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**DEPARTMENT OF DEFENSE**  
**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Chapter XCIX and Part 9901**

**RIN 3206-AK76/0790-AH82**

**Department of Defense Human Resources Management  
and Labor Relations Systems**

**AGENCY:** Department of Defense; Office of Personnel Management.

**ACTION:** Final Rule.

**SUMMARY:** The Department of Defense (DoD or the Department) and the Office of Personnel Management (OPM) are issuing final regulations to establish the National Security Personnel System (NSPS), a human resources management system, within DoD, as authorized by the National Defense Authorization Act (Pub. L. 108-136, November 24, 2003). These regulations govern basic pay, staffing, classification, performance management, labor relations, adverse actions, and employee appeals. These changes are designed to ensure that the Department's human resources management and labor relations systems align with its critical mission requirements and protects the civil service rights of its employees.

**EFFECTIVE DATE:** [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION  
IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:**

**Table of Abbreviations**

AJ – Administrative Judge  
COLA – Cost of Living Adjustment  
CONUS – Continental United States  
DARPA – Defense Advanced Research Projects Agency  
DoD – Department of Defense  
ECI – Employment Cost Index  
EEO – Equal Employment Opportunity  
EEOC – Equal Employment Opportunity Commission  
EPI – Extraordinary Pay Increase  
FLRA – Federal Labor Relations Authority  
FLSA – Fair Labor Standards Act  
FMCS – Federal Mediation and Conciliation Service  
FSIP – Federal Service Impasses Panel  
FWS – Federal Wage System  
GAO – Government Accountability Office (former General Accounting Office)  
GS – General Schedule  
HR – Human Resources  
KPP – Key Performance Parameter  
LWOP – Leave Without Pay  
MRO – Mandatory Removal Offense  
MSPB – Merit Systems Protection Board  
NAF – Nonappropriated Fund  
NAPA – National Academy of Public Administration  
NSLRB – National Security Labor Relations Board  
NSPS – National Security Personnel System  
OMB – Office of Management and Budget  
OPM – Office of Personnel Management  
PEO – Program Executive Office  
PFR – Petition for Review  
RFR – Request for Review  
SES – Senior Executive Service  
SL – Senior Level  
ST – Scientific or Professional Positions  
WGI – Within-grade increase

**Table of Contents**

This supplementary information section is organized as follows:

## Introduction

### The Case for Action

- Pay and Classification
- Performance Management
- Staffing, Employment and Workforce Shaping
- Adverse Action and Appeals
- Labor-Management Relations

### Development of the National Security Personnel System

- Strategic Engagement and Establishment of the Program Executive Office
- Development of Design Options
  - Guiding Principles and Key Performance Parameters
  - Communications During the Design Process
  - Outreach to Employee Representatives
  - Outreach to Employees
  - Outreach to Other Stakeholders
  - Development of Design Options – Working Groups
  - Publication of Proposed Regulations
- Public Comments
- Meet-and-Confer Process

### Major Issues

- Specificity of the Regulations
- Pay for Performance and Pay Pool Funding
- Adverse Actions and Appeals
- Mandatory Removal Offenses
- Labor Relations
- Management Rights/Scope and Duty to Bargain
- Independence of the National Security Labor Relations Board

### Response to Specific Comments and Detailed Explanation of Regulations

#### Subpart A – General Provisions

- Section 9901.101 – Purpose
- Section 9901.102 – Eligibility and Coverage
- Summary of Coverage Eligibility Chart
- Section 9901.103 – Definitions
- Section 9901.104 – Scope of Authority
- Section 9901.105 – Coordination with OPM
- Section 9901.106 – Continuing Collaboration
- Section 9901.107 – Relationship to Other Provisions

Section 9901.108 – Program Evaluation

Subpart B – Classification

- Section 9901.201 – Purpose
- Section 9901.202 – Coverage
- Section 9901.203 – Waivers
- Section 9901.204 – Definitions
- Section 9901.211 – Career Groups
- Section 9901.212 – Pay Schedules and Pay Bands
- Section 9901.221 – Classification Requirements
- Section 9901.222 – Reconsideration of Classification Decisions
- Section 9901.231 – Conversion of Positions and Employees to the NSPS Classification System

Subpart C – Pay and Pay Administration

- General Comments
- Section 9901.301 – Purpose
- Section 9901.302 – Coverage
- Section 9901.303 – Waivers
- Section 9901.304 – Definitions
- Section 9901.311 – Major Features
- Section 9901.312 – Maximum Rates
- Section 9901.313 – National Security Compensation Comparability
- Section 9901.321 – Structure
- Section 9901.322 – Setting and Adjusting Rate Ranges
- Section 9901.323 – Eligibility for Pay Increase Associated with a Rate Range Adjustment
- Section 9901.331 – General
- Section 9901.332 – Local Market Supplements
- Section 9901.333 – Setting and Adjusting Local Market Supplements
- Section 9901.334 – Eligibility for Pay Increase Associated with a Supplement Adjustment
- Section 9901.341 – General
- Section 9901.342 – Performance Payouts
- Section 9901.343 – Pay Reduction Based on Unacceptable Performance and/or Conduct
- Section 9901.344 – Other Performance Payments
- Section 9901.345 – Treatment of Developmental Positions
- Section 9901.351 – Setting an Employee’s Starting Pay
- Section 9901.352 – Setting Pay Upon Reassignment
- Section 9901.353 – Setting Pay Upon Promotion
- Section 9901.354 – Setting Pay Upon Reduction in Band
- Section 9901.355 – Pay Retention
- Section 9901.356 – Miscellaneous

- Section 9901.361 – General
- Section 9901.371 – General
- Section 9901.372 – Creating Initial Pay Ranges
- Section 9901.373 – Conversion of Employees to the NSPS Pay System

#### Subpart D – Performance Management

- General Comments
- Section 9901.401 – Purpose
- Section 9901.402 – Coverage
- Section 9901.403 – Waivers
- Section 9901.404 – Definitions
- Section 9901.405 – Performance Management System Requirements
- Section 9901.406 – Setting and Communicating Performance Expectations
- Section 9901.407 – Monitoring Performance and Providing Feedback
- Section 9901.408 – Developing Performance and Addressing Poor Performance
- Section 9901.409 – Rating and Rewarding Performance

#### Subpart E – Staffing and Employment

- General Comments
- Section 9901.501 – Purpose
- Section 9901.502 – Scope of Authority
- Section 9901.503 – Coverage
- Section 9901.504 – Definitions
- Section 9901.511 – Appointing Authorities
- Section 9901.512 – Probationary Periods
- Section 9901.513 – Qualification Standards
- Section 9901.514 – Non-Citizen Hiring
- Section 9901.515 – Competitive Examining Procedures
- Section 9901.516 – Internal Placement

#### Subpart F – Workforce Shaping

- General Comments
- Section 9901.601 – Purpose and Applicability
- Section 9901.602 – Scope of Authority
- Section 9901.603 – Definitions
- Section 9901.604 – Coverage
- Section 9901.605 – Competitive Area
- Section 9901.606 – Competitive Group
- Section 9901.607 – Retention Standing
- Section 9901.608 – Displacement, Release, and Position offers
- Section 9901.609 – Reduction in force Notices
- Section 9901.610 – Voluntary Separation

Section 9901.611 – Reduction in force Appeals

Subpart G – Adverse Actions

General Comments

Section 9901.701 – Purpose

Section 9901.702 – Waivers

Section 9901.703 – Definitions

Section 9901.704 – Coverage

Section 9901.711 – Standard for Action

Section 9901.712 – Mandatory Removal Offenses

Section 9901.714 – Proposal Notice

Section 9901.715 – Opportunity to Reply

Section 9901.716 – Decision Notice

Section 9901.717 – Departmental Record

Subpart H – Appeals

General Comments

Section 9901.802 – Applicable Legal Standards and Precedents

Section 9901.803 – Waivers

Section 9901.804 – Definitions

Section 9901.805 – Coverage

Section 9901.806 – Alternative Dispute Resolution

Section 9901.807 – Appellate Procedures

Section 9901.808 – Appeals of Mandatory Removal Actions

Section 9901.809 – Actions Involving Discrimination

Subpart I – Labor-Management Relations

General Comments

Section 9901.901 – Purpose

Section 9901.902 – Scope of Authority

Section 9901.903 – Definitions

Section 9901.904 – Coverage

Section 9901.905 – Impact on Existing Agreements

Section 9901.906 – Employee Rights

Section 9901.907 – National Security Labor Relations Board

Section 9901.908 – Powers and Duties of the Board

Section 9901.909 – Powers and Duties of the Federal Labor Relations Authority

Section 9901.910 – Management Rights

Section 9901.911 – Exclusive Recognition of Labor Organizations

Section 9901.912 – Determination of Appropriate Units for Labor Organization Representation

Section 9901.913 – National Consultation

Section 9901.914 – Representation Rights and Duties  
Section 9901.916 – Unfair Labor Practices  
Section 9901.917 – Duty to Bargain and Consult  
Section 9901.918 – Multi-Unit Bargaining  
Section 9901.919 – Collective Bargaining Above the Level of Recognition  
Section 9901.920 – Negotiation Impasses  
Section 9901.921 – Standards of Conduct for Labor Organizations  
Section 9901.922 – Grievance Procedures  
Section 9901.923 – Exceptions to Arbitration Awards  
Section 9901.924 – Official Time  
Section 9901.925 – Compilation and Publication of Data  
Section 9901.926 – Regulations of the Board  
Section 9901.927 – Continuation of Existing Laws, Recognitions,  
Agreements, and Procedures  
Section 9901.928 – Savings Provisions

## Next Steps

### NSPS Implementation

Employee Transition Plan (Spiral Strategy)

HR and Labor Relations Transition

Development of Implementing Issuances and Continuing Collaboration  
Training

## Regulatory Requirements

E.O. 12866 – Regulatory Review

Regulatory Flexibility Act

E.O. 12988 – Civil Justice Reform

E.O. 13132 – Federalism

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

Unfunded Mandates

## Introduction

The Secretary of Defense, Donald Rumsfeld, and the Director of the Office of Personnel Management, Linda M. Springer, jointly prescribe this final regulation to establish a flexible and contemporary system, consistent with statutory merit system principles and prohibitions against prohibited personnel practices (in 5 U.S.C. 2301 and 2302, respectively), for managing the Department's human capital. This system has been developed pursuant to a process based on extensive outreach to employees and employee

representatives. In addition, DoD and OPM have engaged in outreach to the public as well as to the Congress and other key stakeholders. As enacted by section 1101 of the National Defense Authorization Act (Public Law 108-136, November 24, 2003, hereinafter referred to as “enabling legislation” or “enabling statute”) and codified at 5 U.S.C. 9902, the system preserves all core civil service protections, including merit system principles, veterans’ preference, and due process. It also protects against discrimination, retaliation against whistleblowers, and other prohibited personnel practices, and ensures that employees may organize and bargain collectively (when not otherwise prohibited by law, including these regulations, applicable Executive orders, and any other legal authority).

This Supplementary Information addresses the following areas:

- The Case for Action
- Summary of the Design Process
  - Strategic Engagement and Establishment of the Program Executive Office
  - Development of Design Options
  - Meet-and-Confer Process
- Major Issues
- Response to Specific Comments and Detailed Explanation of Regulations
- Next Steps

### **The Case for Action**

“...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 that statement on May 25, 2001, President Bush set a new direction for defense strategy and defense management—one toward transformation. On January 31, 2002, Secretary of Defense Donald Rumsfeld echoed the sentiments expressed by President Bush, stating that “[a]ll the high-tech weapons in the world will not transform the U.S. armed forces unless we also transform the way we think, the way we train, the way we exercise, and the way we fight.”

Transformation is more than acquiring new equipment and embracing new technology—it is the process of working and managing creatively to achieve real results. To transform the way DoD achieves its mission, it must transform 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 – must anticipate the future and wherever possible help create it. The Department must seek to develop new capabilities to meet tomorrow’s threats as well as those of today. NSPS is a key pillar in the Department of Defense’s transformation – a new way to manage its civilian workforce. NSPS is essential to the Department’s efforts to create an environment in which the Total Force (military personnel, civilian employees, and contractors) 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 must complement and support the military around the world in every time zone, every day. Just as new threats, new missions, new technology, and new tactics are changing the work of the military, they are

changing the work of our 700,000 civilians. To support the interests of the United States in today's national security environment – where unpredictability is the norm and greater agility the imperative – civilians must be an integrated, flexible, and responsive part of the team.

At best, the current personnel system is based on 20<sup>th</sup> century assumptions about the nature of public service and cannot adequately address the 21<sup>st</sup> century national security environment. Although the current Federal personnel management system is based on important core principles, those principles are operationalized in an inflexible, one-size-fits-all system of defining work, hiring staff, managing people, assessing and rewarding performance, and advancing personnel. These inherent weaknesses make support of DoD's mission complex, costly, and ultimately risky. Currently, pay and the movement of personnel are pegged to outdated, narrowly defined work definitions; hiring processes are cumbersome; high performers and low performers are paid alike; and the labor system encourages a dispute-oriented, adversarial relationship between management and labor. These systemic inefficiencies detract from the potential effectiveness of the Total Force. A more flexible, mission-driven system of human resources management that retains those core principles will provide a more cohesive Total Force. The Department's 20 years of experience with transformational personnel demonstration projects, covering nearly 30,000 DoD employees, has shown that fundamental change in personnel management has positive results on individual career growth and opportunities, workforce responsiveness, and innovation; all these things multiply mission effectiveness.

The immense challenges facing DoD today require a civilian workforce transformation: civilians 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 and a labor relations system that support and protect their critical role in DoD’s Total Force effectiveness. The enabling legislation provides the Department of Defense with the authority to meet this transformation challenge.

More specifically, the law provides the Department and OPM – in collaboration with employee representatives – authority to establish a flexible and contemporary system of civilian human resources management 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 become the foundation of DoD civilian human resources management.

NSPS is designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded. The system offers the civilian workforce a contemporary pay-banding construct, which will include performance-based pay. 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 HR management system is a foundation for a leaner, more flexible support structure and will help attract skilled, talented, and motivated people, while also retaining and improving the skills of the existing workforce.

Despite the professionalism and dedication of DoD civilian employees, the limitations imposed by the current personnel system often prevent managers from using civilian employees effectively. The Department sometimes uses military personnel or contractors when civilian employees could have and should have been the right answer. The current system limits opportunities for civilians at a time when the role of DoD's civilian workforce is expanding to include more significant participation in Total Force effectiveness. NSPS will generate more opportunities for DoD civilians by easing the administrative burden routinely required by the current system and providing an incentive for managers to turn to them first when certain vital tasks need doing. This will free uniformed men and women to focus on matters unique to the military.

The law requires the Department to establish a contemporary and flexible system of human resources management. DoD and OPM crafted NSPS through a collaborative process involving management, employees, and employee representatives. DoD leadership will ensure that supervisors and employees understand the new system and can function effectively within it. The system retains the core values of the civil service and allows employees to be paid and rewarded based on performance, innovation, and results. In addition, the system provides employees with greater opportunities for career growth and mobility within the Department.

A key to the success of NSPS is ensuring employees perceive the system as fair. In a human resources management system, fairness is the basis for trust between employees and supervisors. The Department's mission cannot be accomplished without the workforce. It is a tenet of the Department that employees will exercise personal

responsibility and sustain a high level of individual performance and teamwork when they perceive that the human resources system and their supervisors are fair.

The Department and the Office of Personnel Management are addressing fairness in the National Security Personnel System 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 decision criteria; and accountability mechanisms.

NSPS regulations and implementing issuances will include rules to guard against arbitrary actions. Examples include written performance expectations, the guarantee that employees rated higher than “unacceptable” will receive the full minimum by which their pay rate range is adjusted, the requirement to prescribe the conditions for probationary periods established by the Secretary, public notice of vacancies when the Department is recruiting externally, and prohibition against establishing reduction in force competitive areas that target an individual employee on the basis of non-merit factors.

NSPS continues employees’ and labor organizations’ rights to challenge or seek review of key decisions. For example, all employees will be able to request reconsideration of their performance ratings through an administrative grievance procedure. Bargaining unit employees will also have the option of using a negotiated grievance procedure. 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. Labor organization officials may file unfair labor practice claims or grievances.

The Department and its Components will 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 will call on two major streams of information. First, human resources management accountability reviews within the Department will be used to 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 will monitor the outcomes of administrative and negotiated grievances, performance rating reconsiderations, equal employment opportunity complaints, and whistleblower complaints to correct chronic problems and particular failings.

The second stream will be NSPS program evaluation findings. These will enable the Secretary and the 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 of the NSPS Requirements Document for a credible and trusted system. Section 9901.108 of these final regulations codifies the requirement for NSPS program evaluation. It opens to designated employee representatives the design and results of evaluations of particular NSPS aspects so that they can provide comments and recommendations to help ensure balanced and fair methods and conclusions. A robust and long-term NSPS program evaluation plan of studies and reviews, transactional data analyses, opinion surveys, and other evaluative methods will be fielded with NSPS implementation.

Fairness in NSPS is not a specific thing, but rather an intrinsic quality being 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.

#### **A. Pay and Classification**

The NSPS pay and classification system will provide a more flexible support structure that will help attract skilled, 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 will replace the artificial limitations created by the current pay and classification systems. With broad pay bands, the Department will be able to move employees more freely across a range of work opportunities without being bound by narrowly described work definitions. The pay structure will be much more responsive to market conditions. The Department will be able to adjust rate ranges and local market supplements based on variations relating to specific occupations, rather than the current one-size-fits all approach. 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 using performance rather than time on the job to determine pay increases.

#### **B. Performance Management**

In recognition of the increased importance of performance in making pay and retention decisions, the Department has created a much more robust performance management system.

The Department will use a multi-level system that makes distinctions in levels of employee performance. The system will link employee achievements, contributions,

knowledge, and skills to organizational results. It will also allow the Department to better recognize and support team contributions and accomplishments. Performance expectations will be clearly communicated to employees and will be linked to the organization's strategic goals and objectives. The ability to recognize valid distinctions in performance and reward employees based on those distinctions will foster a high performance culture within the Department.

### **C. Staffing, Employment and Workforce Shaping**

NSPS will retain the merit system principles and veterans' preference while giving the Department the flexibility necessary to streamline the hiring process and adapt quickly to critical mission needs. The Department will be able to use direct-hire authority for severe shortage or critical needs. NSPS will also provide for a more efficient process for creating appointing authorities, in conjunction with the Office of Personnel Management, as new requirements emerge. As part of this process, the system provides for transparency and public awareness through notice in the *Federal Register*. The new pay-setting flexibilities will also enhance the Department's ability to attract and retain the talented workforce necessary to accomplish its mission.

Through workforce shaping flexibilities, the Department will create a reduction in force system that places more emphasis on performance while continuing to protect veterans' preference rights. The downsizing process will be less disruptive to employees and the mission. The Department will continue to fully utilize tools such as separation incentives and the Priority Placement Program to avoid and mitigate the impact of any reductions it faces.

#### **D. Adverse Actions and Appeals**

Consistent with the enabling legislation, the final regulations streamline and simplify adverse actions and appeals procedures, but without compromising due process for DoD employees. Employees will still receive notice of a proposed adverse action, the right to reply, and the right to appeal to the Merit Systems Protection Board (MSPB). In the proposed regulations, we proposed to replace the two existing authorities and adopt a single process and standard for all actions whether based on unacceptable performance or misconduct. In doing so, we proposed to adopt the higher of the two current burdens of proof – “preponderance of the evidence” – rather than the lower standard – “substantial evidence.” We have retained this higher burden of proof. In addition, the final regulations clarify that the full MSPB’s standard for review is as specified in the enabling legislation. The final regulations retain authority for the Secretary to establish a number of mandatory removal offenses (MROs) that have a direct and substantial adverse effect on the Department’s national security mission. The final regulations also retain authority for the Department to review decisions of MSPB Administrative Judges who are the first step in the NSPS appeals process.

