usually the immediate supervisor, who evaluates and assesses employee performance and recommends a rating of record, share assignment, and payout distribution for review by the Pay Pool Panel.

*Rating of record* has the meaning given that term in § 9901.103.

*Unacceptable performance* has the meaning given that term in § 9901.103.

### § 9901.405 Performance management system requirements.

(a) The Secretary may issue implementing issuances further defining a performance management system for NSPS employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system—

(1) Provides for the appraisal of the performance of each employee annually;

(2) Holds supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(3) Specifies procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance;

(4) Specifies the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances;

(5) Provides for the following multiple rating levels:

| Rating of record | Rating of record descriptor |
|------------------|-----------------------------|
| Level 5 .....    | Role Model.                 |
| Level 4 .....    | Exceeds Expectations.       |
| Level 3 .....    | Valued Performer.           |
| Level 2 .....    | Fair.                       |
| Level 1 .....    | Unacceptable.               |

(6) Specifies rounding rules for average adjusted ratings as follows:

(i) The combination of the job objective rating and the contributing factor assessment results in an adjusted rating for each job objective;

(ii) The job objective adjusted ratings are averaged to obtain the employee's raw score;

(iii) Any objective rated as "NR" is not counted when averaging ratings;

(iv) When the employee's raw score ends with .51 or higher, the rating is rounded to the next higher whole number;

(v) When the employee's raw score ends with .50 or lower, the rating is rounded to the next lower whole number; and

(vi) The resulting rounded score is the recommended rating of record.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers will—

(1) Clearly communicate performance expectations and hold employees responsible for accomplishing them;

(2) Make meaningful distinctions among employees based on performance and contribution;

(3) Foster and reward excellent performance;

(4) Address poor performance; and

(5) Assure that employees are assigned a rating of record.

#### **§ 9901.406 Setting and communicating performance expectations.**

(a) Performance expectations will support and align with the mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated to the employee in

writing prior to holding the employee accountable for them.

(c) Notwithstanding the requirements in paragraphs (d) through (g) of this section, employees are accountable for demonstrating professionalism and appropriate standards of conduct and behavior, such as civility and respect for others.

(d) In addition to the requirement in paragraph (c) of this section, supervisors and managers will be held accountable through their performance expectations for how well they plan, monitor, develop, correct, and assess subordinate employees' performance.

(e) Performance expectations include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(f) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such characteristics). Such assignments and instructions need not be in writing.

(g) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

(h) Performance expectations are subject to higher- or second-level review to ensure consistency and fairness within and across organizations.

(i) Performance expectations that comprise a performance plan are considered to be approved when the supervisor has communicated the performance plan to the employee in writing.

#### **§ 9901.407 Minimum period of performance.**

(a) Only employees who have completed the minimum period under one or more NSPS approved performance plans may be issued a

rating of record in accordance with the procedures prescribed by this subpart.

(b) The minimum period of performance is 90 calendar days.

(1) Periods during which an employee is in a leave status may not be applied toward the 90-day minimum.

(2) If an employee has a break in NSPS-covered service (e.g., due to job change to a non-NSPS position, resignation), the service performed prior to the break may not be used to satisfy the 90-day minimum period. A break caused by a situation described in § 9901.342(i) through (1) is not considered a break for this purpose.

(c) Employees who have not completed the minimum period of performance during the applicable appraisal period will not be rated and will not be eligible for a performance payout unless otherwise provided in § 9901.342(i) through (1).

#### **§ 9901.408 Employees on time-limited appointments.**

Employees who are appointed for less than 90 days—

(a) Will be given performance expectations that are linked to the organization's strategic plan; and

(b) May receive an evaluation at the end of the appointment which—

(1) Consists of a narrative description addressing employee performance, accomplishments and contributions during that appointment; and

(2) May serve as documentation and justification for recognition under 5 U.S.C. chapter 45.

#### **§ 9901.409 Monitoring and developing performance.**

(a) In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(1) Monitor the performance of their employees and their contribution to the organization;

(2) Provide ongoing (i.e., regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period; and

(3) Document at least one interim performance review. Documented interim reviews are not required for overall periods of performance of less than 180 days.

(b) Developing performance is integrated with the performance management process and is a shared responsibility of management and employees. Developing performance includes but is not limited to—(1) Coaching and mentoring employees;

- (2) Reinforcing strengths and addressing weaknesses; and
- (3) Discussing employee development opportunities.

**§ 9901.410 Addressing performance that does not meet expectations.**

(a) If at any time during the appraisal period a supervisor determines that an employee's performance is not meeting expectations, the supervisor will—

- (1) Identify and communicate to the employee the specific performance deficiencies that require improvement;
- (2) Consider the range of options available to address the performance deficiency, including remedial training, improvement periods, reassignment, oral warnings, letters of counseling, written reprimands, or adverse action (including a reduction in rate of basic pay or pay band or a removal); and
- (3) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(b) Adverse actions taken based on unacceptable performance and/or conduct will be taken in accordance with the provisions in 5 U.S.C. chapter 75 or other appropriate procedures if not covered by chapter 75, such as procedures for National Guard Technicians under 32 U.S.C. 709(f).

**§ 9901.411 Appraisal period.**

(a) Except as provided in paragraphs (a)(1) through (3) and (b) of this section, the appraisal period will be October 1 to September 30.

(1) The appraisal period may begin after October 1 and end after September 30 for newly converted groups of employees;

(2) The appraisal period may begin after October 1 for employees who move to a NSPS position from a non-NSPS position after that date; and

(3) The appraisal period may end between July 3 and September 30 for employees receiving early annual recommended ratings.