#### **E. Labor Management Relations**

To ensure that the Department has the flexibility to carry out its vital mission, as authorized by the enabling legislation, the regulations, among other things, revise management’s rights and its duty to bargain to ensure that the Department can act as and when necessary. Collective bargaining is prohibited on such critical matters as procedures observed in making work assignments and deployments unless the Secretary, in his or her sole, exclusive, and unreviewable discretion, elects to bargain. The

Secretary may authorize bargaining on these matters to advance the Department's mission accomplishment or promote organizational effectiveness. If the Secretary does not elect to bargain procedures on these matters, consultation is required. Management and exclusive representatives will negotiate over changes that have foreseeable, significant, and substantial impact, as well as appropriate arrangements for employees affected by those changes, under certain specified conditions. Additionally, the regulations create the National Security Labor Relations Board (NSLRB) to address those issues that are most important to accomplishing the DoD mission, with other matters retained by the Federal Labor Relations Authority (FLRA). The regulations provide the Secretary discretion as to when the NSLRB will be in place. The regulations also provide the Secretary discretion, in consultation with the Director, to designate another third party to exercise the authority of the Board in the interim. The revisions to the regulations strike the right balance between the mission needs of DoD and the meaningful involvement of employees and their representatives.

## **Development of the National Security Personnel System**

### **A. Strategic Engagement and Establishment of Program Executive Office**

While dialogue with employee representatives began in January 2004, in April senior DoD leadership initiated a collaborative process to design and implement NSPS. This process was crafted by a group of 25 to 30 senior experts representing DoD, OPM, and the Office of Management and Budget. The Defense Acquisition Management model was used to establish the requirements for the design and implementation of NSPS, including Guiding Principles and Key Performance Parameters (KPPs), which defined the minimum requirements for NSPS. The Honorable Gordon R. England was

appointed by the Secretary of Defense as the NSPS Senior Executive. As the NSPS Senior Executive, Secretary England established the NSPS Program Executive Office (PEO) as the central DoD policy and program office to conduct the design, planning and development, deployment, assessment, and full implementation of NSPS.

The entire process was accomplished jointly with OPM. An integrated executive management team composed of senior DoD and OPM leaders provided overall policy and strategic advice to the PEO and served as staff to the Senior Executive.

## **B. Development of Design Options**

### *Guiding Principles and Key Performance Parameters*

In setting up the process for the design of the system, senior leadership adopted a set of Guiding Principles as a compass to direct efforts throughout all phases of NSPS development. They translate and communicate the broad requirements and priorities outlined in the enabling legislation into concise, understandable requirements that underscore the Department's purpose and intent in creating NSPS. The Guiding Principles are:

- Put mission first – support National Security goals and strategic objectives;
- Respect the individual – protect rights guaranteed by law;
- Value talent, performance, leadership and commitment to public service;
- Be flexible, understandable, credible, responsive, and executable;
- Ensure accountability at all levels;
- Balance HR interoperability with unique mission requirements; and
- Be competitive and cost effective.

In addition, senior leadership approved a set of Key Performance Parameters (KPPs), which define the minimum requirements and/or attributes of the system. Those KPPs are summarized below:

- High Performing: Employees/supervisors are compensated/retained based on performance/contribution to mission;
- Agile and Responsive: Workforce can be easily sized, shaped, and deployed to meet changing mission requirements;
- Credible and Trusted: System assures openness, clarity, accountability and merit principles;
- Fiscally Sound: Aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance, and managers will have flexibility to manage to budget;
- 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.

#### *Communications During the Design Process*

In undertaking a project of this magnitude, impacting over 700,000 civilians of the Department, it was essential to ensure the availability of information on the new HR and labor relations systems. It was also critical to solicit the views and ideas of employees, employee representatives and other stakeholders.

In April 2004, the PEO developed and implemented a communications strategy. The objectives of DoD's communications strategy are to (1) demonstrate the rationale for

and benefits of NSPS; (2) demonstrate openness and transparency in the design and process of converting to NSPS; (3) express DoD's commitment to ensuring NSPS is applied fairly and equitably; and (4) address potential criticism of NSPS.

The PEO identified numerous channels for disseminating relevant, timely, and consistent information. These include: print and electronic media; e-mail; town hall meetings; focus groups; speeches; and briefings. A website was developed to serve as a primary, two-way communications tool for the workforce, other stakeholders, and the general public. The website includes the capability for visitors to submit questions and comments. The PEO has responded to thousands of questions and comments.

The website will remain available during implementation and will provide current information for managers, supervisors and employees.

#### *Outreach to Employee Representatives*

In January and February 2004, we met with union leaders for the purpose of exchanging ideas and interests on a new labor relations system. All unions holding DoD national consultation rights (NCR) at the time were invited to the January 22, 2004, meeting. Seven of these eight NCR unions elected to attend. In addition, one additional union without DoD national consultation rights was invited to attend and participated in the January 22, 2004, meeting. Union leadership from all of the 43 unions representing DoD employees were invited to attend and participate in the February 26-27, 2004, meeting. Twenty-six unions attended and participated in the February 2004 meeting.

In the spring of 2004 and continuing over the course of several months, we sponsored a series of additional meetings with union leadership to discuss design elements of NSPS. Officials from DoD and OPM met throughout the summer and fall

with union officials representing many of the DoD civilians who are bargaining unit employees. These sessions provided the opportunity to discuss the design elements, options, and proposals under consideration for NSPS and solicit union feedback.

During this time, 10 meetings (in addition to the 2 meetings held in January and February 2004) were held with officials of the 43 unions that represent DoD employees, including the 9 unions that currently have national consultation rights. These union officials represent over 1,500 separate bargaining units covering about 450,000 employees. These meetings involved as many as 80 union leaders from the national and local level at any one time, and addressed a variety of topics, including: the reasons change is needed and the Department's interests; employee communications; and proposed design options in the areas of labor relations and collective bargaining, adverse actions and appeals, and pay and performance management.

#### *Outreach to Employees*

In keeping with DoD's commitment to provide employees and managers an opportunity to participate in the development of NSPS, the PEO sponsored a number of Focus Group sessions and town hall meetings at various sites across DoD. In mid-July 2004, a total of 106 focus groups were held throughout DoD, including overseas locations. Separate focus groups were held for employees, civilian and military supervisors, and managers and practitioners from HR, legal and EEO communities. Bargaining unit employees and union leaders were invited to participate. For the major system design elements, focus group participants were asked what they thought worked well in the current HR systems and what they thought should be changed. Over 10,000 comments, ideas and suggestions received during the focus group sessions were

summarized and provided to NSPS Working Groups for use in developing options for the labor relations, appeals, adverse actions, and human resources design elements of NSPS.

In addition, town hall meetings were held in DoD facilities around the world during the summer of 2004, providing an opportunity to communicate with the workforce, provide the status of the design and development of NSPS, and solicit thoughts and ideas. The NSPS Senior Executive, Secretary England, conducted the first town hall meeting at the Pentagon on July 7, 2004. Some of the town hall meetings were broadcast live, as well as videotaped and rebroadcast on military television channels and websites to facilitate the widest possible dissemination.

#### *Outreach to Other Stakeholders*

In addition to reaching out to DoD employees and labor organizations, DoD and OPM met with other groups who were thought to be interested in the design of a new HR system for DoD. DoD and OPM invited selected stakeholders to participate in briefings held at OPM in August and September 2004.

Those invited to the briefings included: public interest groups, such as the National Academy of Public Administration (NAPA), Coalition for Effective Change, and Partnership for Public Service; veterans' service organizations; and non-union employee advocacy groups. Both before and after these briefings, DoD and OPM responded to dozens of requests for special briefings. DoD and OPM also met with the Government Accountability Office, Office of Management and Budget, and Department of Homeland Security to keep them up to date on the team's activities; and consulted with the Merit Systems Protection Board on the appeals process to ensure that it provides employees the protections of due process.

### Development of Design Options – Working Groups

In order to incorporate all the information and develop options, the PEO established functionally aligned Working Groups. Over 120 employees representing the Military Departments (Army, Navy, Air Force), other DoD Components, and OPM participated in the process.

The Working Groups reviewed all available information, including: pertinent laws, rules, regulations; input from NSPS focus groups and town hall; union consultation meetings; data review and analysis from alternative personnel systems and laboratory and acquisition demonstration projects; the enabling legislation; and Guiding Principles and Key Performance Parameters. In addition, subject matter experts briefed the Working Groups on a variety of topics, such as pay-for-performance systems, alternative personnel systems, pay pool management, and market sensitive compensation systems.

In developing options for the NSPS, the Working Groups benefited from the Government's experience under demonstration project authorities (e.g. the China Lake Demonstration Project originally authorized by section 6 of the Civil Service Miscellaneous Amendments Act of 1983; the Defense reinvention laboratory demonstration projects authorized by section 342 of the National Defense Authorization act for fiscal year 1995, as amended; and the Acquisition Workforce Demonstration Project, authorized by section 4308 of the National Defense Authorization Act for fiscal year 1996, as amended) and alternative personnel systems (e.g. the Defense Intelligence Personnel System, the Government Accountability Office, and the Federal Aviation Administration), the DoD "Best Practices" initiative (68 FR 16120, April 2, 2003), and

the compilation of research materials from the Department of Homeland Security HR Systems Design process.

At the conclusion of the process, the Working Groups provided a set of options covering a broad range of variations on the six areas of focus: (1) compensation (classification and pay banding); (2) performance management; (3) hiring, assignment, pay setting, and workforce shaping; (4) employee engagement; (5) adverse action and appeals; and (6) labor relations. Each option was evaluated against the Guiding Principles and KPPs.

Potential options presented a wide range of views and concerns. The PEO and senior leaders representing organizations within DoD reviewed all the options. After extensive discussion, the selected options were presented to the Overarching Integrated Product Team (OIPT) for review and the Senior Executive for approval.

#### *Publication of Proposed Regulations*

These extensive and collaborative design efforts all preceded the formal process for developing the new HR and labor relations systems. The enabling legislation established a formal process in this regard, officially beginning when the Secretary and the Director published proposed regulations to establish the new DoD HR and labor relations systems in the Federal Register on February 14, 2005. The process was designed to ensure collaboration with employee representatives in the design and implementation of the new HR and labor relations systems.

The first formal step provided a 30-day period for the public, employees, and employee representatives to review and submit formal comments on the proposed system. The second step provided for a minimum of 30 days to “meet and confer” with employee

representatives in order to attempt to reach agreement on the design of the new system. The third step required notification to Congress on the decision to implement the new system. The new system becomes effective 30 days after congressional notification.

### **C. Public Comments**

In response to the proposed rule, the Department received 58,538 comments during 30-day public comment period. The Department received comments from a wide variety of individuals including DoD civilian and military personnel, DoD organizations, labor organizations, other Federal agencies, Members of Congress and the general public. At the conclusion of the public comment period, and continuing over the next several months, DoD and OPM staff reviewed and analyzed the comments.

In general, the comments ranged from overall rejection of the proposed regulations to enthusiastic acceptance. Many comments focused on the need for fairness in the system and the need for training of employees and managers. Concerns were expressed about maintaining due process and the scope of bargaining.

Many of the comments were from national labor organizations and their members.<sup>1</sup> Almost 80 percent of the comments were form letters submitted by email or letter.<sup>2</sup> The form letters expressed general opposition to the proposed regulations. These submissions expressed concerns that the proposed regulations lacked sufficient specificity. The comments also expressed a desire to remain with the current system, citing too much power being given to managers and supervisors, with no corresponding

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<sup>1</sup> DoD has 43 different unions representing over 1,500 separate bargaining units covering about 450,000 employees. In the spring of 2004, thirty-six unions joined together to form the United Department of Defense Workers Coalition (“the Coalition”).

<sup>2</sup> There were 41 different form letters totaling 43,714 comments. An additional 1,850 form letters were received with additional comments added by the commenter.

accountability. Specific concerns included: adequate funding of pay pools; deployment of civilians to war zones; and the lack of third-party review for performance appraisals, adverse actions and labor disputes. There was also concern that the regulations did not adhere to congressional intent to maintain the requirements of the applicable labor relations statutes. Approximately 415 of the commenters included substantive analysis of the proposed regulations. Virtually all of these comments favor some changes, along with a wide variety of views on the merits of the proposed regulations.

Acknowledging that there are strong views on the proposals presented, DoD and OPM reviewed and carefully considered all the comments and the arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes made as a result of the comments. Also summarized are the suggestions for changes considered where no change is being made. In addition to the more substantive comments discussed below, a number of editorial suggestions were made, some of which have been adopted and others which have not. A number of other changes have been made to better organize or structure the regulatory text. Finally, we received a number of comments on issues that go beyond the scope of these regulations, which are not addressed in the discussion that follows.

#### **D. The Meet-and-Confer Process**

The public comment period was followed by the second step in the formal development process – an additional 30-day period during which DoD and OPM

representatives were to meet and confer with employee representatives to resolve differences over the proposed regulations wherever possible.

The meet-and-confer process began officially in April 2005. On April 8, 2005, a meeting with labor organizations was held to discuss procedures to be followed during the meet-and-confer process.

The following principals participated in the meet-and-confer process:

- Forty-three labor organizations were invited to participate. Thirty-six of those labor organizations were represented by a “coalition” led by the AFL-CIO, and were authorized to send an unlimited number of representatives. Eighteen of the labor organizations chose to send representatives. The actual number of representatives present in the room typically ranged from 25 to 50.
- The coalition includes: American Federation of State, County and Municipal Employees (AFSCME); American Nurses Assn. (ANA); Antilles Consolidated Education Assn. (ACEA); Assn. of Civilian Technicians (ACT); American Federation of Government Employees (AFGE); American Federation of Teachers (AFT); Communications Workers of America (CWA); Fairchild Federal Employees Union (FFEU); Federal Education Assn. (FEA); Int’l. Assn. of Machinists and Aerospace Workers (IAMAW); Graphic Communications International Union (GCIU); Hawaii Council of Commissary Dept. of Defense Unions (HCCDU); Int’l. Brotherhood of Boilermakers; Int’l. Assn. of Fire Fighters (IAFF); Int’l. Assn. of Tool Craftsman (IATC); Int’l. Brotherhood of Electrical Workers (IBEW); Int’l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America (IBT); Int'l. Guard Union of America (IGUA); Int'l. Union of Operating Engineers (IUOE); Int'l. Union of Painters and Allied Trades (IUPAT); Int'l. Federation of Professional and Technical Engineers (IFPTE); Int'l. Organization of Masters, Mates and Pilots (IOMMP); Laborers International Unions (LIUNA); National Marine Engineers Beneficial Assn. (MEBA); Metal Trades Dept. /AFL-CIO (MTD); National Assn. of Aeronautical Examiners (NAAE); National Air Traffic Controller Assn. (NATC); National Federation of Federal Employees (NFFE); National Assn. of Gov. Employees (NAGE); Professional Airways Systems Specialists (PASS); Retail Wholesale, and Department Store Union (RWDSU); Seafarers Int'l. Union of North America (SIUNA); Service Employees International Union (SEIU); Sheet Metal Workers Int'l. Assn. (SMWIA); Sport Air Traffic Controllers (SPORT); United Assn. of Journeymen and Apprentices of the plumbing, sprinkler fitting industry of the U.S. and Canada (UA); United Nurses Assn. of California (UNAC); and United Power Trades Org. (UPTO)

- Other unions also participated in the meet-and-confer process. These include: Fraternal Order of Police (FOP) and the National Assn. of Independent Labor (NAIL).
- Five representatives from DoD, including the Principal Deputy Under Secretary of Defense (Personnel and Readiness), the Program Executive Officer, the Deputy PEO, and two senior program managers.
- Two senior executives from the Office of Personnel Management (OPM) and various senior program managers as necessary.

The Secretary, in consultation with the Acting Director<sup>3</sup>, also requested the services of the Federal Mediation and Conciliation Service for the entire meet-and-confer process. Face-to-face meet-and-confer sessions occurred from April 18, 2005, through June 2, 2005. During that period, the parties met for 19 days, with other days spent preparing for meetings and exchanging recommendations for amendments to the regulations. The Department provided 36 written recommendations to revise the regulations as well as 14 recommended clarifications of intent. The unions presented revised regulations for each subpart of the proposed regulations in addition to other revisions covering such topics as – exigencies and post-implementation bargaining, implementing issuances, and third-party review of performance appraisals and adverse actions. At the conclusion of the meet-and-confer process, the NSPS Senior Executive and the Acting Director of OPM met with representatives from the labor organizations in mid-June 2005, to provide them with an opportunity to present their issues and concerns directly to the principals.

The review of the public comments and the proposals during the meet-and-confer process has led to significant revisions of the proposed regulations. Some of the revisions are substantial, such as extending employees the right to grieve performance ratings of record, restricting authority to issue implementing issuances<sup>4</sup> that supersede inconsistent provisions of collective bargaining agreements, changing the standard for mitigating penalties, providing an opportunity for labor organizations to submit names of

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<sup>3</sup>During this period of time, the Honorable Dan Blair was Acting Director of the Office of Personnel Management. On June 28, 2005, the Honorable Linda M. Springer was sworn in as OPM's Director.

<sup>4</sup> Implementing issuances are defined in § 9901.103 of the regulations. Issuances are defined in § 9901.903.

potential members of the NSLRB, and retaining the current interest of justice standard for payment of attorney fees. Other revisions are purely technical.

Significant differences with many of the labor organizations remain over such issues as the scope of bargaining, implementing issuances that supersede conflicting provisions of collective bargaining agreements, the specificity of the regulations, the ability to grieve pay decisions, the use of behavior as part of performance evaluation and the use of performance in a reduction in force. These differences cannot be reconciled with the need for a contemporary and flexible system of human resources management as DoD seeks to transform the civilian part of the Total Force of military personnel, civilian employees, and DoD contractors. The current system limits opportunities for civilians at a time when the role of DoD's civilian workforce is expanding to include more significant participation in Total Force effectiveness. NSPS will generate more opportunities for DoD civilians by easing the administrative burden routinely required by the current system. It will provide an incentive for managers to (1) identify military positions that can be converted to civilian and (2) to turn to civilians first when certain vital tasks need doing. This will free military men and women to focus on matters unique to the military, while greatly increasing the role of the Department's civilian employees. The need for a flexible and contemporary system to support the Department's national security mission is nothing less than an absolute requirement and it must become the foundation of DoD civilian human resources management.

Where we indicate agreement in this Supplementary Information, we are referring to agreements reached between DoD and OPM, after consideration of public comments and proposals made during the meet-and-confer process, rather than to agreements

reached between management and labor organization representatives during the meet-and-confer process.

### **Major Issues**

The 58,538 public comments, in addition to the face-to-face discussions during the meet-and-confer process, clearly defined the issues that were of most concern to DoD civilians potentially covered by all or parts of NSPS. Major issues identified were as follows: (a) Specificity of the Regulations; (b) Pay for Performance and Pay Pool Funding; (c) Adverse Actions and Appeals; (d) Mandatory Removal Offenses; (e) Labor Relations; (f) Management Rights/Scope and Duty to Bargain; and (g) Independence of the NSLRB. Because these issues are critical to understanding the objectives of the Department's new HR and labor relations systems, as well as the implementation of NSPS, we have given them particular attention in the following sections of this Supplementary Information.

#### *a. Specificity of the Regulations*

A significant issue raised in the public comments and during the meet-and-confer process concerns the lack of specificity in the proposed regulations. Many of the commenters recommended that the regulations include far greater specificity, while others referred to the inability to provide substantive comments on the proposed rule without more information.

These comments and concerns focused almost exclusively on the subparts establishing the HR system – those dealing with Subpart B – Classification, Subpart C – Pay and Pay Administration, Subpart D – Performance Management, Subpart E – Staffing and Employment, and Subpart F – Workforce Shaping. Those subparts remain

relatively general in nature and expressly provide for the Department to develop implementing issuances to carry out the policies established in accordance with NSPS. In contrast, the subparts dealing with adverse actions, appeals, and labor relations (subparts G, H, and I, respectively) are more detailed, requiring fewer implementing issuances.

The law requires the Department to establish a contemporary and flexible system of human resources management (see 5 U.S.C. 9902(b)(1) and (2)). Of all of the various objectives set by Congress for this system in the enabling legislation, flexibility was the very first enumerated. Unnecessary and excessive detail in subparts B, C, D, E, and F would undermine that objective. The regulations provide the overall framework for the new HR system without the inflexible requirements present in today's system. In response to these comments, and as a result of the meet-and-confer process, we have added greater detail to certain sections of the subparts at issue. These additions are documented at length in our responses to the detailed comments that follow.

However, even with added detail, all five of the subparts at issue retain their original structure in the final regulations, establishing a general policy framework to be supplemented by detailed Departmental implementing issuances. We believe this is the appropriate approach, providing the Department the flexibility it requires in implementing an HR system of this scope.

Labor organization comments focus primarily on process, asserting that by including greater detail in the proposed regulations, they would have been given an opportunity to participate and provide input to the final regulations via the statutory meet-and-confer process set forth in 5 U.S.C. 9902(f)(1)(A)-(C). Among other things, that statutory process requires the Department and OPM to provide employee representatives

with an opportunity to comment on the proposed regulations and, thereafter, meet with DoD and OPM officials (under the auspices of the Federal Mediation and Conciliation Service, if necessary) in an attempt to resolve any concerns and disagreements. As the labor organizations and other commenters have correctly pointed out, the proposed regulations did not provide for an analogous opportunity with respect to the development of implementing issuances. This became a major topic of discussion during the meet-and-confer process, with labor organizations insisting that DoD and OPM either include all implementing details in these final regulations or subject the Department's implementing issuances to collective bargaining. We did not adopt either alternative. Including such detail in these regulations would not provide the Department the flexibility its mission requires. In addition, collective bargaining over the content of implementing issuances is prohibited by the enabling legislation.

In summary, the inflexibility of the current system required new ways to meet the rapidly changing requirements for DoD civilians to provide support to the military members. A standardized, yet flexible DoD environment that promotes the growth of all employees and improves the manager's ability to manage the workforce is essential. The regulations were developed to provide the Department the ability to maintain flexibility, while at the same time involving employee representatives in the details of new processes established through implementing issuances.

Five of the subparts in these final regulations remain relatively general in nature, providing broad policy parameters but leaving much of the details to implementing issuances. We believe this structure, patterned after the chapters in title 5 that they replace, is appropriate. By providing for detailed implementing issuances, the subparts

dealing with Classification, Pay and Pay Administration, Performance Management, Staffing and Employment, and Workforce Shaping provide the Department with the flexibility mandated by Congress, and they do so without compromising the Department's commitment to substantive employee representative involvement in the development of those implementing issuances.

*b. Pay for Performance and Pay Pool Funding*

The pay system we described in the proposed regulations was designed to fundamentally change the way we pay employees in the Department of Defense. Instead of a pay system based primarily on tenure and time-in-grade, we proposed a system that bases individual pay increases on performance. This proposal honors major points that were debated by the Congress and agreed upon with the passage of the enabling legislation. In addition, the proposed pay system would be far more market-sensitive than the current pay system. The proposed changes relating to classification, pay, and performance management were designed to achieve these two primary goals.

A number of commenters agreed with the proposal to create a more occupation-specific and market- and performance-based classification and pay system. However, most commenters strongly recommended that we maintain the status quo; that is, that DoD continue to rely on the General Schedule (GS) and Federal Wage System (FWS) classification and pay systems. Many commenters thought the proposed pay-for-performance system would lower employee morale, increase competition among employees, and undermine teamwork and cooperation. Some also questioned the ability of the Department to successfully implement the proposed system, or of DoD managers to establish and apply performance standards fairly and consistently to pay decisions.

Other commenters thought a pay-for-performance system would have a chilling effect on the expression of dissenting opinions, especially those concerning fraud, waste, and abuse. Some commenters recommended that current employees be allowed to remain in the existing system or have the option to stay in the current system or convert to NSPS. Still others wanted a more gradual implementation with testing of the effectiveness of the new system on various populations first.

We have retained the system described in the proposed regulations. We believe 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. They also expect the Department to do everything it can to recruit and retain the most talented individuals it can find to carry out its critical mission. The GS and FWS pay systems do not provide the opportunity to appropriately reward top performers or pay them according to their true value in the labor market. Under the GS and FWS pay systems, performance is rewarded as an exception rather than the rule, and market is defined as “one size fits all,” with no distinction for differences in market pay based on occupation.

The GS and FWS pay systems are primarily longevity-based systems – that is, pay increases are linked primarily to the passage of time. While time in grade determines eligibility for a GS or FWS step increase, it is true that a finding that the employee is performing at an acceptable level of competence is also required. However, this minimal requirement is met by roughly 99 percent of all GS employees. Thus, at any given grade level, the vast majority of employees can expect to automatically receive base pay increases of up to 30 percent over time – in addition to the annual across-the-board pay increases – so long as their performance is “acceptable.” Even employees whose

performance is unacceptable receive annual across-the-board pay increases that range from 3 to 5 percent, and special rates that are even higher. Over time, even less productive employees will progress steadily to the top of the GS and FWS pay ranges and may end up being paid significantly more than higher-performing employees with less time in grade. Such a system cannot be fairly characterized as providing performance-based pay.

The NSPS pay-for-performance system, by contrast, is designed to recognize and reward performance in two key ways. First, it establishes the fundamental principle that no employee may receive a base pay or local market supplement increase if his or her performance does not meet or exceed expectations. In contrast to the present pay systems, employees rated unacceptable will not get an annual adjustment. Second, the NSPS system provides for individual base pay increases based on an employee's performance, whether by demonstrating requisite competencies at the entry/developmental level or by meeting or exceeding performance expectations at the full performance level. In contrast to the present pay systems, under NSPS, an employee will progress through the pay range based on how well he or she performs.

This concept may be simply summarized: the higher the performance, the higher the pay. This, too, is a fundamental principle of the new system, and we choose the order of these words deliberately. This system does not assume that individuals are motivated by pay, but rather that we have an obligation as an employer to reward the highest performers with additional compensation – however they may be motivated to achieve excellence. The Department has a special responsibility in this regard. Thus, the system we have designed is not a “performance-for-pay” system, but a “pay-for-performance”

system. Nevertheless, we believe it will inspire DoD employees to perform at their best. This is in contrast to the GS and FWS pay systems, where it is possible for a high-performing employee to be paid the same, or even less, than a lower performing co-worker.

As it designs and implements NSPS, the Department is taking the following steps to ensure that the performance management system functions properly:

- Training managers to provide candid and constructive feedback to help employees maximize their contribution and potential;
- Emphasizing the need for ongoing and meaningful dialogue between managers and employees;
- Use of a pay pool process to ensure that performance decisions are made in a careful, deliberative environment that uses a consistent approach to decisions regarding performance ratings and shares;
- Implementing a new competency-based performance management system that is intended to create a clear linkage between employee performance and the Department's strategic plan and core values;
- Increasing employee understanding and ownership of organizational goals and objectives;
- Adopting automation tools that facilitate "best practices" in the pay-for-performance environment;
- Reinforcing the use of team and organizational rewards; and
- Preserving non-cash rewards as tools to recognize performance.

The 50-plus-year-old GS pay system also is not sufficiently market-sensitive, potentially under-valuing the talents of the Department's most critical employees. Under the GS and FWS pay systems, all employees in a given geographic location receive the same annual pay adjustment without regard to their occupation or the level of duties and responsibilities they are expected to perform. This one-size-fits-all approach treats all occupations alike, across the board as well as in particular locations, regardless of market value. Thus, we inevitably end up underpaying employees in some occupations and overpaying others. Even within an occupation, the rigidities of the current pay systems sometimes force us to underpay employees at the entry/developmental grades, with recruiting difficulties and high attrition the result.

The new NSPS pay system is designed to be much more market-sensitive. First, it allows NSPS, 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 those career groups or bands, based on national and local labor market factors and other conditions. Instead of "one size fits all" pay rates and adjustments, the system 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, will enable DoD to allocate payroll dollars to the occupations and locations where they are most needed to carry out the Department's mission.

The goals and principles of the new system are sound, and we have confidence that the Department has the capability to execute them effectively. Pay-for-performance

systems like that proposed for DoD are not new. Pay banding has been around in the Federal Government since 1980, and the Federal Government has substantial experience in implementing performance-based pay systems (e.g., in demonstration projects). DoD alone has tested and implemented 11 performance-based pay systems since 1980. Research shows that employee attitudes toward such systems change over time, as they gain experience with them. For example, employee support for the “China Lake” broadbanding/pay-for-performance demonstration project was only 29 percent before the project began, reached 51 percent by 1985, and was 69 percent by 1988. Employee support was 70 percent when Congress made the project permanent in 1994. Today, thousands of Federal employees already are covered by successful performance-based pay systems.

The system we have devised is also consistent with the findings and recommendations of NAPA in its May 2004 Report, “Recommending Performance-Based Federal Pay.” The basis for managing individual salary increases should be pay for performance. This recommendation has been a constant theme in discussions for more than two decades and the principle in every demonstration project that tested new pay policies. The evidence from the projects confirms that pay for performance can be successful in DoD. Nonetheless, the switch to a pay-for-performance system will be implemented via a spiral (multi-phase) approach resulting in application of the NSPS HR system, including the pay-for-performance system, to new segments of the DoD population at approximately 6-month intervals over a 2-year period. The phased intervals of implementation will provide opportunities to assess and adjust the system as each new group of employees is covered by the new system. For the most part, populations phased

into NSPS will be grouped by organization in order to facilitate the change in organizational culture that will be essential to the success of NSPS and the improved organizational performance resulting from its implementation.

In summary, we believe the Department's pay-for-performance system is an imperative, essential to DoD's ability 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.

Many commenters expressed concern that there will not be sufficient resources made available to fund pay pools at adequate levels. There were also many comments suggesting that pay pool money will be diverted from pay to mission requirements or to reward supervisors and managers, thereby leaving less for lower-graded employees.

Proper funding of pay pools is fundamental to the success of NSPS. DoD senior leadership recognized its importance in setting two Key Performance Parameters – “Credible and Trusted” and “Fiscally Sound.” In addition, this issue was the subject of testimony by the NSPS Senior Executive to the Senate Armed Services Committee in April 2005. Secretary England was asked what assurances he could give that limited appropriations or other budget pressures would not result in pay pools too small to truly reward performance. He declared that the Department viewed this as a basic covenant with its employees and confirmed that action is being taken to protect pay pool funding.

The Department is implementing financial policies for NSPS. Protection of pay pool funding is being addressed in several different ways. First, the Department will mandate the minimum composition and expenditure of pay pool funds. Second, appropriate senior-level officials are required to certify that funds allocated to the

performance-based pay pools have been used only for the purpose for which they were intended. Third, any exception to the minimum funding of the pay pool will be based on stringent criteria, along with higher-level approval. Fourth, mechanisms will be in place to monitor compliance.

In accordance with the enabling legislation, for fiscal years 2004 through 2008, the aggregate amount allocated for compensation of DoD civilian employees under NSPS, to the maximum extent practicable, will not be less than if they had not been converted to the NSPS. This takes into account potential step increases and promotions employees would have received if not converted to NSPS. In addition, § 9901.313(b) provides that for fiscal years 2009 and beyond, DoD will develop a formula that ensures, to the maximum extent possible, that employees are not disadvantaged in the overall amount of pay available, in the aggregate, 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.

c. Adverse Actions and Appeals

In authorizing the creation of a new human resources system for the Department, Congress specifically required that employees be afforded the protections of due process. Recognizing the critical nature of the Department's mission, Congress also stated in 5 U.S.C. 9902(h)(2) that the new appeals process may "establish legal standards and procedures for personnel actions, including standards for applicable relief, to be taken on the basis of employee misconduct, or performance that fails to meet expectations."

The proposed regulations included a number of changes to adverse actions and appeals procedures. Consistent with the enabling legislation, these changes were intended to simplify and streamline those procedures and provide for greater individual accountability, all without compromising guaranteed due process or protections against whistleblower reprisal or discrimination. Greater accountability is particularly critical to the Department. By its very nature, the Department's national security mission requires an exceptionally high level of workplace order and discipline. The fact that DoD employees provide critical support to the military mission of defending the country means that they, and the Department have a special responsibility to the public.

With that in mind, the proposed regulations provided for shorter notice for adverse actions, an accelerated appeals adjudication process using MSPB AJs, a preponderance of the evidence burden of proof to sustain the Department's adverse actions, whether based on conduct or performance, or both, and specifically limited the mitigation of agency selected penalties by MSPB AJs and private arbitrators. The proposed regulations also required that arbitration decisions on adverse actions be reviewable by the Department and the full MSPB prior to review by the Federal Circuit Court of Appeals. The proposed regulations also gave the Secretary authority to establish a number of mandatory removal offenses (MRO) – that is, offenses that have such a direct and substantial impact on national security that they must carry a mandatory removal penalty. While the enabling legislation provides authority to establish an internal appeals process using adjudicators other than MSPB AJs, the Secretary and the Director decided that with the changes outlined above, DoD could achieve the objectives of the enabling legislation using MSPB AJs for initial review of employee adverse action

appeals. Ultimately, the enabling legislation provides for full MSPB review of any DoD final appeals decision as well as for judicial review.

Commenters, including labor organizations participating in the meet-and-confer process, generally expressed concern that these changes, separately and together, would vitiate the due process rights of DoD employees. They argued that the changes would substantially diminish the authority of third parties such as MSPB and arbitrators to fully and fairly review and adjudicate adverse actions. Commenters, as well as some members of Congress, expressed particular concern, about the proposal to permit the Department to review arbitrator and MSPB AJ decisions on adverse actions. Commenters expressed skepticism that the stringent standards established for this review would adequately protect due process of employees. Commenters also expressed concern about the proposal to limit the ability to mitigate penalties unless the penalty was “wholly without justification.” Commenters generally supported the proposal to adopt a “preponderance of evidence” standard of proof, although a few commenters were opposed to this proposal.

These comments express a fundamental misconception of the requirements of due process as established by the United States Supreme Court. For example, in accordance with Supreme Court decisions, due process requires that before an employee who has a property interest in a job is removed, he or she is entitled to notice, an opportunity to reply, a decision, and a post-decision review. The final regulations preserve these due process rights for covered employees and afford even greater protection than the U.S. Constitution requires. Recognizing that many of these comments were erroneously characterized as due process issues, we nevertheless considered their merits.

DoD and OPM have decided that the final regulations will continue to provide for a shorter, 15-day minimum advance notice to an employee of a proposed adverse action (compared to a 30-day notice under current law). We have also retained the provision giving employees a minimum of 10 days to respond to the charges specified in the notice of adverse actions. Some commenters suggested that the 10-day period was not long enough, but this notice is actually longer than the 7-day minimum reply period that is provided under current law. This reply period runs concurrently with the notice period, which is also consistent with current law. Employees continue to have a right to be heard before a proposed adverse action is taken against them. This change protects that right while still providing for a more streamlined process. Since these are minimum time periods, local management may extend these time limits on a case-by-case basis if necessary.

We are persuaded by the concerns expressed by commenters, as well as labor organizations during the meet-and-confer process, that the enabling legislation establishes the standard by which the full MSPB may mitigate penalties. Specifically, the proposed regulations precluded mitigation except where a determination is made that the penalty is so disproportionate to the basis for the action as to be wholly without justification. Since the enabling legislation specifically provides the criteria for full MSPB review of NSPS appeals decisions, the Secretary and Director agree that it is unnecessary to require the full Board to apply the “wholly without justification” standard. The criteria for full MSPB review as provided in the enabling legislation have been added to these regulations. Furthermore, the Secretary and Director agree to revise the “wholly without justification” standard for MSPB AJs that are used as part of the Department’s appeals

process as well as arbitrators. The standard has been revised to preclude mitigation except when the action is “totally unwarranted in light of all pertinent circumstances.” This standard is similar to that recognized by the Federal courts and is intended to limit mitigation of penalties by providing deference to an agency’s penalty determination. The Department has statutory authority to establish new legal standards. In this case, the Department is electing to adopt a legal standard that meets the need of the Department by ensuring deference is provided to the Department’s penalty determinations along with the requirement that AJs give consideration to the Department’s national security mission.

Under the final regulations, MSPB AJs (as well as arbitrators) will also be able to mitigate penalties in adverse action cases, but only under limited circumstances. We continue to believe that, because the Department bears full accountability for national security, it is in the best position to determine the penalty for poor performance and/or misconduct, subject to a more limited review than exists now under chapter 75 of title 5, U.S. Code. Thus, its judgment in regard to penalty should be given deference. This limited standard for mitigation of penalties selected by DoD is intended to explicitly restrict the authority of MSPB AJs and arbitrators to modify penalties to those situations where the penalty is simply not warranted. MSPB AJs and arbitrators may not modify the penalty imposed by the Department unless such penalty is totally unwarranted in light of all pertinent circumstances. Consistent with the intent that deference be given to agency selected penalties, the regulations also provide that when a penalty is mitigated, the maximum justifiable penalty must be applied. In determining the maximum justifiable penalty, MSPB AJs and arbitrators will use the applicable agency table of penalties or other internal guidance.

Commenters and labor organizations expressed strong concerns over DoD reviewing MSPB AJ decisions. These concerns ranged from whether the Department had legal authority to conduct this review to whether this assists in achieving the Department's goal of streamlining the appeals process. Some expressed concerns that this would not be a truly independent appeals process as a result. We recognize these concerns, but believe that the process provides for appropriate review and safeguards. The enabling legislation authorizes an appeals process resulting in a final Department decision that is subject to full MSPB review. Consistent with this authority, we have established an independent appeals process using existing and familiar resources, MSPB AJs, to adjudicate employee appeals of DoD adverse actions. These AJs would issue initial decisions that would lead to a final Department decision subject to full MSPB review. The decision to utilize the MSPB AJ corps, rather than establishing a new corps of AJs, is purposeful. We are mindful of the need to conserve resources and recognize the value these AJs' independence brings to the process. Nevertheless, to ensure that the Department receives proper deference to its critical mission requirements, the Department will retain the opportunity to review and modify, under criteria prescribed in these regulations, those initial AJ decisions before they become final Department decisions. In response to concerns raised by the unions during the meet-and-confer process, this review will occur at the DoD level. This highlights that the highest levels of the Department wish to ensure that this process is applied fairly and consistently across the Department. Also, in order to ensure timely decisions by the Department when taking action on an AJ or arbitrator decision, time limits for taking action will be established in implementing issuances. Ultimately, any decision of the Department is subject to review

by the full MSPB and the Court of Appeals for the Federal Circuit. We believe this process affords employees full and fair opportunity for redress, as well as adjudicative independence, and deference to DoD's critical mission needs, consistent with the NSPS statutory authority.

Finally, many commenters and labor organizations participating in the meet-and-confer process expressed concerns about the organization of the appellate procedures, finding them difficult to follow. We are persuaded by their concerns and have reorganized the appellate procedures in a user-friendly format.

With the changes outlined above, we believe we have addressed and resolved the concerns raised by commenters regarding adverse actions and appeals. Due process is preserved under the final regulations. Thus, the adverse actions and appeals procedures set forth in these regulations are "fair, efficient, and expeditious," consistent with congressional direction.

*d. Mandatory Removal Offenses*

The proposed regulations authorized the Secretary to identify offenses that, because they have a direct and substantial adverse impact on the Department's national security mission, warrant a mandatory penalty of removal from the Federal service. Only the Secretary could mitigate the removal of an employee determined to have committed such a mandatory removal offense (MRO). Employees alleged to have committed these offenses would have the right to advance notice, an opportunity to respond, and a written decision. They would also be entitled to appeal that decision to the independent MSPB AJs, who could reverse the action but could not mitigate the removal penalty. Decisions of the MSPB AJs are subject to review by DoD as well as the full MSPB.

Commenters and unions expressed a number of objections to the concept of MROs. Since no examples of potential MROs were provided in the proposed regulations, they feared that removal could be too harsh a penalty as for yet unspecified offenses. They also were concerned that employees would not be given full and complete notice of such offenses prior to their application.

As proposed, an MRO should have a direct and substantial adverse impact on the Department's national security mission. Accordingly, we have decided to retain MROs. However, in response to comments, the Secretary and the Director understand the concern over the lack of specificity with regard to MROs. During the meet-and-confer process, participating labor organizations expressed a similar concern, but we believe we were able to satisfactorily address most of their objections about lack of specificity by sharing with them potential mandatory removal offenses.

In addition to those MROs discussed during the meet-and-confer process, an illustrative list of potential MROs follows:

- Purchasing, using, or transporting weapons or materials for the purpose of committing, attempting to commit, or aiding and abetting terrorism.
- Committing, attempting to commit, or aiding and abetting an act of sabotage against the Department of Defense that resulted or could have resulted in loss of life, significant financial loss or adverse impact on military readiness.
- Soliciting or intentionally accepting a bribe or other unauthorized personal benefit in return for an act that compromises or could compromise national security.