(b) If, by the end of the appraisal period, an employee has not met the minimum period of performance, management may extend the appraisal period provided such extensions do not—

(1) Delay the payout for the applicable pay pool; or

(2) Extend beyond the rating of record effective date.

(c) The effective date of ratings of record will be January 1, except for additional ratings of record as described in § 9901.412(b)(2).

(d) The effective date of a rating of record described in § 9901.412(b)(2) is

the date the rating is final, as described in paragraph (g) of § 9901.412.

**§ 9901.412 Rating and rewarding performance.**

(a) Forced distribution of ratings (setting pre-established limits for the percentage or number of ratings that may be assigned at any level) is prohibited.

(b) An appropriate rating official—

(1) Will prepare and recommend a rating of record after the completion of the appraisal period; and

(2) May recommend an additional rating of record following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record.

(c) The recommended rating of record is subject to higher-level review.

(d) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions.

(e) If an employee engages in work-related misconduct and the nature or severity of that misconduct has an impact on the execution of his or her duties, that of the team, and/or that of the organization, the impact may be considered in the employee's rating of record.

(f) A Pay Pool Panel will —

(1) Review recommended ratings of record, share assignments, and payout distributions, and make adjustments, which in the panel's view would result in equity and consistency across the pay pool; and

(2) Afford the rating official the opportunity to provide further justification of a recommended rating of record before a change to that rating becomes final.

(g) Consistent with the requirements of merit system principles and this part, the Pay Pool Manager is the approving authority for Pay Pool Panel recommendations concerning ratings of record, share assignments, and payout distribution. A rating of record is considered final when issued to the employee with all appropriate reviews and signatures.

(h) An appropriate rating official will communicate the final rating of record, share assignment, and payout distribution to the employee.

(i) Once the minimum performance period is met and an employee is eligible for a rating of record, the rating of record of an employee may not be lowered based on an approved absence from work, including the absence of a disabled veteran to seek medical

treatment as provided in Executive Order 5396.

(j) A rating of record issued under this subpart—

(1) Is an official rating of record for the purpose of any provision of this title for which an official rating of record is required;

(2) Will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances;

(3) Will be used as a basis for—

(i) A pay determination under any applicable pay rules;

(ii) Determining reduction-in-force retention standing; and

(iii) Such other action that the Secretary considers appropriate, as specified in implementing issuances;

(4) Will cover a specified appraisal period; and

(5) Will not be carried over as the rating of record for a subsequent appraisal period without an actual evaluation of the employee's performance during the subsequent appraisal period.

(k) Employees who change pay pools after the last day of the appraisal period and before the effective date of the payout will be evaluated and assigned a rating of record by the Pay Pool Manager associated with the pay pool of record on the last day of the appraisal period and the share assignment and payout distribution determination will be made in accordance with § 9901.342(g).

(l)(1) An early annual recommended rating of record will be issued when—

(i) The supervisor (or rating official if different) ceases to exercise the duties relative to monitoring, developing, and rating employee performance within 90 days before the end of the appraisal period; or

(ii) The employee is reassigned, promoted, or reduced in band resulting in the assignment of a new rating official within 90 days before the end of the appraisal period.

(2) An employee who is eligible for a recommended rating of record or an early annual recommended rating of record at the time they move to a position outside of NSPS will be entitled to a rating of record. Such ratings of record must be approved through the Pay Pool Panel process.

(m) At any time prior to the last 90 days of the appraisal period, a supervisor or other rating official may prepare a performance assessment (e.g., close-out assessment) for the purpose of providing input on an employee's performance to a new supervisor. Such an assessment is not a rating of record (recommended or final).

**§ 9901.413 Reconsideration of ratings.**

(a) *Nonbargaining unit employees.* (1) A rating of record or job objective rating may be challenged by a nonbargaining unit employee only through the reconsideration process specified in this subpart and implementing issuances. This process will be the sole and exclusive agency administrative process for all nonbargaining unit employees to challenge a rating of record.

(2) Consistent with this part, Pay Pool Managers will decide job objective rating and rating of record reconsiderations.

(3) If the Pay Pool Manager decision is challenged, consistent with this part, the Performance Review Authority will make a final decision.

(4) A share assignment determination, payout distribution determination, or any other payout matter will not be subject to the reconsideration process or any other agency administrative grievance system.

(b) *Bargaining unit employees.* (1) Negotiated grievance procedures are the

exclusive administrative procedures for bargaining unit employees to challenge a rating of record or job objective rating as provided for in 5 U.S.C. 7121.

(2) If a negotiated grievance procedure is not available to a bargaining unit employee or challenging a rating of record or job objective rating is outside the scope of the employee's negotiated grievance procedure, a bargaining unit employee may challenge a rating of record or job objective rating in accordance with this subpart and implementing issuances.

(c) *Recalculation based on adjusted job objective rating or rating of record.* In the event a reconsideration or negotiated grievance decision results in an adjusted job objective rating or rating of record the revised rating will be referred to the Pay Pool Manager for recalculation of the employee's performance payout amount and distribution.

(1) Any adjustment to salary will be retroactive to the effective date of the performance payout.

(2) Salary adjustments will be based on the share range appropriate for the adjusted rating of record as identified in § 9901.342(f).

(3) Share values for the adjusted rating of record will reflect the share value paid to other members across the pay pool for that rating cycle.

(4) Decisions made through the reconsideration process or a negotiated grievance procedure will not result in recalculation of the payout made to other employees in the pay pool.

(d) *Alternative dispute resolution.* Alternative dispute resolution techniques, such as mediation, interest-based problem-solving, or others, may be pursued at any time during the reconsideration process consistent with the Component's policies and procedures.

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