- Employees involved in the Personnel Reliability Program failing to safeguard the assets for which they are directly responsible and such failure results in loss, theft, sabotage, unauthorized use, destruction, detonation, or damage.
- Intentionally engaging in activities that compromise or could compromise the information or financial infrastructure, including major procurement fraud, of the Department of Defense, when the employee knew or reasonably should have known of the compromise or potential compromise.

There is no question that employees must be made aware of the final list of MROs approved by the Secretary. Both the Secretary and the Director believe that this is a basic issue of fairness and a tenet of an organizational culture that establishes clear accountability. That is why the proposed regulations provided that MROs will be identified to employees in advance, as part of implementing issuances, and made known to all employees upon identification. During the meet-and-confer process, participating labor organizations were especially concerned about this issue. We agree that these offenses should not be a surprise to anyone, and have retained these provisions in the final regulations but have also added a requirement that they be publicized via notice in the *Federal Register*. The Secretary also intends to consult with the Department of Justice in preparing the list of offenses for publication.

With these changes, the final regulations provide for the independence demanded by commenters while assuring DoD's ability to remove employees who engage in offenses that have direct and substantial impact on the Department's national security mission. The Secretary is accountable to the President and the American people for

safeguarding national security. No other agency or department bears this burden. These regulations ensure that the Secretary's authority aligns with that responsibility.

*e. Labor Relations*

Without exception, employee representatives objected to the proposed labor relations regulations, both in their comments and during the meet-and-confer process. Employee representatives argued that Congress expressly specified only two modifications to chapter 71 – bargaining above the level of recognition and independent third party review of decisions. We disagree. In enacting chapter 99, Congress expressly recognized the need for the Department to design a labor relations system that both addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and allows for a collaborative issue-based approach to labor management relations.

Moreover, Congress specifically authorized the Secretary, together with the Director, to *establish* and *adjust* this labor relations system in support of the overall HR management system *notwithstanding* the provisions of the current system as set forth in chapter 71. Thus, the Secretary and the Director have modified chapter 71 “to address the unique role that the Department’s civilian workforce plays in supporting the Department’s national security mission.” (5 U.S.C. 9902(m)) In taking the steps necessary to establish and adjust this labor relations system, Congress further recognized that the provisions of this system will supersede existing collective bargaining agreements covering Department employees and negotiated pursuant to the provisions of chapter 71. Finally, Congress indicated that the authority of the Secretary and Director to devise and adjust the Department’s labor relations system would expire in 2009 absent

further action by Congress (5 U.S.C. 9902(d)(2) and 5 U.S.C. 9902(m)(1), (2), (8), and (9)).

*f. Management Rights/Scope and Duty to Bargain*

The ability to act quickly is central to the Department's national security mission – not just during emergencies but, more importantly, in order to prepare for or prevent emergencies. The ability to act quickly is necessary even in meeting day-to-day operational demands. The Department must be able to assign employees and to introduce the latest security technologies without delay. This principle was crucial in the formulation of the enabling legislation and in the congressional debate that followed its introduction. Congress clearly recognized the Department's need to operate under a new labor relations system that would provide the flexibility necessary to respond to a variety of vital operational challenges and carry out its national security mission.

To achieve this objective, the proposed regulations revised, among other things, the management rights and duty to bargain provisions found in 5 U.S.C. chapter 71. We expanded the list of management rights that are excluded from bargaining, including the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work -- rights that deal directly with the Department's national security operations. In addition, we excluded from bargaining the procedures that the Department would follow in exercising these expanded operational management rights. We also proposed to allow the Department to take action in any of these areas without advance notice to labor organizations and without pre-implementation bargaining.

Without exception, labor organizations objected to the proposed regulations, both in their comments and during the meet-and-confer process, arguing that altering the scope of bargaining in any way is contrary to the enabling legislation. They also claimed that these changes were unnecessary because current law already provided the Department with sufficient flexibility to deal with emergencies. They also took strong exception to the provisions in the proposed regulations that would allow issuances to supersede conflicting provisions of any collective bargaining agreements and limit bargaining to only those matters that are not inconsistent with the issuances. Labor organizations did acknowledge the Department's need to take certain actions without pre-implementation bargaining, and during the meet-and-confer process they proposed a process for accelerated bargaining within established time limits and the use of binding arbitration to resolve all bargaining disputes. Additionally, they suggested that the term "emergency" be interpreted as including "exigencies requiring action reasonably necessary to carry out the Department's national security mission before collective bargaining concerning the action can be completed," and that in such exigencies the Department will afford the opportunity to bargain when circumstances reasonably allow. Their proposals would have allowed the Department to temporarily suspend provisions of collective bargaining agreements in situations where there is a direct connection between the exigency and the Department's national security mission. Even under such mission critical and exigent conditions, they insisted that post implementation agreements would have prospective effect only if the emergency was unforeseen. If the national security exigency were foreseen, then any remedy for Department action that was contrary to a contractual provision would have retroactive effect unless the retroactive effect would "unduly

disrupt Department operations reasonably necessary to carry out the Department's national security mission.”

We recognize the good faith effort made by these labor organizations to meet the Department's operational needs. However, their proposals were lacking in several respects. We have, therefore, retained the management rights/scope of bargaining provisions in the proposed regulations with some modifications.

With respect to procedures, the proposals offered by the labor organizations do not go far enough. They would still require the Department to bargain, before acting, over the procedures it would follow in exercising its management rights, including those that deal directly with its operations. Once negotiated, those procedures can and do place significant constraints on critical actions such as the assignment of work, the deployment of personnel, and the staffing of tours of duty. These procedures are negotiable under 5 U.S.C. chapter 71. Labor organizations would have the Department continue that obligation, but under time limits and with an expanded interpretation of the chapter 71 provisions regarding emergencies that would allow management to bargain post implementation in certain limited circumstances.

However, in today's operational environment, the exceptional has become the rule. Department managers, supervisors, and employees are critical to the Department's mission to defend our national security. The Department must be able to rely on the judgment and ability of managers and supervisors to make day-to-day decisions – even if this means deviating from established or negotiated procedures. Moreover, the Department's managers and supervisors must be able to make split-second decisions to deal with operational realities free of procedural constraints.

With respect to post-implementation bargaining, the proposals offered by labor organizations are similarly lacking. Although they would allow management to implement without bargaining in advance when faced with an emergency, they would still require immediate post-implementation negotiations and third-party impasse resolution over such matters. However, the reality of DoD's operational environment today is that change is constant, and as a consequence, so too would be post-implementation bargaining, with the prospect of prolonged third-party impasse resolution. These negotiations would be required even in cases where the change was short-lived and/or where its impact was insignificant, insubstantial, or transient. The demand on DoD's frontline managers, supervisors and employees to engage in constant post-implementation negotiations would divert them from accomplishing the mission. This is unacceptable and inconsistent with the authority Congress granted to the Department in the enabling legislation.

Further, under 5 U.S.C. chapter 71, interpretations of negotiated appropriate arrangements tend to assume that those agreements have anticipated future changes, but today's operational environment belies that assumption. Changes necessitated by operational demands are recurring and variable. Our frontline managers and supervisors must not be bound by agreements presupposing circumstances that are assumed to be constant, when they must face current and future exigencies.

Nevertheless, in recognition of the concerns articulated by commenters during the public comment period and during the meet-and-confer process by participating labor organizations and as a result of the June 16, 2005, meeting of the United DoD Workers

Coalition, DoD's NSPS Senior Executive, and OPM's Acting Director, the Secretary and the Director decided that the proposed regulations would be revised in a number of ways.

First, we have modified the definition of "issuances" to make clear the distinction between an "implementing issuance" and an "issuance". An "implementing issuance" is a document issued to carry out a policy or procedure implementing NSPS (but does not include internal operating guides, manuals, or handbooks that do not change employees' conditions of employment), while an "issuance" is a document to carry out a non-NSPS policy or procedure of the Department. We have also clarified that while an implementing issuance immediately supersedes those provisions of collective bargaining agreements that are inconsistent with the implementing issuance, an issuance does not supersede a conflicting provision of a collective bargaining agreement during the term of that agreement. This ensures the viability of the collective bargaining process under NSPS. When a provision of a collective bargaining agreement conflicts with an issuance, the collective bargaining provision remains in effect until the expiration or renegotiation of the agreement, at which time the parties will have to bring the conflicting provision into conformance with the issuance. This is comparable to the process that has long been followed regarding Governmentwide regulations. Specifically, issuances will be subject to national consultation with those labor organizations holding national consultation rights. Moreover, following consideration of comments and recommendations received through the national consultation process, issuances are subject to collective bargaining to the extent proposals are not inconsistent with the issuance and are otherwise negotiable under § 9901.910 and § 9901.917.

More importantly, and in response to concerns that managers may issue implementing issuances and issuances for the sole purpose of invalidating particular provisions of a collective bargaining agreement that they do not like, we have also modified the regulations to specify that implementing issuances, that is, those that implement NSPS and supersede conflicting provisions of existing collective bargaining agreements, may only be issued by the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments. We have limited “Principal Staff Assistants” to senior officials in the Office of the Secretary of Defense who report directly to the Secretary and Deputy Secretary of Defense. We also have added a new subparagraph, § 9901.905(c) to make clear that any provision of a collective bargaining agreement that is inconsistent with issuances that do not implement NSPS will remain in effect until the expiration, renewal, or extension of the agreement, whichever occurs first.

Finally, we have modified the regulations to permit bargaining, in the sole, exclusive, unreviewable discretion of the Secretary, over the procedures that would be followed in exercising the expanded operational management rights. We have also modified the regulations to permit bargaining, at the election of the Secretary, over appropriate arrangements on the routine matters related to the expanded operational management rights. The Secretary may authorize such bargaining to advance the Department’s mission accomplishment or promote organizational effectiveness. Mid-term agreements on appropriate arrangements and procedures for (a)(1) and (a)(2) management rights are not precedential or binding on subsequent acts, or retroactively applied, except at the Secretary’s sole, exclusive, and unreviewable discretion. Procedures and appropriate arrangements in term agreements are binding, except that

nothing will delay or prevent the Secretary from exercising his or her authority under subpart I. For example, the Secretary may authorize deviation from such agreements when it is necessary to carry out the Department's mission. This authority builds on the authority that exists today when an emergency occurs, as that term is applied under chapter 71, to address the unique nature of the Department's mission and the operational demands it must face.

Taken together, we believe these revisions meet the Department's mission needs, are consistent with the enabling legislation's intent to preserve collective bargaining rights as provided for in 5 U.S.C. chapter 99, and assure employees that issuances will not be issued for the improper purpose of eliminating local bargaining. While commenters have argued that any alteration of the scope of bargaining violates the enabling legislation, this interpretation is inconsistent with the express authority Congress has given the Secretary and the Director to establish and from time to time adjust the labor relations system for the Department to address the unique role that the Department's civilian workforce plays in supporting the Department's national security mission. These regulations fulfill that statutory requirement while providing employees with the rights envisioned by Congress.

*g. Independence of the National Security Labor Relations Board*

The National Security Labor Relations Board (NSLRB) described in the NSPS regulations is intended to act as one element of independent third-party review of collective bargaining disputes as provided for in 5 U.S.C. 9902(m)(6). Commenters, including labor organizations participating in the meet-and-confer process, objected to the creation of the NSLRB because they believe that an internal DoD review board would

not be independent from management influence, unlike the Federal Labor Relations Authority (FLRA). Commenters suggested that any board whose membership would be appointed and removed by the Secretary could not reasonably be expected to remain impartial. They also suggested that the primary reason for taking jurisdiction of these matters away from the independent and impartial FLRA is to guarantee that DoD management can influence the NSLRB's decisions, giving them an unfair advantage over employee representatives.

We have decided to retain the NSLRB. Employing the NSLRB to adjudicate labor disputes in place of the FLRA ensures timely and efficient case management by a body cognizant of the important and unique nature of the Department's mission. We believe that the final regulations have adequately balanced the Department's interest in timeliness and mission recognition with employees' desire to have an impartial dispute adjudicator. The regulations establish NSLRB membership criteria that require candidates to exhibit integrity and impartiality in addition to extensive knowledge of labor laws, DoD's mission, or both. Although the Secretary has authority to remove NSLRB members before the expiration of their terms, that authority is limited to removal for inefficiency, neglect of duty or malfeasance in office, which is a standard similar to that for removing members of the FLRA. In addition, since the standard is established in these jointly prescribed regulations, it may not be changed unilaterally by the Secretary. Finally, we stress that the NSLRB decisions are subject to review by the FLRA, which acts as another element of independent third-party review. The FLRA decisions, including those reviewing decisions of the NSLRB, remain subject to judicial review as they are under chapter 71. These regulations establish that the NSLRB will operate

independent of the chain of supervision as does any agency administrative judge or administrative review board whose decisions can be appealed to a higher authority.

Multiple commenters, including labor organizations participating in the meet-and-confer process, recommended that the labor organizations be given the opportunity to participate in the NSLRB nomination process. We agree and have included in the final regulations an explicit requirement that the Secretary consider labor organization nominations. Whereas the proposed regulations did not provide a role for labor organizations in the nomination process, the final regulations provide that the Secretary will consider labor organization nominations in selecting the two non-chair members of the NSLRB. This assures labor organizations a voice in the NSLRB selection process.

While we have not adopted all suggestions related to the NSLRB, we believe the final regulations ensure that NSLRB members will discharge their duties in a fair and impartial manner by 1) including employee representatives in the process for selecting such members; 2) requiring that individuals appointed as members have integrity, impartiality, and subject matter expertise; 3) limiting the grounds on which the Secretary can remove NSLRB members; and 4) providing for FLRA review of NSLRB decisions and, as prescribed in chapter 71, judicial review of FLRA decisions.

## **Response to Specific Comments and Detailed Explanation of Regulations**

### **Subpart A – General Provisions**

#### *Section 9901.101 – Purpose*

Section 9901.101 explains the overall purpose of the regulations in 5 CFR part 9901, which is to implement a new human resources management system and a new labor relations system, as authorized by 5 U.S.C. 9902. The section states various

guiding principles and key operational characteristics and requirements. We have added a reference in § 9901.101(a) to the labor relations system, which is established under 5 U.S.C. 9902(m), since this is a separate and distinct authority. (See additional discussion regarding this distinction in the analysis of comments regarding § 9901.102.)

Commenters questioned the authority to waive or modify statutes through these regulations. We are modifying § 9901.101(a) to clarify that 5 U.S.C. 9902 provides authority for these regulations to waive or modify certain statutory provisions.

A commenter recommended that the regulations restate the statutory merit principles instead of just referencing them as a guiding principle. We do not believe such a restatement is necessary; however, we have added a statutory citation – 5 U.S.C. 2301 – in § 9901.101(b)(1).

Commenters expressed concern regarding the key operational characteristic “Agile and Responsive Workforce and Management,” which was further described as “workforce can be easily sized, shaped, and deployed to meet changing mission requirements.” In particular, some objected to viewing civilian employees as deployable in the same manner as military personnel. While DoD has always had and will continue to have the right to assign employees to serve in geographic locations based on mission requirements, the word “deploy” in this section is being used in a broader context and was intended to encompass the strategic organization of work based on employee skills and competencies and mission needs. In particular, we believe the authority in subpart B to classify work into broader career groups supports this objective.

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 as of a specific effective date.

Commenters indicated that the Secretary's discretionary authority in coverage matters is too broad. We believe it is essential that the Secretary be given such discretion. The authority to establish systems would be meaningless unless there is corresponding authority to place eligible employees under the system. The Secretary needs flexibility to phase in coverage in an orderly way, while retaining authority to change effective dates as needed, based on changing conditions or mission requirements.

Commenters stated that the authority in § 9901.102(b)(1) to establish an immediate effective date for subpart I (dealing with labor relations) conflicts with 5 U.S.C. 9902(1). Section 9902(1) provides that the Secretary may apply the "National Security Personnel System" only if (1) the affected organizational or functional unit has no more than 300,000 employees or (2) the Secretary determines "in accordance with subsection (a)" that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b). The term "National Security Personnel System" is defined in 5 U.S.C. 9902(a) to be the "human resources management system," which is established under the authority of subsection (a). Section 9902(b) provides requirements for a system established "under subsection (a)." Under 5 U.S.C. 9902(b)(3)(D) and (d), the human resources management system established under subsection (a) does not reach to the labor relations system established under 5 U.S.C. chapter 71. Instead, 5 U.S.C.

9902(m) provides a totally separate authority to establish and adjust a “labor relations system.” We believe it is clear that the limitations in 5 U.S.C. 9902(l) apply only to the human resources management system established under 5 U.S.C. 9902(a).

Commenters raised questions about the coverage of employees in certain DoD laboratories who are covered by a demonstration project or an alternative system. Section 9902(c) of title 5, U.S. Code, states that the National Security Personnel System will not apply to defense laboratories in organizations listed in § 9902(c)(2) before October 1, 2008, and will apply after that date only if the Secretary determines that greater flexibilities are available. Consistent with the explanation in the preceding paragraph, the reference to the “National Security Personnel System” in 5 U.S.C. 9902(c) refers to the human resources management system which is defined as the National Security Personnel System in § 9902(a). Thus, the restrictions in 5 U.S.C. 9902(c) do not apply to the coverage of these laboratory employees under the labor relations system established under 5 U.S.C. 9902(m), and these employees may be covered by subpart I (dealing with labor relations) before October 1, 2008.

Commenters objected to the possible coverage of certain civilian mariners who are currently covered by a pay system established under 5 U.S.C. 5348 and are also covered by 5 U.S.C. chapter 71. These employees will be covered by subpart I (dealing with labor relations). However, the Secretary has determined that they will not be covered by the human resources system, including the adverse actions and appeals provisions. Other commenters asked about certain Army Corps of Engineers employees under Public Law 97-257. U.S. Army Corps of Engineers employees paid from Corps of Engineers Special Power Rate Schedules will be covered by subpart I (dealing with labor

relations). The Secretary has determined that they will not be covered by the human resources system, including the adverse actions and appeals provisions.

Commenters asked whether a category of employees could be covered by some, but not all, provisions of subparts B through H. In particular, commenters noted that National Guard Technicians were eligible for coverage but were subject to certain provisions outside title 5 – e.g., qualification requirements established under title 32, instead of qualification standards established under 5 U.S.C. chapter 51. Since 5 U.S.C. 9902 does not provide authority to modify or waive statutory provisions outside of certain specified chapters in title 5, any such provisions would continue in effect. The Secretary may extend coverage to eligible employees under subparts B through H to the extent those provisions are not in conflict with other statutory requirements.

Commenters proposed that certain occupations be excluded from coverage – e.g., attorneys or law enforcement officers – because of the nature of their work. We disagree. We believe the flexible systems we are authorizing can be applied successfully to all occupational categories.

Commenters raised questions regarding the purpose of § 9901.102(f). Paragraph (f) is intended to allow the Secretary to extend NSPS coverage to employees who are currently covered by systems established administratively under authorities outside of title 5, but only when those authorities give DoD the discretion to cover those employees under administratively determined systems or to leave them in the title 5 systems that would otherwise apply. For example, if DoD has discretionary statutory authority to cover a category of employees under an administratively determined classification and pay system instead of the General Schedule, such employees remain potentially eligible

for General Schedule coverage and accordingly would also be eligible for NSPS coverage. Commenters questioned whether paragraph (f) could be used to cover educators employed by the DoD Education Activity in an NSPS pay system. Since the pay system for those educators employed overseas (Department of Defense Dependents Schools) is established under nondiscretionary statutory provisions in title 20, they are not eligible for coverage under an NSPS pay system. However, the pay system for those educators employed in the Continental United States (Defense Domestic Elementary and Secondary Schools) is established under discretionary provisions in title 10. Therefore, they are eligible for coverage under an NSPS pay system.

Commenters proposed that current employees (or at least current employees meeting certain age and service requirements) be “grandfathered” and left in existing title 5 systems instead of being covered by NSPS, unless they elect otherwise. This proposal is not practicable from an administrative viewpoint and is contrary to the objectives behind the enabling legislation. We believe the flexibilities provided under the proposed NSPS will yield significant benefits to the Government and will also benefit employees based on their performance. It is therefore not acceptable to delay full application of NSPS.

Commenters questioned why members of the Senior Executive Service (SES) are not covered by NSPS – specifically, the classification, pay, and performance provisions in subparts B through D. In fact, SES members are eligible for coverage under those NSPS provisions, subject to the conditions in § 9901.102(d). (See coverage provisions in §§ 9901.202(b)(4), 9901.302(b)(4), and 9901.402(b)(1).) We note that the SES pay and performance provisions in title 5 are already designed to be performance-sensitive. Thus,

DoD does not plan to cover SES members in its initial implementation spirals. DoD may determine at a later date whether coverage under NSPS pay and performance provisions is necessary given the title 5 authorities that already apply to SES members.

In light of the numerous comments regarding the coverage eligibility of specific categories of DoD employees under the various subparts of these regulations, we have prepared the following summary chart showing various categories of employees that are eligible for coverage under the NSPS systems. This chart is not intended to be comprehensive or authoritative, but covers the major categories of employees in DoD outside of the General Schedule. In the chart, categories of employees that are identified as eligible for coverage under a particular subpart are annotated with “Yes,” and those that are identified as ineligible for coverage are annotated with “No.” The chart and its footnotes must be read together for full information on coverage eligibility. Actual coverage is subject to applicable law and approval by the Secretary under § 9901.102(b).

Summary of Non-General Schedule Coverage Eligibility under 5 CFR Part 9901

Category	Eligible for Human Resources System/ Appeals Process (subparts B-H)	Eligible for Labor Relations System (subpart I)
Air and Army Reserve Technicians	Yes	Yes
Army and Air National Guard technicians (dual status) under 32 U.S.C. 709	Yes <sup>1</sup>	Yes <sup>2</sup>
Army and Air National Guard technicians (non dual status) under 32 U.S.C. 709	Yes <sup>1</sup>	Yes <sup>2</sup>
Hydropower Corps of Engineers Special Power Rate Schedules (WB pay plan)	No	Yes
Navy Civil Service Mariner (WM pay plan)	No	Yes
Overseas Teachers (DoDDS)	No	Yes
Pentagon Force Protection Agency (title 5 and title 10 employees)	Yes <sup>3</sup>	Yes
Federal Wage System (WA, WD, WG, WJ, WK, WL, WN, WO, WS, WT, WY, XF, XG, XH pay plans)	Yes	Yes
Nonappropriated Fund	Yes <sup>4</sup>	Yes
Domestic Teachers (DDESS)	Yes <sup>4</sup>	Yes
Defense Laboratories in Organizations listed in 5 U.S.C. 9902(c)	No <sup>5</sup>	Yes
Armed Services Board of Contract Appeals	No for Board members; Yes for other employees	No for Board members; Yes for other employees
Court of Appeals for the Armed Forces	No for Judges and attorneys in chambers; Yes for other employees <sup>6</sup>	No for Judges and attorneys in chambers; Yes for other employees <sup>6</sup>
Consultants and Experts (10 U.S.C. 129b)	No	No
DARPA, scientists and engineers	No	No
DCIPS (including DISES)	No	No
Executive Schedule	No	No
Faculty at DoD Educational Institutions: Air University, Air Force Institute of Technology, Army War College/ Command & General Staff College, Defense Acquisition University, National Defense University, Defense Language Institute, George C. Marshall Center, Asia-Pacific Center for Security Studies, Western Hemisphere Institute for Security Cooperation, US Naval Postgraduate School, Naval War College/US Marine Corps University, USAF Academy, US Naval Academy, US Military Academy	Yes <sup>4</sup>	Yes
Faculty and staff at USUHS	No	No
Foreign Nationals (Direct Hire)	No	No
Schedule C	Yes	No
SES	Yes	No
Senior Level (SL/ST)	Yes	Yes
DoD Office of the Inspector General	Yes, unless appointed under authority of the Inspector General Act of 1978 (5 U.S.C. App. § 6) <sup>7</sup>	No

<sup>1</sup> Subject to limitations pursuant to 32 U.S.C. 709

<sup>2</sup> But excluded from national level bargaining under 5 U.S.C. 9902(g)

<sup>3</sup> Title 10 employees under title 10 discretionary authority and subject to 10 U.S.C. 2674

<sup>4</sup> Under title 10 discretionary authority

<sup>5</sup> Until 2008, excluded from HR system and appeals process pursuant to 5 U.S.C. 9902(c)

<sup>6</sup> Pursuant to 10 U.S.C. chapter 47, subchapter XII

<sup>7</sup> Currently there are no appointees under that authority

Section 9901.103 – Definitions

Section 9901.103 provides definitions of terms used in more than one subpart. Commenters expressed concerns about some definitions.

Commenters requested greater clarity with respect to the use of “implementing issuances.” Accordingly, we are revising the definition of “implementing issuances” to make clear that such documents can be issued by only certain high-level DoD officials (despite the Secretary’s broad delegation authority), including those formally designated as acting in those high-level positions. We have also clarified that implementing issuances do not include internal operating guides, handbooks, or manuals that do not change conditions of employment. This is consistent with current practice. We have also added a definition of “Military Department.”

To address general comments regarding the need for greater specificity where possible, we have added definitions of the terms “initial probationary period” and “in-service probationary period.” These terms are used in subpart E (Staffing and Employment) and subpart F (Workforce Shaping). In addition, we clarified the definition of “NSPS” to more closely track the language in the statute. “NSPS” means the human resources management system established under 5 U.S.C. 9902(a). It does not include the labor relations system established under 5 U.S.C. 9902(m). We do, however, use “NSPS” in the supplementary information and in public statements as a shorthand reference to describe both the HR and the labor relations systems. We also note that chapter 99 is entitled the National Security Personnel System.

Commenters expressed concern about the definition of “performance.” In particular, commenters objected to the use of the terms “behavior,” “demeanor,”

“attitude,” and “manner of performance” in defining performance. We note that these terms are used in a context that makes clear that we are dealing with 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 assigned work. For example, customer service is generally a paramount organizational objective. Thus, 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. Some commenters suggested that assessments of manner of performance would open the door to abuse, cronyism, punishment for criticism of management, or retaliation against whistleblowers. We disagree. Under NSPS, employees are still protected against prohibited personnel practices and will have the same whistleblower rights they have always had. We note that managers will be held accountable for how they manage this process.

A commenter questioned whether the definition of “promotion” allows management to add higher-level duties without providing pay increases. It appears that this comment is primarily directed at the new classification authority under subpart B that would allow DoD to reduce the number of grade level distinctions by using bands to describe levels of work. Each band will encompass a single broad level of work that may encompass a range of duties previously performed at different grade levels. Promotion is movement to a higher level of work, i.e., higher band.

Commenters requested greater clarity regarding the term “unacceptable performance.” In conjunction with related changes made in subpart D (Performance

Management), we are clarifying that an employee's performance may be found to be unacceptable based on failure to successfully complete work assignments or other instructions that amplify written performance expectations.

Section 9901.104 – Scope of authority

Section 9901.104 identifies the provisions in title 5 that are subject to waiver or modification under 5 U.S.C. 9902.

Commenters objected to any modification or waiver of any title 5 provision. A commenter suggested this section would grant legislative power reserved for Congress. In fact, this section merely implements an authority provided by Congress. Under 5 U.S.C. 9902, DoD and OPM may prescribe regulations establishing new human resources management and labor relations systems notwithstanding certain title 5 provisions. In other words, Congress has provided that systems established by regulation may be used in place of certain statutory systems. This is not dissimilar to numerous cases where Congress has excluded an agency from a title 5 provision and allowed the agency to develop its own rules administratively, except that, in the case of NSPS, Congress has actually established additional requirements to guide system development in terms of both substance and procedure.

Commenters asserted that this section was misleading in that it did not reveal that the enabling legislation gave DoD authority to waive any part of title 5, including provisions dealing with retirement, health benefits, life insurance, leave, etc. This assertion is incorrect. Section 9901.104 identifies the limited number of title 5 provisions that are subject to waiver or modification. DoD and OPM have no authority to waive or modify title 5 provisions, except as provided for in 5 U.S.C. 9902. (Other laws are

affected only for the purpose of dealing with references to waived or modified provisions, as described in § 9901.107). Section 9902(b)(5) of title 5, U.S. Code, states that a system established under 5 U.S.C. 9902(a) is “not limited by any specific law or authority under this title [i.e., title 5] . . . that is waived in regulations prescribed under this chapter [i.e., chapter 99], subject to paragraph (3).” The referenced paragraph (3) in 5 U.S.C. 9902(b) includes a subparagraph (D) that links to 5 U.S.C. 9902(d), which in turn specifies that most of title 5 is nonwaivable, except as provided for in section 9902.

Commenters questioned the inclusion of chapters 33 and 35 in the list of waivable or modifiable chapters in § 9901.104, since those chapters include veterans’ preference rules. However, § 9901.104(a) states that chapters 33 and 35 may be waived or modified only as authorized by 5 U.S.C. 9902(k). Section 9902(k) of title 5, U.S. Code, requires the Secretary to comply with veterans’ preference requirements. Thus, the regulations in subpart E (Staffing and Employment) and subpart F (Workforce Shaping) that modify parts of chapters 31 and 33 do not affect veterans’ preference rights and protections.

A commenter questioned the effect of the NSPS regulations on determinations under the Fair Labor Standards Act (FLSA). OPM’s authority to administer the FLSA is found in section 4(f) of the Fair Labor Standards Act of 1938, as amended. (See also 29 U.S.C. 204(f).) Since this authority is outside the waivable title 5 chapters, these regulations do not affect OPM’s FLSA regulations or OPM’s authority to settle FLSA claims.

#### Section 9901.105 – Coordination with OPM

Section 9901.105 identifies the areas which trigger a requirement to coordinate DoD implementing issuances and certain other actions with OPM. As described in the

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.

Commenters expressed concern that § 9901.105 gave DoD too much authority. Some recommended that DoD should be required to get formal OPM approval, rather than just “coordinate” with OPM. A commenter also suggested that DoD should be required to coordinate with other agencies with national security missions so that national security employees would have a common framework. Under the enabling legislation, OPM’s authority is to approve jointly developed regulations, and OPM has exercised that authority in these part 9901 regulations. 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 a coordination role is sufficient to allow OPM to fulfill its responsibilities. In this coordination role, OPM will ensure that Governmentwide interests and the interests of other agencies are appropriately considered.

In these final regulations, we have added a coordination requirement with respect to the establishment of policies and procedures for time-limited appointments under § 9901.511(d), consistent with our original intent. The Supplementary Information for the proposed regulations stated that coordination with OPM would occur in this area. (See 70 FR 7563.) We have added a coordination requirement with respect to the

modification of coverage, retention procedures, or appeals rights under subpart F (Workforce Shaping). This coordination requirement is consistent with § 9901.602, which provides that, in accordance with § 9901.105, DoD will prescribe implementing issuances to carry out the provisions of subpart F. Also, we have moved the coordination provision related to qualification standards from § 9901.105(c) to § 9901.105(e) to address concerns raised during the meet-and-confer process that language in the proposed regulations did not clearly identify OPM's role in this matter. Finally, we have added a requirement that the Secretary coordinate with the Director regarding the Secretary's determination under 5 U.S.C. 9902(l) that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b). This determination must be made before the Department applies the human resources management system established under 5 U.S.C. 9902(a) to an organization or functional unit that exceeds 300,000 civilian employees.

*Section 9901.106 – Continuing collaboration*

As authorized by 5 U.S.C. 9902(f)(1)(D) and (m), section 9901.106 of the regulations establishes a process called “continuing collaboration” for involving employee representatives in the further planning and development of the HR and labor relations systems after promulgation of the joint DoD/OPM enabling regulations. Under this continuing collaboration provision, DoD will provide employee representatives the opportunity to participate in the development of implementing issuances that carry out the provisions of part 9901.

Section 9901.106 implements 5 U.S.C. 9902(f)(1)(D), which requires the Secretary and the Director to develop a method for employee representatives to

participate in further planning and development after promulgation of joint DoD/OPM regulations establishing the HR system under 5 U.S.C. 9902(a). In addition, this section provides for the same continuing collaboration with respect to application of the labor relations system established by joint DoD/OPM regulations under 5 U.S.C. 9902(m). Section 9901.106 does not apply to the adjustment of the NSPS enabling regulations themselves. Such regulatory adjustments must be made using the meet-and-confer process described in 5 U.S.C. 9902(f)(1)(A)-(C) or (m), as applicable.

During the meet-and-confer process, several participating labor organizations suggested that adjustments to the HR system or labor relations system should be subject to the meet-and-confer process rather than the continuing collaboration process, and others suggested that there should be collective bargaining over implementing issuances. In addition, commenters questioned whether continuing collaboration on implementing issuances met the requirements of 5 U.S.C. 9902(f)(1)(D), which requires a method for employee representatives to participate in any further planning or development which might become necessary.

As we have already explained, we agree that adjustments to the HR system regulations or the labor relations system regulations would be subject to the meet-and-confer process described in 5 U.S.C. 9902(f)(1)(A)-(C) and (m)(3). However, we did not adopt the suggestion to require that implementing issuances be subject to collective bargaining or the meet-and-confer process. Collective bargaining is inappropriate for the development of HR system implementing issuances, since it is inconsistent with the requirements of § 9902(f)(4). In addition, Congress expressly required DoD and OPM to develop a separate method, apart from the meet-and-confer process, for employee

representatives to participate in the further planning and development of the HR system (which will be manifested in the implementing issuances).. The continuing collaboration process does meet the requirements of 5 U.S.C. 9902(f)(1)(D), and we therefore have retained this process in the final regulations.

In addition, we have added language to clarify that the continuing collaboration process in § 9901.106 is the exclusive process for employee representatives to participate in the further planning, development, and implementation of the NSPS HR and labor relations systems established by these enabling regulations. (See 5 U.S.C. 9902(f)(4) and (m)(1)-(2).)

We also received comments during the meet-and-confer process, as well as written comments, suggesting that all labor organizations representing employees affected by an implementing issuance should have the opportunity to be represented in the continuing collaboration process. Labor organizations recommended that we eliminate the provision authorizing the Secretary to determine the number of employee representatives who will participate in the continuing collaboration process. While, as a practical matter, it would be administratively inefficient to include representatives from more than 1500 Departmental bargaining units in the continuing collaboration process, we do agree that bargaining units affected by an implementing issuance should be represented in the process. Therefore, we have retained the provision giving the Secretary sole and exclusive discretion to determine the number of employee representatives that may participate in the process, but we have modified the final regulations to make clear that each national labor organization with one or more bargaining units affected by an implementing issuance will be provided the opportunity

to participate in the process. We believe this will provide for an efficient and meaningful continuing collaboration process, particularly when large numbers of bargaining units are affected.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that employee representatives should be involved before a draft implementing issuance is proposed. In fact the continuing collaboration process provides the Secretary flexibility to involve affected labor organizations whenever appropriate, including at the conceptual stage. These commenters further suggested that there should be some feedback to the labor organizations regarding the disposition of any recommendations made during the continuing collaboration process. We agree and have modified the regulations to ensure that the Department considers the views and recommendations offered during the process before taking final action. A commenter also expressed concern that the Secretary was not required to adopt suggestions or recommendations, but we believe 5 U.S.C. 9902 intended the Secretary to have the final authority to implement the NSPS. In addition, employee representatives will receive from the Department a written statement of the reasons for taking final action regarding an implementing issuance.

Finally, commenters, including labor organizations participating in the meet-and-confer process, recommended that the regulations provide employee representatives a reasonable time to submit their comments. The complexity of issues will vary greatly from implementing issuance to implementing issuance, which makes it imprudent to establish a standard time for commenting in the regulations. Therefore, we have not

adopted this recommendation and have retained the provision authorizing the Secretary to establish these timeframes.

Section 9901.107 – Relationship to other provisions

Section 9901.107 describes the relationship of the NSPS regulations to other laws and regulations. Commenters expressed confusion regarding the purpose of this section – in particular, paragraph (b). For example, a commenter suggested that DoD was attempting to exempt itself from title 5 rules on back pay. Paragraph (b) is merely addressing situations where other laws contain references to statutory provisions that are being waived and replaced by NSPS regulations. In general, our purpose is to give those other laws continuing effect by deeming the references to waived provisions to be references to the NSPS regulations replacing those waived provisions. Thus, for example, we are not eliminating NSPS employees’ entitlement to back pay under 5 U.S.C. 5596, but are merely giving meaning to references in § 5596 to statutory provisions in chapters 71 and 77 that no longer apply to NSPS employees. The final regulations reflect a technical revision in paragraph (b)(3) to make clear that all references in § 5596 to provisions in chapter 71 (dealing with labor relations) are considered to be references to corresponding provisions in subpart I of these regulations. Also, in paragraph (b)(2), we revised a regulatory citation consistent with the rearrangement of sections in subpart H.

Commenters expressed concern regarding § 9901.107(a)(2), which (1) provides that part 9901 must be interpreted in a manner that recognizes DoD’s need to accomplish its critical national security mission swiftly and effectively and (2) accords DoD and OPM’s interpretation of the regulations great deference. The principle of providing

deference to the agencies responsible for regulating and implementing a statute is well established. We believe it is entirely appropriate that the regulations recognize that the need for deference is even greater when the agency is responsible for defending and protecting our country and its citizens against external threats. We have clarified that deference is to be given to DoD's and OPM's interpretation of these regulations. In paragraph (c), we have removed the reference to law enforcement officer geographic adjustments under section 404 of the Federal Employees Pay Comparability Act of 1990, since those adjustments are no longer payable.

Finally, in paragraph (d), we have removed the reference to 29 CFR part 1614 as unnecessary because the paragraph specifically provides that 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) are not waived, modified, or otherwise affected by these regulations. This is consistent with the enabling statute and our commitment to full and vigorous enforcement of Federal sector nondiscrimination laws. This means that employees and applicants for employment will have the right to file EEO complaints under those provisions of law as they do today and that EEOC's jurisdiction over those complaints remains unchanged.

#### Section 9901.108 – Program evaluation

Section 9901.108 requires that DoD establish procedures for evaluating the NSPS regulations and their implementation.

Commenters recommended that other organizations, such as OPM, be involved in program evaluation. They consider it important that program evaluations be conducted

by independent, unbiased organizations. This regulation is meant to place a self-evaluation requirement on DoD, not to address third-party evaluations of NSPS. We believe it is a matter of good management that any agency implementing new human resources management and labor relations systems have responsibility for evaluating those systems so that problems can be corrected and improvements made. Under law and Executive order, OPM has general oversight responsibilities with respect to agency administration of human resources management programs. Of course, OPM has a particular interest and accountability with respect to NSPS, since Congress authorized OPM and DoD to jointly prescribe the NSPS regulations. OPM expects to review the results of DoD evaluations of NSPS and may conduct evaluations of its own. Nothing in

these regulations prevents evaluations of NSPS by other appropriate organizations, such as the Merit Systems Protection Board or the Government Accountability Office.

A commenter suggested that DoD establish an ongoing mechanism whereby employees can submit observations and recommendations for improving NSPS (including anonymous submissions). The commenter observed that this was especially important when employees (including supervisors) are not part of a bargaining unit. We do not believe it is necessary to establish a special, ongoing mechanism for such input within this regulation. When appropriate for the subject, NSPS evaluation methods established under § 9901.108 will elicit workforce observations and recommendations; and employees also may use normal Departmental processes to comment on the human resources system. In addition, we note that the term “employee representative” as used in 5 U.S.C. 9902 is not limited to representatives of labor organizations. DoD may request views and comments from representatives of other employee groups, such as a managers’ association.

Commenters requested greater detail on the nature of DoD evaluations, such as evaluation criteria, benchmarks, parameters, and timeframes. Commenters also stated that the program evaluation process in the proposed regulation is too vague with respect to the participation of employee representatives and recommended that we incorporate more specific provisions, such as providing information to employee organizations, timeframes for review, and procedures for employee organizations to collect information directly from employees. Section 9901.101 of these regulations already identifies “key operational characteristics and requirements,” which are essentially high-level evaluation criteria. DoD will provide additional detail as it develops its evaluation program. The

timing, nature and complexity of NSPS program evaluations will vary greatly and will be affected by the spiral rollout strategy for the human resources system. We consider it to be imprudent to set standard timeframes. We believe this is an area where flexibility is essential so that DoD can adjust the evaluation program based on experience.

Accordingly, we have not adopted the recommendations made by commenters for greater specificity.

## **Subpart B – Classification**

### General Comments

Commenters were concerned about the lack of specificity about the structure of the NSPS classification system and commented on this issue with regard to each section of this subpart. A number of commenters felt the proposed regulations were too vague and did not provide enough details about how the career groups and bands will be established, which occupations will be in each career group, and which positions will be in each band. Commenters recommended a number of amendments to subpart B to provide more detailed criteria.

Commenters expressed a strong desire that this subpart of the regulations be more specific and that employees and employee representatives be involved in the design of the NSPS classification system. Responding to the lack of detail in the regulations, labor organizations recommended that the bar on collective bargaining of the NSPS classification system under § 9901.903 of the proposed regulations be removed.

Commenters also requested that implementing issuances for this subpart be subject to public review and comment. We have not removed the bar on collective bargaining.

While the detailed implementing issuances for this subpart will not be subject to public

review and comment, they will be established under the “continuing collaboration” provisions in § 9901.106. Under continuing collaboration, the exclusive process for employee representative involvement (5 U.S.C. 9902(f)(4)), employee representatives will have the opportunity to review and comment on draft implementing issuances. Furthermore, we have added a new section at § 9901.205, which further clarifies that classification matters are not subject to collective bargaining. This is consistent with the statutory mandate that the scope of bargaining not be expanded under NSPS (5 U.S.C. 9902(m)(7)).

We understand the desire for the regulations to provide more specificity about how the NSPS classification system will operate. However, the regulations must provide sufficient flexibility for a classification system with career groups and bands that support the market-based features of the NSPS pay system and can be customized to meet DoD’s mission requirements and strategic human capital needs both today and in the future. Except as otherwise explained in this section of the Supplementary Information, we have not modified subpart B of the regulations in response to these comments. The regulations provide for implementing issuances that will provide further details, including the criteria for the career groups and definitions of the bands. DoD will consider the suggestions and recommendations made by commenters as it develops these implementing issuances.

Commenters recommended that DoD issue classification standards to ensure consistent application of the NSPS classification system. DoD will establish standardized classification procedures and criteria in the implementing issuances required by this subpart.

## Other 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. The lack of details in this subpart of the proposed regulations caused some commenters to question whether the proposed classification system would provide for “equal pay for equal work.” The merit system principle at 5 U.S.C. 2301(b)(3) ensures 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.” The NSPS classification system established by these regulations will provide for a classification structure with consistently defined work levels, while the performance management and compensation systems will establish the value of that work, as required under this principle.

### Section 9901.202 – Coverage

Section 9901.202 identifies the employees and positions eligible for coverage under this subpart, including those otherwise covered by the General Schedule and prevailing rate systems, employees in SL and ST positions, and members of the SES, subject to § 9901.102(d). This section also provides the authority for the Secretary to designate additional employees and positions for coverage. Commenters requested clarification of coverage for students and for laboratories. Students in positions otherwise classified to the General Schedule or other covered classifications systems will be covered under the NSPS classification system. Section 9902(c) of title 5, U.S. Code, specifies that coverage will not occur before October 1, 2008, for the defense laboratories

in the following organizations: Aviation and Missile Research Development and Engineering Center, Army Research Laboratory, Medical Research and Materiel Command, Engineer Research and Development Command, Communications-Electronics Command, Soldier and Biological Chemical Command, Naval Sea Systems Command Centers, Naval Research Laboratory, Office of Naval Research, and Air Force Research Laboratory. Section 9902(c)(1) of title 5, U.S. Code, provides that on or after October 1, 2008, these laboratories will be covered to the extent the Secretary determines the flexibilities provided by NSPS are greater than the flexibilities they currently have under demonstration authority.

Commenters recommended excluding Civilian Mariner, Emergency Essential Civilians, and dual status military technicians from coverage under this subpart. We have not changed coverage under this subpart based on these comments. The classification system is an integral part of NSPS and provides the flexibility needed as the foundation for the performance management and pay components of the system.

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 § 9901.107 and § 9901.222(d). Section 9901.203(b) states that the classification of positions above GS-15 is not waived for certain purposes.

A commenter requested clarification of whether this section waives 5 U.S.C. 6303(f) regarding the annual leave accrual for members of the SES and employees in SL and ST positions. As specified in § 9901.203(b), this is one of the enumerated provisions that may not be waived.

Section 9901.204 – Definitions

This subpart defines the key components and terms used in the NSPS classification system. A commenter suggested revising the definition of “classification” to remove the phrase “job evaluation,” to eliminate potential confusion with “performance evaluation.” We did not make this change. The phrase is not used to define classification, but rather is included to explain that the terms may be used interchangeably.

Section 9901.211 – Career groups

Section 9901.211 provides DoD the authority to establish career groups. DoD’s implementing issuances will provide the criteria and rationale for grouping occupations or positions into career groups.

One commenter noted that this section does not mention OPM’s role in establishing the career groups. Under § 9901.105(c)(1), DoD is required to coordinate with OPM before establishing career groups.

Commenters expressed a need for consistent career groups across DoD. We did not make a change in the regulations based on this comment; however, DoD anticipates uniform career groups. Several commenters provided specific recommendations about grouping occupations together into career groups. Other comments recommended

limiting the number of career groups to keep the system simple. In developing the implementing issuances, DoD will consider these suggestions.

Section 9901.212 – Pay schedules and pay bands

Section 9901.212 provides DoD with the authority to establish pay schedules within each career group, and pay bands within each pay schedule. One commenter noted that the bands, as defined in this section, are simple to understand.

Commenters noted an incorrect reference in the proposed regulations at § 9901.212(d). We have corrected the reference.

Commenters noted that this section does not mention OPM oversight and recommended that OPM review and approve the pay schedules. Under § 9901.105(c)(1), coordination of pay schedules and pay bands with OPM is required.

The proposed regulations stated in § 9901.221(a) that pay schedules “may include two or more pay bands.” We made a technical correction to clarify that a pay schedule may include one or more pay bands.

Commenters expressed a need for consistent pay bands throughout DoD. We did not make a change in the regulations based on this comment; however, DoD anticipates that bands will be defined consistently for a given occupation. Several commenters recommended grouping particular General Schedule grades into pay bands. Commenters also recommended placing specific occupations (e.g., attorney) into particular bands. Additional commenters suggested ways to band supervisory positions, while other commenters requested clarification of how supervisory and team leader positions will be placed into bands. DoD will consider these suggestions and address the number and

composition of pay bands and the assignment of supervisor and team leader positions to bands in its implementing issuances.

Several commenters requested further detail on the classification of prevailing rate positions under NSPS. One commenter suggested adopting the bands used for DoD nonappropriated fund (NAF) employees. DoD will consider these comments when establishing NSPS pay schedules and pay bands for prevailing rate positions.

A commenter questioned how duty levels within bands will be described. DoD will establish a process for consistently describing the duties of positions.

Several commenters requested that DoD establish military rank equivalencies for each band, for purposes such as travel accommodations. Such equivalency determinations are outside the scope of the NSPS regulations.

Several commenters noted the importance of dual career paths to support both supervisory and non-supervisory expertise. DoD agrees that this is an important feature to include in the NSPS classification system. The pay band structure supports this concept through pay bands, such as expert and supervisory bands, which could provide for parallel career progression.

#### Section 9901.221 – Classification process

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

Labor organizations participating in the meet-and-confer process expressed concern that employee promotions might be unduly delayed because § 9901.221(d) in the

proposed regulations did not provide a timeframe for classification decisions. As a result of these discussions, we have added a requirement in this section that personnel actions implementing classification decisions occur within four pay periods after the date of the decision.

Some commenters expressed concerns that under the NSPS classification system, position descriptions will not be required. They were concerned that the duties required by a position will not be clearly defined and will be too broad, which may result in uncertain expectations or the assignment of work unrelated to an employee's position. While NSPS provides increased flexibility, DoD will establish a process for consistently describing the requirements of positions.

*Section 9901.222 – Reconsideration 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 expressed concern that this section provides insufficient detail. DoD's implementing issuances will establish policies and procedures for handling an employee's request for reconsideration of classification decisions.

A commenter noted that current regulations provide employees the right to request reconsideration of official titles of their positions of record and asked that the regulations provide this right under the NSPS classification system. We agree and have added "official title" to § 9901.222(a).

Commenters were concerned that there was no independent review to a neutral party. Paragraphs (a) and (c) of this section provide employees the right to directly

request OPM reconsider the classification of their official position and allow an employee to request that OPM reconsider a DoD classification reconsideration decision, respectively. This right is parallel to the classification appeal right of current General Schedule employees under 5 U.S.C. 5112(b).

Commenters suggested that the regulations authorize retroactive promotions if an employee's position is found to be misclassified, and one commenter suggested that retroactive promotions be limited to 2 years preceding the reconsideration determination. Under the current classification law and regulations (5 U.S.C. chapter 51 and 5 CFR part 511) classification decisions generally may not be made effective retroactively. (See 5 CFR 511.701(a)(4).) In addition, the Supreme Court has held that neither the Classification Act under 5 U.S.C. chapter 51 nor the Back Pay Act under 5 U.S.C. 5596 creates a substantive right to back pay for periods of wrongful classifications. (See *United States v. Testan*, 424 U.S. 392 (1976).)

OPM regulations at 5 CFR 511.703 provide an exception to this general rule and allow a retroactive effective date if upon classification appeal an employee is found to have been wrongfully demoted. Any similar retroactive effective date provisions regarding classification reconsideration decisions will be addressed in DoD's policies and procedures for reviewing these requests, under § 9901.222(b).

Commenters suggested that classification reconsideration decisions should be based on OPM's classification standards. The appropriate criteria for reconsideration are those criteria used in classifying the position. As noted in § 9901.222(e), where DoD has adopted OPM standards, OPM criteria will be used; and where DoD has established its own criteria for classifying positions under this subpart, DoD criteria will be used.

Commenters suggested that DoD should have a central classification appeals office. This change has not been made in the regulations. DoD currently has a central classification appeals office.

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 expressed concerns about the conversion process, finding it vague and requesting further detail. They questioned whether all positions will be reclassified, whether employees will be required to reapply for their current job, and how DoD will deal with employees in entry positions who have completed training but not yet met time-in-grade criteria. A commenter requested that the length of “save pay” be a minimum of 2 years. Additionally, commenters requested guidance on converting employees currently classified under demonstration projects and on converting employees leaving DoD from NSPS to the General Schedule. A commenter requested that employees be provided new position descriptions prior to conversion. DoD will consider these comments when issuing the implementing issuances to prescribe the conversion process.

Commenters questioned the applicability of the conversion rules to employees converted to the NSPS pay system from demonstration projects and alternative pay systems. In response to these comments, we revised § 9901.231(b) to provide that DoD will convert employees to the system without a reduction in their rate of pay, including any applicable locality payment, special rate supplement, local market supplement, or “similar payment under other legal authority.”

We also made a technical correction, changing the term “special rate” to “special rate supplement.” This change is consistent with other recently published special rate regulations.

## **Subpart C – Pay and Pay Administration**

### *General Comments*

Commenters and the labor organizations participating in the meet-and-confer process articulated concerns about the lack of specificity in subpart C of the regulations on the pay structure and the pay administration rules governing the NSPS pay system. Commenters felt the regulations were too vague and difficult to understand because of the lack of detailed information on such issues as establishment of career groups and pay schedules, establishment and adjustment of pay band rates and rate ranges, establishment and adjustment of local market supplements, composition and funding of performance pay pools, pay-setting, and premium pay. Commenters expressed difficulty in understanding how their rate of basic pay and pay adjustments would be determined under NSPS and the impact individual and group performance would have on pay. Other commenters recommended that the regulations be withdrawn until the entire system could be disclosed or tested.

Commenters, including labor organizations participating in the meet-and-confer process, repeatedly referenced the lack of specificity when recommending a number of amendments to subpart C of the regulations which they felt would provide detailed criteria and situations for setting and adjusting rate ranges; entitlement to rate range adjustments; setting and adjusting local market supplements; entitlement to local market supplements; eligibility and amounts of performance pay increases; and setting pay for

initial hires, reassignments, promotions, and reductions in band. Amendments were also suggested for initial conversion into NSPS.

Citing the lack of specificity, commenters and the labor organizations participating in the meet-and-confer process stated that the regulations should be revised to remove the bar in subpart I on collective bargaining of the NSPS pay structure and system and to provide that the NSPS pay system be subject to national consultation rights.

Numerous commenters requested that the regulations be more transparent and that DoD work closely with employees and employee representatives in designing the NSPS pay system. They also cited the lack of details in the regulations as the basis for doubting the fairness and equity of the NSPS pay system.

We recognize the desire that the regulations provide greater specificity and guarantees pertaining to the NSPS pay system. However, the regulations must afford DoD sufficient flexibility to design an agile pay system that is performance-based, market-based, and tailored to DoD's performance goals, mission requirements, and strategic human capital needs. Except as otherwise explained in this section of the Supplementary Information, we have not modified subpart C of the regulations in response to these comments.

However, we concur with commenters that the NSPS pay system must be designed in a transparent and credible manner that involves employees and employee representatives. While we have not removed the bar on collective bargaining in subpart I, the implementing issuances, as defined in § 9901.103, which will include the details of the NSPS pay system, will be covered by the "continuing collaboration" provisions in

§ 9901.106, which Congress established as the exclusive process for the involvement of employee representatives in the further planning and development of the HR system (5 U.S.C. 9902(f)(1)(D) and (f)(4)). (See Section 9901.103 – Definitions and Section 9901.106 – Continuing collaboration.) Further, DoD will consider the suggestions and recommendations made by commenters as it develops implementing issuances for the NSPS pay system. Finally, we have added a new section at § 9901.305, which further clarifies that pay matters are not subject to collective bargaining. This is consistent with the statutory prohibition against expanding the scope of bargaining under NSPS to those matters not subject to bargaining today because they are governed by law or Governmentwide regulations (5 U.S.C. 9902(m)(7)).

Commenters also stated that the regulations should require the new pay system to fully comply with the merit system principles and protect against prohibited personnel practices, implement the performance management provisions of subpart D prior to implementing the pay system in subpart C, require DoD to assess the impact of the pay system on employees prior to implementation, and establish a DoD compensation board. Neither the merit system principles nor the rules regarding prohibited personnel practices are waived under NSPS. Regarding testing and/or assessment of the system prior to implementation, the Department has tested many of these flexibilities via the demonstration projects. Additionally, the Department will use a spiral implementation strategy that will allow it to make modifications as necessary based on lessons learned in the earlier spirals. With regard to the recommendation for a compensation board, establishment of a mechanism for determining rate range adjustments will be addressed in implementing issuances.

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. Commenters stated that employees should receive pay increases equivalent to the increases they would have received under the General Schedule. Many commenters also stated that the Department should continue to rely on the General Schedule classification and pay system – in essence, a retention of the *status quo* – or make the General Schedule system more flexible. Other commenters questioned the Department’s ability to successfully implement the system and/or the ability of the Department’s managers to establish and apply performance standards fairly and consistently to pay determinations, especially if they have not used the current system effectively. Other commenters stated that the NSPS pay system must contain the transparency and objectivity of the General Schedule, including the involvement of Congress and the Federal Salary Council.

The Department plans to implement the system described in the proposed regulations. That system is consistent 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)(6)(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.

The General Schedule classification and pay system is an impediment to these expectations. The General Schedule does not provide the opportunity to appropriately

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

Under the General Schedule, performance is rewarded by exception, and market value is defined as “one size fits all.”

The General Schedule pay system is primarily a longevity-based system, i.e., pay increases are linked primarily to time in grade. In addition to length of time, employees must be found to be performing at an “acceptable level of competence” to receive a step increase. However, since 99 percent of all employees satisfy this requirement, virtually all employees can expect to receive base pay increases automatically of up to 30 percent over time. These increases are in addition to annual across-the-board pay increases. Even employees whose performance is unacceptable receive the annual across-the-board and locality pay increases that average between 3 and 5 percent. Over time, even minimally productive employees will progress steadily to the top of the General Schedule pay range and may be compensated significantly more than higher performing employees with less time in grade. A system based primarily on longevity is not designed to base compensation on performance.

Commenters stated that employees have no basis to predict salary from year to year and that they have no way of knowing the amount of their annual salary increases. Commenters stated that many benefits (e.g., leave, retirement, life insurance) are based on salary, and since raises are not guaranteed and cannot be predicted under NSPS, they will be losing benefits. Other commenters stated that their “high-three” average salary could be less under NSPS, which will reduce employee annuities. A commenter also noted that because salary costs under the NSPS pay system cannot be easily predicted, the A-76 contract bidding process will be more difficult to analyze.

The Department, while recognizing that there is less predictability under the NSPS pay system, also notes that pay increases are not completely predictable under the current system – other than periodic within-grade increases. Additionally, under current title 5 provisions a number of situations affect an employee’s salary (e.g., transfer from one locality pay area to another and change from an occupation with a special rate to an occupation without one) and therefore affect an employee’s annuity calculation. Furthermore, NSPS is a pay-for-performance system that will provide meaningful financial rewards to high-performing employees and greater employee control over future pay increases. High-performing employees will have the opportunity to achieve significant pay increases – the higher the performance, the higher the pay. The Department will be able to use salary trends to estimate future costs for purposes such as A-76.

Commenters questioned the Department’s statements that DoD has more than 20 years’ experience with pay-for-performance systems. Pay-for-performance systems similar to this proposal are not new. Pay banding has been part of the Department’s compensation program since 1980, and the Department has a significant amount of experience in implementing and evaluating performance-based pay systems (e.g., demonstration projects). Currently, approximately 44,000 of the Department’s employees are covered by performance-based pay systems.

Other Comments on Specific Sections of Subpart C

Section 9901.301 – Purpose

Many commenters stated that the pay-for-performance system would lower employee morale, increase competition among employees, and undermine teamwork and cooperation.

The NSPS performance management system provides opportunities for the Department to recognize and reward teamwork. The Department does not assume that employees are solely motivated by pay. As a responsible employer, the Department has the obligation to reward the highest performers with the highest levels of compensation – regardless of their motivational basis for achievement. The Department believes the new system will enhance employees’ desire to strive for maximum achievement. More importantly, this will provide for more equitable treatment of employees based on level of performance (which is consistent with merit system principles) and will help create a high-performance culture within the Department. In addition, a pay-for-performance system will allow the Department to be more competitive in recruiting and retaining top performers who have higher value in the labor market.

Commenters stated that since DoD bases military “within-grade increases” on longevity, civilian employees should continue to receive time-based increases. The enabling legislation did not grant the Department authority to waive the provisions of title 10, United States Code, under which military pay and benefits are established. Additionally, while the Department values both its military personnel and civilian employees, it continues to support separate pay and benefit systems in recognition of the different attributes and demands of military and civilian service.

Section 9901.302 – Coverage

Section 9901.302 lists the categories of employees eligible for coverage under subpart C. Commenters stated that Federal Wage System (FWS) and other prevailing rate employees should not be covered by the NSPS pay system. Others stated that since FWS and other prevailing rate pay systems are already based on market rates, such employees should be excluded from coverage. Other commenters thought the NSPS pay system should cover GS and FWS employees at the same time.

The Department intends to include all eligible employees in the NSPS human resources management and labor relations systems, as described in the Subpart A – General provisions section of this Supplementary Information. However, the Department does not intend to cover FWS employees in the initial implementation phases of the NSPS human resources management system. (See the Next Steps section of this Supplementary Information.) Prior to including FWS employees in the system, the Department will conduct additional analyses to determine the appropriate application of NSPS in the trades and crafts environment. Part of that analysis will include reviewing current wage survey approaches.

A commenter urged the regulations to exclude law enforcement officers from the NSPS pay system. The commenter stated that DoD has not provided any evidence that a pay-for-performance system is appropriate for law enforcement work, that law enforcement work often has no counterpart outside the Federal Government for labor market comparisons, and that the proposal does not consider the current difficulties in recruiting and retaining law enforcement officers. The Department considers pay for performance appropriate for law enforcement work. It also recognizes that it will have to

use appropriate comparisons when making determinations regarding pay ranges for law enforcement officers.

Commenters stated that employees appointed under the authority of section 1113 of Public Law 106-398 should be added to the coverage statement in § 9901.302. We believe that this refers to section 1101 of the National Defense Authorization Act for Fiscal Year 1999, as amended. This section provides authority for DARPA and selected military department laboratories to hire and pay a limited number of scientists and engineers. As shown in our matrix, these positions are outside the scope of NSPS. (See Section 9901.102 – Eligibility and coverage.)

Section 9901.303 – Waivers

Section 9901.303 lists the provisions of title 5 which DoD may waive or modify under these regulations, including the student loan repayment authority at 5 U.S.C. 5379. Commenters expressed concern that attorneys and other excepted service positions are ineligible to participate in the student loan repayment program.

Section 9901.303(c) states that employees occupying positions excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character are ineligible. This exclusion is identical to the exclusion in 5 CFR part 537, Repayment of Student Loans, and it does not exclude most attorneys and other excepted service employees from eligibility for student loan repayment.

Section 9901.304 – Definitions

Section 9901.304 provides definitions of terms used in subpart C. Commenters asked whether extraordinary pay increases (EPIs) are basic pay increases or bonuses. We

have revised the definition of “extraordinary pay increase” or “EPI” to clarify that an EPI may be a basic pay increase or a bonus.

A commenter asked for the meaning of “pay pool level,” as used in the definition of “modal rating.” The definition of modal rating has been revised to clarify that the term modal rating for this subpart refers to the most frequently occurring rating for employees in the same pay band within a particular pay pool for a particular rating cycle.

In response to general comments requesting greater clarity, we have revised the definition of “pay pool” to mean “the amount designated for performance payouts” instead of “the dollar value of the funds set aside for performance payouts.”

Commenters made various other requests for additional definitions of terms used in subpart C, such as “compensation,” “aggregate pay,” “conduct,” “pay system,” and “rate range.” In some cases, we do not believe a definition is needed. In other cases, we believe it is more appropriate to define or explain such terms in implementing issuances in order to preserve the Department’s flexibility.

#### Section 9901.311 – Major features

Section 9901.311 provides DoD with the authority to establish the NSPS pay system through implementing issuances and lists the major features of the NSPS pay system. Commenters questioned whether supervisory and nonsupervisory employees will be under the same pay system. Others questioned the use of a supervisory differential under the system.

The same pay structure and pay administration rules cover both supervisory and nonsupervisory employees. Details on the treatment of supervisors and non-supervisors under this section will be addressed in the implementing issuances. At this time, DoD

plans to include supervisory and nonsupervisory employees in the same career groups but to place them under separate pay schedules. NSPS does not establish a supervisory differential.

Section 9901.312 – Maximum rates

Section 9901.312 provides the Secretary with the authority to establish limitations on maximum rates of basic pay and aggregate pay for employees covered by the NSPS pay system. During the meet-and-confer process, participating labor organizations recommended retitling the section “Maximum and Minimum Rates” and adding a requirement to the end of the section that the overall amount allocated for compensation for DoD employees covered by NSPS must not be less than the amount that would have been allocated for compensation if they had not been converted to NSPS. This section has not been changed; however, this topic is addressed under Section 9901.313 – National security compensation comparability of this Supplementary Information.

Commenters expressed concerns that maximum rates would limit the Department’s ability to reward pay for good performance and reduce current pay potential. However, we note that any pay system will include salary ranges (including a maximum rate) for any given set of jobs, consistent with the applicable labor market. Even the most outstanding performers will be limited by the salary range for the job they perform. The proposed NSPS pay system is designed to allow the best performers to progress in pay more rapidly. The ability to reach the range maximum more quickly is a benefit to the high-performing employee.

Section 9901.313 – National security compensation comparability

Section 9901.313 is consistent with 5 U.S.C. 9902(e)(4), which requires that, to the maximum extent practicable, through fiscal year 2008, the overall (aggregate) amount allocated for compensation of the Department's civilian employees covered by NSPS may not be less than the amount that would have been allocated for compensation of such employees if they had not been converted to the NSPS pay system.

During the meet-and-confer process, the participating labor organizations recommended adding a new paragraph to this section of the regulations that requires the rates of compensation for DoD civilian employees to be adjusted at the same time and in the same proportion as the rates of compensation for members of the armed forces, as required by 5 U.S.C. 9902(e)(3). Other commenters recommended that civilian employees receive pay increases identical to members of the armed forces. Comparability with military pay is already addressed under 5 U.S.C. 9902(e)(3) and does not need to be repeated in these regulations.

Commenters requested clarification on the formula DoD will develop in applying this section. Commenters recommended that DoD ensure that through 2008 each individual installation receive the same funding it would have received under the General Schedule. Others, including labor organizations during the meet-and-confer process, recommended that the final regulations state that the money allocated to employees collectively will be the same as that allocated under the General Schedule. Commenters also asked whether the amount of money available to employees after 2008 will be less than the amount available under the General Schedule. Commenters requested that § 9901.313 include a requirement that the Department actually spend the same level of

funding for employee pay increases under NSPS as would be spent under the General Schedule. Other commenters pointed out that this section protects a pool of money, but does not protect the pay of individual employees.

The Department is developing financial policy guidance for issuance. In addition, training will be conducted to reinforce these funding requirements. However, Public Law 108-136 does not require that every installation be funded at the same level as under the General Schedule, nor does it require that each individual employee will receive the same pay increase under NSPS that he or she would have received under the General Schedule.

One of the key requirements of the NSPS pay-for-performance system is providing meaningful financial rewards to high-performing employees. Without the proper funding, this requirement cannot be realized. Although the enabling legislation does not mandate a funding level beyond fiscal year 2008, the Department recognizes the importance adequate funding plays in a pay-for-performance system.

Commenters questioned the meaning of various terms used in this section. For example, commenters asked what “pay in the aggregate” means in paragraph (a). Commenters also asked for a definition of “to the maximum extent practicable” in paragraph (b) of this section and who would decide what “to the maximum extent practicable” means. Commenters also questioned the meaning of “flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact pay levels” in that same paragraph. Commenters stated that DoD could use the flexibility provided by this section to lower payroll costs and divert such funds to other budget needs.

The enabling legislation recognizes that all future circumstances cannot be predicted. The terminology “to the maximum extent practicable” was used in the enabling legislation and was designed to preserve the flexibility to accommodate changes in missions, changes in the composition of the workforce (e.g., mix of new employees, long-term employees, and retirement eligible employees), and other changes that might affect pay levels. Further defining the term would be inconsistent with the intent of the law. However, under NSPS guiding principles, the Department values a high-performing workforce and recognizes that maximum effort to adequately fund civilian employee compensation is crucial. The term “pay in the aggregate” refers to the concept addressed earlier that the enabling legislation does not require that each individual employee will receive the same pay increase under NSPS that he or she would have received under the General Schedule. The enabling legislation protects pay for employees overall rather than at the individual level.

A commenter recommended that the two uses of the term “pay” in § 9901.313(b) be replaced with the term “compensation” because “compensation” is defined in paragraph (c) and “pay” is not. We agree and have replaced the term “pay” with “compensation” in § 9901.313(b).

During the meet-and-confer process, the participating labor organizations recommended adding a paragraph to this section to address locality pay funding. Another commenter recommended that the payments included as “compensation” under § 9901.313(c) be clarified. To clarify what types of payments are included in the term “compensation” as used in this section, we have redefined “compensation” to mean basic pay “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 similar payment under other legal authority.”

Section 9901.322 – Setting and adjusting rate ranges

Section 9901.322 provides DoD with the authority to set and adjust rate ranges, determine the effective date of rate range adjustments, establish different rate ranges and provide different rate range adjustments for different pay bands, and adjust the minimum and maximum rates of a pay band by different percentages.

Commenters, including labor organizations participating in the meet-and-confer process, were concerned about the frequency and effective dates of rate range adjustments. In response to these comments, paragraph (b), which says DoD may determine the effective date of newly set or adjusted band rate ranges, has been modified to add: “Established rate ranges will be reviewed for possible adjustment at least annually.” We anticipate making rate range adjustments (when warranted) and performance payouts in January of each year. However, we have not revised the regulations to prescribe an effective date for such adjustments because this would unduly limit the Department’s ability to make adjustments at other times in response to significant labor market changes or nonstandard performance cycles.

Commenters questioned whether consideration of the “availability of funds” in § 9901.322(a) will allow DoD to use salary funds for other budget needs and noted that this factor appears to contradict the funding guarantees provided under § 9901.313 – National security compensation comparability. We believe it is clear in the regulations that DoD must comply with § 9901.313. The availability of funds criterion may be considered only after the requirements of § 9901.313 have been met.

Commenters asked why labor market conditions will be considered in setting and adjusting rate ranges. Others asked why different pay adjustments should be made for different pay bands. Other commenters felt that basing pay for employees on the local job market is a step in the right direction of closing the pay gap between Federal employees and their private sector counterparts. Commenters asked whether a private sector company's lay-offs will cause a rate range minimum or maximum to be adjusted downward.

The Department has not revised § 9901.322(c). The ability to adjust rate ranges based on labor market conditions and to adjust different pay bands by different percentages is a key flexibility in designing a system responsive to labor market factors. Under § 9901.322(a), the Department will consider a number of factors in determining appropriate rate ranges. Labor market conditions are only one of these factors. Others include such factors as the Department's mission requirements, availability of funds, and pay adjustments granted to employees of other Federal agencies. The NSPS regulations do not give any one factor greater weight than others. Given the circumstances of a particular year, any factor may have a greater or lesser effect on decisions regarding adjustments in rate ranges. Section 9901.322 refers to "other relevant factors," which could include any number of indicators, such as recruitment and retention rates for specific occupations/locations and the projected availability of candidates for specific occupations compared to projected vacancies in these occupations. In the framework set by § 9901.322, private sector pay trends do not require the Department to match these trends automatically, because they are only one of several factors that may be considered in setting and adjusting rate ranges.

Commenters and labor organizations participating in the meet-and-confer process were concerned about the flexibility provided in § 9901.322(d) allowing DoD to adjust the minimum and maximum rates of a pay band by different percentages. The labor organizations recommended that the regulations require pay band minimum and maximum rates to be adjusted by the same percentage. Other commenters recommended that the minimum and maximum rates be adjusted by the same percentage to minimize administrative burdens and to avoid pay compression if the minimum rate is increased, but not the maximum rate.

Commenters also felt that allowing the Department to adjust the maximum rate of a pay band by an amount different from the minimum rate could benefit a few favorite employees at the top of a band by providing opportunities for greater performance pay increases at the expense of other good employees. Commenters also were concerned that, if minimum pay band rates are not increased, employees in such bands will not receive a rate range adjustment. A commenter suggested that employees receive the average percentage increase of the minimum and maximum pay band rates to prevent DoD from freezing pay. The Department does not believe that a requirement to automatically adjust the minimum and maximum pay band rates by the same amount would provide the flexibility necessary to make the NSPS pay structure reflective of market-based factors. However, pay compression is one the factors that will be considered in establishing minimum and maximum rates.

Commenters stated that only Congress should have power to set pay raises. Others stated that § 9901.322 will allow DoD to reduce congressionally approved pay raises to a lower level and that all employees, including high performers, can have their

pay cut if DoD decides to use the money for mission or other requirements. Others stated that every year Congress and the President determine the cost-of-living adjustment (“COLA”) increase that employees receive and that it is not fair to take money Congress intended to offset inflation and put the money in a performance pool. Commenters recommended that DoD continue to allocate the annual average pay raise that is authorized and appropriated by Congress for GS employees to NSPS employees who are fully successful in addition to other rewards based on outstanding performance. The current practice under the General Schedule of increasing pay for all employees by the same amount results in the overpaying of employees in some occupations and the underpaying of employees in other occupations. Under NSPS, the Department is creating a system that allows the flexibility necessary to consider both market factors and performance in making compensation decisions.

As set forth in 5 U.S.C. 5303, the amount of the annual January adjustment in the General Schedule is based on a formula using the Employment Cost Index (ECI) – a measure of the movement in wages and salaries for private industry workers. However, the President may propose an alternate plan due to national emergency or economic conditions and notify Congress of his plan to adjust the General Schedule by a different amount than that indicated by the ECI. In recent years Congress has specified in legislation the amount of the increase in General Schedule pay. However, whether it is specified by the President or by legislation, the adjustment in General Schedule rates is not based on a cost-of-living calculation, and is not a COLA increase. (As a point of clarification, nonforeign area cost-of-living allowances (COLAs) are paid as additional compensation to certain Federal employees in Alaska, Hawaii, Puerto Rico, Guam, the

U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands. The COLA is designed in recognition of the higher living costs in these local areas compared with living costs in the Washington, DC, area. To set the COLA rates, OPM surveys the prices of more than 200 items, including goods and services, housing, transportation, and miscellaneous expenses in each of the allowance areas and in the Washington, DC, area. Section 5941 of title 5, United States Code, and Executive Order 10000 (as amended) authorize the payment of COLAs in nonforeign areas.)

Commenters stated that it is unfair for the Secretary to set pay in secret, that such decisions may result in no or smaller increases for some pay bands compared to others, that unlike General Schedule pay decisions, pay-setting decisions will now be made behind closed doors and employees will have no opportunities to influence the decisions, and that the Bureau of Labor Statistics (BLS) data used by the current system is available for public review and accountability. A commenter also questioned what safeguards are in place to ensure that rate range adjustments do not result in EEO violations. Merit system principles and anti-discrimination laws are not waived under NSPS. The merit system principle at 5 U.S.C. 2301(b)(3) ensures 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.”

The Department concurs with commenters that the NSPS pay system must be designed and executed in a transparent and credible manner that involves employees and employee representatives. The Department will establish in its implementing issuances a

process for determining rate range adjustments. Employee representatives will be involved through the “continuing collaboration” process.

Section 9901.323 – Eligibility for pay increase associated with a rate range adjustment

Section 9901.323 provides that an employee must have a rating of record above “unacceptable” to receive a pay increase associated with a rate range adjustment. A number of commenters stated that payment of rate range adjustments should not be based on employee performance. Commenters objected to withholding such annual increases for employees with an unacceptable rating, especially if employees are denied the ability to appeal or grieve the rating. As discussed in our analysis of comments on subpart D, we have revised the regulations to provide bargaining unit employees with the option of grieving a rating of record through a negotiated grievance process. The Department believes that providing pay increases to employees whose ratings are unacceptable is inconsistent with a performance-based pay system.

Commenters and the labor organizations participating in the meet-and-confer process expressed concerns that § 9901.323(c) penalizes employees who do not have a rating of record by not guaranteeing them a rate range adjustment and that such employees should be presumed to have a rating of above “unacceptable.” In response to these comments, we have revised the regulations to provide that an employee without a current rating of record for the most recently completed appraisal period will receive the same percentage increase as employees with a rating above “unacceptable.” Paragraph (a) has been modified to add that, except for employees receiving a retained rate under § 9901.355, employees with a current rating of record above “unacceptable,” and employees who do not have a current rating of record for the most recently completed

appraisal period, will receive a percentage increase in basic pay equal to the percentage by which the minimum of their rate range is increased (not to exceed the maximum rate of the band). Additionally, paragraph (c) has been deleted.

Commenters stated it was not clear whether all employees with a rating of record above “unacceptable” will receive the same percentage increase. Other commenters stated that this section implies that all employees above “unacceptable” will receive a rate range adjustment, but those with salaries at the top of the pay band may not if the maximum rate of that band is not increased.

Section 9901.323(a) provides that employees with a rating of record above unacceptable will receive a percentage increase in basic pay equal to the percentage by which the minimum rate of their rate range is increased. However, this increase is subject to § 9901.356(b), which provides that an employee’s rate of basic pay may not exceed the maximum rate of the employee’s pay band rate range, except when pay retention under § 9901.355 applies.

Commenters asked if an employee’s pay could drop below the minimum of the pay band rate range due to not receiving a pay increase based on unacceptable performance. Other commenters asked whether employees will be converted to the next lower band if pay falls below the pay band minimum rate. Under the NSPS pay system, an employee’s pay could drop below the minimum of the pay band rate range if the minimum of the rate range exceeds the employee’s salary. However, this situation does not require the employee to be placed in a lower pay band. The employee’s pay band is determined by work assignment.

Commenters asked if employees on retained rates will receive rate range increases. We have revised § 9901.323(a) to clarify that employees receiving a retained rate under § 9901.355 will not receive a rate range increase.

Section 9901.331 – General

Section 9901.331 includes general provisions regarding local market supplements. Commenters asked for clarification of the difference between GS locality pay and the NSPS local market supplements described in § 9901.331. Commenters also asked whether local market supplements will replace current GS locality rates and special rates and nonforeign area cost-of living-allowances. Finally, some commenters questioned the cost of administering a new locality pay system.

The local market supplement authority replaces the GS locality pay and special rate authorities. Under NSPS, employees stationed in locations outside the 48 contiguous States will continue to receive applicable foreign and nonforeign area cost-of-living allowances and other differentials and allowances under 5 U.S.C. chapter 59.

Under the GS locality pay system, all employees in a geographic location receive the same locality rate without regard to their occupation or the level of duties and responsibilities they are expected to perform. This “one-size fits all” method treats all occupations alike, regardless of market value and competition. This method results in underpaying employees in some occupations and geographic areas while overpaying others (as compared to the applicable labor market). NSPS is designed to be much more market-sensitive. It gives the Department significant discretion to set and adjust the minimum and maximum rates of pay for each pay band based on national and local labor market factors and conditions. Instead of “one size fits all” pay increases, NSPS allows

the Department to allocate payroll dollars to the occupations and locations where they are most needed to carry out the Department's mission. The Department believes that the development of a new system to identify appropriate rate range adjustments and local market supplements is critical to appropriately compensating its workforce and will consider cost factors as it determines the most effective and efficient method for this purpose.

In response to comments regarding the lack of specificity in the pay retention provisions of the regulations, we have removed the language in § 9901.331 providing DoD with the authority to determine the extent to which local market supplements will apply to employees receiving a retained rate. Section 9901.355(e) provides that employees receiving a retained rate are entitled to any applicable local market supplement. (See *Section 9901.355 – Pay retention.*)

*Section 9901.332 – Local market supplements*

Section 9901.332 provides DoD with the authority to establish local market supplements and local market area boundaries. This section also provides the purposes for which local market supplements are considered basic pay.

A number of commenters expressed concerns about variations among local market supplements for occupations in the same geographic area. The commenters felt this flexibility allows errors and inequities to develop over time and will be confusing to employees. Other commenters were pleased to see a shift in the determination of locality pay from strictly geographic to occupation-based as a way to help recruit and retain employees. The Department believes that variations in local market supplements based on occupations are appropriate and reflective of the conditions in some labor markets.

Commenters felt that the criteria for establishing local market supplements and local market areas should be in regulation. A commenter stated that the regulations should require clear, compelling criteria for the establishment of additional local market supplements that require a balance of human resources interoperability with mission requirements. Another commenter recommended that the regulations be modified to ensure that employees in rural areas and those adjacent to current locality pay areas are not unfairly impacted. Others questioned whether the cost of living, hazardous duties, education, or unique or special skills requirements will be considered in establishing local market supplements. A number of commenters asked whether local market supplements will apply to employees stationed in nonforeign and foreign areas and noted that such payments may help with staffing in those areas.

In response to comments requesting additional specificity, we have revised paragraph (a) to clarify that the Secretary will have sole and exclusive authority to establish local market areas for “standard local market supplements” and “targeted local market supplements.” We have also added definitions of “standard local market supplement” and “targeted local market supplement” in § 9901.304. Standard local market supplements apply to employees within a given pay schedule or band who are stationed within a specified local market area, unless a targeted local market supplement applies. Targeted local market supplements apply to a defined category of employees (based on occupation or other appropriate factors) that may be established to address recruitment and retention difficulties or for other appropriate reasons.

DoD will consider the comments regarding the establishment of local market supplements and local market areas in developing the implementing issuances. The

regulations do allow for the possibility of establishing local market supplements in foreign and nonforeign areas outside the 48 contiguous States; however, in determining the need for and level of any such supplements, DoD will take into account employees' entitlement to allowances and differentials under 5 U.S.C. chapter 59.

A commenter questioned the attempt to preclude judicial review of local market area boundaries under § 9901.332(b). We have clarified § 9901.332(b) to be more consistent with the limitation on judicial review of locality pay areas in 5 U.S.C. 5304(f)(2). Section 5304(f)(2) of title 5, U.S. Code, is not waived by these regulations, but is modified for continued application. Judicial review of any DoD regulation regarding the boundaries of standard local market areas is limited to whether or not the regulation was promulgated in accordance with the administrative procedures requirements in 5 U.S.C. 553. This same type of limitation on judicial review applies to locality pay areas administered by the President's Pay Agent under the current locality pay law.

A number of commenters asked for clarification on the purposes for which local market supplements are considered basic pay. Commenters stated that local market supplements should be considered basic pay for the same purposes as GS locality rates. Commenters also questioned whether local market supplements will be used to compute awards and performance payouts under § 9901.342 that are computed as a percentage of basic pay.

In response to these comments, we have revised paragraph (c) to add that local market supplements are basic pay for 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, and for lump-sum payments for accumulated and accrued annual leave under 5 CFR part 550, subpart L, consistent with the locality pay regulations at 5 CFR part 531, subpart F. We note that paragraph (c) includes a catchall provision under which local market supplements are considered basic pay in computing other payments and adjustments for which locality pay under 5 U.S.C. 5304 is considered basic pay. (See § 9901.332(c)(11) in these final regulations. We have revised the language in the proposed regulations, which was located in § 9901.332(c)(8), to clarify this provision.) Thus, local market supplements also would be used in computing percentage-based awards under 5 U.S.C. chapter 45, consistent with the treatment of locality pay under 5 CFR 531.610(h). Local market supplements are not considered basic pay in applying the performance payouts provision; instead, local market supplements are applied after determining the employee's new rate of basic pay.

*Section 9901.333 – Setting and adjusting local market supplements*

Section 9901.333 provides DoD with the authority to set and adjust local market supplements and determine the effective date of such adjustments. A number of commenters requested clarification on how labor market conditions would be considered in setting local market supplements. For example, some commenters questioned how local market supplements will work for occupations that have no local labor market, no private-sector job equivalents, or where local market rates are not high. Other commenters noted that local labor markets can be volatile and that the ups and downs of the market may be difficult for employees to understand. Commenters also questioned whether local market supplements may be reduced. The Department will consider these

comments as it develops its procedures for setting and adjusting local market supplements.

Commenters stated that 9901.333(b) should be revised to state that supplements will be reviewed periodically. Labor organizations participating in the meet-and-confer process recommended that the regulations be amended to require that local market supplements be adjusted the first pay period in January and that supplements be reviewed at least annually in conjunction with rate range adjustments to determine whether an adjustment is warranted. Section 9901.333(b) provides that DoD will review established local market supplements at least annually. This language is retained since it does not prevent the Department from conducting a review more frequently. However, we have not revised the regulations to prescribe an effective date for such adjustments because this would unduly limit the Department's ability to make adjustments at other times in response to significant labor market changes.

*Section 9901.334 – Eligibility for pay increase associated with a supplement adjustment*

Section 9901.334 provides that an employee must have a rating of record above “unacceptable” to receive a pay increase associated with a local market supplement adjustment. A number of commenters stated that payment of local market supplement adjustments should not be based on employee performance. Commenters objected to withholding such increases for employees with an unacceptable rating, especially if employees are denied the ability to appeal or grieve the rating. As discussed in our analysis of comments on subpart D, we have revised the regulations to provide bargaining unit employees with the option of grieving a rating of record through a negotiated grievance process. However, the Department does not consider providing pay

increases to employees with ratings of unacceptable to be consistent with the intent of a performance-based system.

Commenters and the labor organizations participating in the meet-and-confer process expressed concerns that § 9901.334(c) penalizes employees who do not have a rating of record by not guaranteeing them a local market supplement adjustment and that such employees should be presumed to have a rating of above “unacceptable.” In response to these comments, we have revised the regulations to specify that an employee without a current rating of record for the most recently completed appraisal period will receive the same percentage increase as employees with a rating above “unacceptable.” Paragraph (a) has been modified to add that employees with a current rating of record above “unacceptable” and employees who do not have a current rating of record for the most recently completed appraisal period will receive a pay increase resulting from a supplement adjustment. Additionally, paragraph (c) has been deleted.

Commenters asked whether employees on retained rates will receive local market supplement increases. Commenters also asked whether all employees with a rating of record above unacceptable will receive the same percentage local market supplement increase. As previously discussed in this Supplementary Information, § 9901.355 is revised to provide that employees receiving a retained rate will receive any applicable local market supplement increase.

*Section 9901.341 – General*

During the meet-and-confer process, the participating labor organizations recommended adding language at the end of § 9901.341 stating that the pay and pay administration process must be fair, transparent, and credible. The regulations already set

forth the objectives that the entire NSPS, including the NSPS pay system, be understandable, credible, trusted, and consistent with merit system principles. (See § 9901.101.)

Based on a comment regarding language consistency between §§ 9901.341 and 9901.342(a), to maintain consistency we have added individual contribution as a factor in awarding performance-based pay to employees.

Section 9901.342 – Performance pay increases

Section 9901.342(a) provides an overview of the DoD performance-based pay system for employees under a performance management system established under subpart D. Under a pay-for-performance system, a portion of the annual salary increase received by an employee is based on his or her rating of record. The rating is retrospective, looking back over the employee's performance and contribution over the applicable rating period. This section establishes that NSPS will use a pay pool concept to manage, control and distribute performance-based payouts. Pay pool panels serve as calibration committees and are normally populated by management officials. DoD implementing issuances will provide additional details regarding pay pool constructs, pay pool management, and a pay pool reconciliation process. The pay pool concept improves fairness over the current performance evaluation methodologies in the Department by forcing the open collaboration of peer managers in discussing and assigning ratings to employees within the pay pool. The specific processes for performance management and the accompanying performance-based pay decisions will be addressed in DoD implementing issuances.

Commenters expressed mixed concerns about basing performance payouts on employee contributions. Some commenters recommended that the regulations allow components to implement a contribution-based system. Other commenters agreed that the level and value of an employee's contribution should be factored into performance payouts. Others recommended that contributions not be factored into performance payouts because management controls an employee's possible contribution level and the contribution assessment is arbitrary. NSPS is a performance-based system, and we believe it is appropriate to consider an employee's contribution in the rating and performance payout an employee receives.

Based on a comment regarding language consistency between §§ 9901.341 and 9901.342(a), we have added team performance as a factor in awarding performance-based pay to employees. Other commenters questioned how team or organizational performance will affect individual employee payouts. Some commenters believe that organizational performance should not affect an individual's pay, while other commenters stated that performance payouts should be based on organizational performance. Under the NSPS range of shares concept, organizational performance can be considered in determining the appropriate share assignment.

Regarding the use of pay pool panels, a number of comments suggested that pay pool deliberations and recommendations are susceptible to internal politics, funding availability, staffing needs, and personal favoritism. Similarly, many commenters, including labor organizations participating in the meet-and-confer process, expressed concern that unless the regulations preclude supervisors from inclusion in the same pay pool as their subordinate employees, management cronyism would undermine the system.

Commenters also expressed concerns about a pay pool manager's ability to overturn a supervisor's decisions. Other commenters questioned how consistency will be ensured among pay pools.

Subject to continuing collaboration, implementing issuances will require that pay pool management be transparent and credible while protecting the privacy interests of employees concerned and allowing the free exchange of viewpoints and observations. Subject to continuing collaboration, implementing issuances will provide safeguards to support the neutrality and impartiality of pay pool proceedings. The responsibilities of a pay pool manager under a pay-for-performance system typically include the review of supervisors' proposed ratings of record for consistency and equity across organizational units and to guard against potential discrimination or politicization before finalizing ratings. The regulations and implementing issuances will require that decisions made by pay pool panel members and managers must be consistent with the merit systems principles found in 5 U.S.C. 2301. We have added a new paragraph (a)(3) in § 9901.342 that expressly states the requirement that pay pools will be managed by a pay pool manager or pay pool panel, with the responsibility for reviewing proposed rating and share assignments to ensure fairness and consistency.

Regarding the comments on the commingling of employees and supervisors in the same pay pool, we have not prescribed this level of specificity for the structuring of the pay pool in this rule. There are a number of considerations relative to pay pool constructs. These include functional or organizational orientations, funding, and population size. Depending on these and other factors it may be appropriate to commingle supervisory and non-supervisory personnel provided other measures are taken

to prevent actual and perceived conflicts of interest. For example, participants in the pay pool process will not be allowed to participate in deliberations that directly affect their own performance assessment or pay. This level of detail is best handled in implementing issuances.

Some comments expressed the belief that pay-for-performance is contrary to the needs of national security and that instead of encouraging team cooperation and organizational efforts, the system will encourage unhealthy competition. The deterioration of team or collaborative work ethics and atmosphere is not an inevitable outcome of a pay-for-performance system. We expect that the importance of teamwork and cooperation will 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 will be impressed on employees.

Some commenters questioned the use of the modal rating for employees who do not have a rating of record. The final regulations continue to provide that, for certain employees without a rating of record, DoD will base the performance payout under § 9901.342 on the employee's last rating of record or modal rating, whichever is most advantageous to the employee. (As discussed later, we have made some clarifying language changes in § 9901.342(f) and (g) and added a sentence to give DoD authority to address situations where it is not possible to determine the modal rating. Also, we have revised the definition of "modal rating" in § 9901.304.) DoD considered several options for addressing this issue and determined that use of a modal rating is the most equitable. The modal rating provision applies only to employees returning from a period of military

service as described in § 9901.342(f) or employees returning to duty after being in a workers' compensation status as described in § 9901.342(g), except as otherwise provided in DoD implementing issuances. (See § 9901.342(a)(2).)

We note that in § 9901.342(a)(2), the term "performance payout" has been substituted for "pay increase or bonus payment under this part" as a matter of consistent terminology.

During the meet-and-confer process, the participating labor organizations recommended deletion of the proposed language at § 9901.342(a)(2) authorizing the appropriate rating official to prepare a more current rating of record, consistent with § 9901.409(b). Other commenters also were concerned about the fairness of this provision. One commenter agreed with the flexibility to prepare a more current rating of record, but cautioned that any payout should be based on overall performance, not performance that has occurred more recently.

We have not changed the regulations in response to these comments. This provision is intended to allow a rating official to raise or lower an employee's rating of record based on sustained and significant changes in his or her performance since the last rating of record and is consistent with current regulations. In keeping with the principle that pay and retention should be linked to performance, it is incumbent on management to ensure that the record accurately reflects performance, whether it has improved or deteriorated. This is particularly true in the case of an employee who was previously performing below expectations and who shows improvement over a significant period of time, perhaps as a result of work restructuring or additional training. We note that the issuance of any rating of record is subject to reconsideration procedures. While the

regulations remain unchanged, the implementing issuances will require that such ratings be subject to procedures similar to those required for ratings issued at the end of the appraisal period.

A number of comments addressed concerns that pay increases will be subject to influences beyond the control of the individual employee, such as the number of shares assigned to other employees in the pay pool, pay pool funding levels, the use of pay pool funds for entry/developmental pay increases, and the distribution of discretionary payments. Similarly, many commenters were concerned that if more employees within a pay pool receive higher ratings, the value of the payout for each employee is reduced. Commenters also suggested that this pay pool and shares system will result in forced ratings distributions and quotas. Other commenters, including the labor organizations participating in the meet-and-confer process, made a number of recommendations regarding the funding for pay pools. Finally, a number of commenters expressed concerns about including across-the-board increase money in pay pool funds.

It is true that pay pools will not have unlimited funds available. To create a system based on that approach would be fiscally unsound. In keeping with our guiding principles, the NSPS performance management system is designed to place greater emphasis on making meaningful distinctions between different levels of performance and to reward employees appropriately based on those levels. The proposed regulations state that supervisors and managers will be held accountable for making meaningful distinctions among employees based on performance and contribution. Implementing issuances will continue to stress accountability at all levels for performance evaluations and the related pay decisions and will provide more specific guidance on pay pool

funding. We note that a share-based system does not result in forced distribution of ratings, since a share-based system does not rely on the distribution of ratings to control costs. Current across-the-board increases will be replaced by a combination of adjustments, including adjustments to minimum levels of the rate ranges and performance-based increases, and, thus, such funding may be included in the pay pool. The Department believes that this is consistent with intent of the enabling legislation.

Another recurring theme among commenters was the concern that an employee's pay would be subject to his or her manager's communication and persuasion skills as demonstrated at the pay pool panel meetings. We agree that care must be taken during the pay pool management process to ensure that an employee's final rating is more than a function of the negotiating skills of his or her manager. Expectations for raters and pay pool panel participants will be emphasized in training materials and implementing issuances.

During the meet-and-confer process, participating labor organizations requested that a fixed number of shares, rather than a range of shares, be associated with a particular rating level. Commenters also expressed the belief that by fixing a single share per level of performance, employees would be better insulated from bias and unfair treatment by management. The Department recognizes that a valid, reliable, and transparent performance management system with adequate safeguards for employees is essential. However, for a system to be effective, it must 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. For example, factors that may be considered in the assignment of shares could include the position of the employee's salary within the rate range, the receipt of a promotion pay increase within the last year, the employee's contribution to the accomplishment of important organizational objectives, team/organizational performance, whether the performance was sustained and likely to continue over time or related to a particular set of tasks or projects, or other appropriate factors. In response to the concerns expressed regarding use of a range of shares, we have added a new paragraph (c)(3) in § 9901.342, which (1) requires that DoD provide in implementing issuances additional guidance on the use of share ranges, including some examples of appropriate use of factors in making specific share assignments; (2) requires that DoD organizations inform employees of the factors that may be considered in making share assignments within their pay pool at least 90 days prior to the end of the appraisal period; and (3) provides that pay pool managers and/or pay pool panels will review proposed share assignments to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

Section 9901.342(d) of the regulations provides 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. At the same time, the regulations allow DoD to tailor the performance share calculation to the mission and performance needs of individual components and the specific performance requirements and priorities of organizations, individuals, and occupational groups.

Commenters requested that the regulations provide a more detailed explanation of the formulas used to derive share values and payout amounts. This can best be handled by DoD in its implementing issuances or operating procedures. Similarly, some comments requested that share values be set or predetermined. Some commenters recommended that share value be expressed as a dollar amount. Others recommended that share value be expressed as a percentage. Because DoD is prohibiting the use of forced ratings distribution, the exact value of a share cannot be determined prior to completion of the rating process. In addition, the regulations preserve flexibility in setting share values to establish a more nimble pay-for-performance system. We have not changed the regulations in response to these comments.

Commenters questioned the relationship of the share value to the employee's salary. DoD intends to prescribe a payout calculation such that an employee's payout will be a function of the pool total base salary value, the number of shares assigned within the pool, the employee's salary (if the share value is computed on a percentage basis), and the number of shares assigned to the employee.

Section 9901.342(d)(3) authorizes DoD to establish "control points" within a pay band that limit increases in the rate of basic pay and may require certain criteria to be met for increases above the control point. A commenter likened control points to "invisible barriers that prevent most employees from ever reaching the top of their band." The same commenter suggested that the use of pay pools will provide sufficient cost control without the need for control points. A number of other commenters also expressed similar concerns about control points. During the meet-and-confer process, participating

labor organizations recommended that the authority to establish control points be deleted from the regulations.

The concept of control points is not inconsistent with the goals of a pay-for-performance system, which envisions a greater link between pay decisions and an individual's performance. Control points are tools to manage employees' progression through the bands and can help to ensure that only the highest performers move into the upper range of a pay band, which would allow the Department to set pay more consistently with the labor market and to be more effective in attracting and retaining top performers. Several DoD personnel demonstration projects have successfully used control points in their pay-for-performance systems. We will ensure that if control points are used under NSPS, they are well defined and understandable to employees.

Section 9901.342(d)(4) specifies that a performance payout may not cause an employee's rate of basic pay to exceed the maximum rate of the band or applicable control point. Commenters expressed concerns that this provision unduly limits pay increases and that the paragraph should be modified to state that an employee's rate of basic pay may not exceed a control point only if the employee does not meet the applicable control point criteria. We have not modified the regulations in response to this comment, since we believe the regulatory text is clear. Section 9901.342(d)(4) states that an employee may not receive a pay increase that causes his or her rate of basic pay to exceed an "applicable" control point. A control point is not applicable unless the employee fails to meet the criteria established under § 9901.342(d)(3).

Also relative to § 9901.342(d)(4), a number of comments relayed concern that management decisions relative to the distribution of performance payouts between

bonuses and increases in basic pay would be subject to bias and favoritism. Many comments suggested that organizations might institute policies that promote the use of lump-sum payments in lieu of increases in basic pay as a cost savings measure. Commenters especially emphasized the long-term cost to employees in terms of retirement benefits. We acknowledge that such decisions cannot be taken lightly. Again, these regulations require, and DoD implementing issuances will emphasize, that such distinctions must be consistent with the merit system principles found in 5 U.S.C. 2301 and supported by employee job performance and contribution. Training and supplemental guidance will illustrate the short- and long-term outcomes of payout distribution decisions as they affect organizations and employees. In addition to the system requirements at § 9901.405(b)(4) and (c), which hold supervisors accountable for effective performance management, the proposed regulations provide at § 9901.406(c) that the performance expectations for supervisors and managers will include the assessment and measurement of how well they exercise their performance management responsibilities under NSPS.

Consistent with other changes in the regulations that clarify how DoD will grant performance payouts to retained rate employees, we have amended § 9901.342(d)(6) to clarify that for an employee receiving a retained rate under § 9901.355, a lump-sum performance payout may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record who is at the maximum rate of the band. (See *Section 9901.355 – Pay retention* for additional information.)

Section 9901.342(e) specifies the circumstances under which performance payouts may be prorated. Commenters asked for clarification or made suggestions

regarding when and how performance payouts would be prorated. This language remains unchanged. Policies relative to proration can best be handled by DoD in its implementing issuances.

Sections 9901.342(f) clarifies how DoD will set the rate of basic pay for employees upon reemployment after performing honorable service in the uniformed services and how intervening performance pay adjustments for such employees would be determined upon reemployment. The regulations require DoD to issue implementing issuances governing how it will set the rate of basic pay for employees upon reemployment and require DoD to credit the employee with intervening rate range adjustments under § 9901.323 and increases from performance payouts. Commenters agreed that employees returning from performing honorable uniformed service should not be disadvantaged under the NSPS pay system. However, some comments suggested that employees performing military service will be negatively affected upon return to civilian service under NSPS. For example, a commenter noted that the regulations do not address the flexibility managers will have to assign a returning service member to the low end or the high end of the share range assigned to a rating level. We have revised the language to clarify that the pay of an employee returning from qualifying service (who does not have a rating of record for the appraisal period serve as the basis for the performance payout) will be set at a rate including performance-based pay increases equal to either the average increase received by employees assigned the modal rating or assigned the same rating as the employee's actual, most recent rating of record, whichever is most advantageous to the employee.

Additionally, the following language was added to § 9901.342(f): “In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, DoD may establish alternative procedures for determining a basic pay increase under this section.” This language was added primarily in response to concerns that some organization may experience skewed pay pools during the first years NSPS is implemented because of the absence of a statistically significant number of employees in the pay pool due to mobilizations (as in the case of military technicians).

Section 9901.342(g) clarifies how DoD will set the rate of basic pay for employees upon reemployment after being in a workers’ compensation status. This section has been modified to the extent necessary so that it remains consistent with § 9901.342(f) and in response to comments made about paragraph (g) that were similar to those made about paragraph (f).

During the meet-and-confer process, the participating labor organizations recommended adding a new paragraph to § 9901.342 requiring that all provisions in part 9901, including ratings of record and payouts, be subject to a final independent third-party review. A commenter agreed with the rule in § 9901.342(c) that employees with unacceptable ratings of record should not receive a performance payout, but only if the employee has the ability to appeal or grieve the rating. Other commenters made similar recommendations and questioned what appeals or grievance process employees can use if they do not agree with their pay increase. As discussed in our analysis of comments on subpart D, we have revised the regulations to provide bargaining unit employees with the option of grieving a rating of record through a negotiated grievance process. If that

process results in a new rating of record, the employee's rate of basic pay would be adjusted accordingly. However, management decisions as to the amount of a pay increase are not subject to review as long as those decisions are consistent with the validated rating of record and within the flexibilities provided by the regulations.

During the meet-and-confer process, the participating labor organizations recommended adding a requirement to the regulations for all employees rated "fully successful" or better to share in performance payouts. We have not accepted this recommendation. The Department has not definitively identified the number of rating levels or their descriptors. Therefore, it is premature to guarantee a pay increase to any specific group of employees.

*Section 9901.343 – Pay reduction based on unacceptable performance and/or conduct*

Section 9901.343 provides DoD with the authority to reduce an employee's rate of basic pay for unacceptable performance or conduct under the adverse action procedures in subpart F of these regulations. During the meet-and-confer process, the participating labor organizations were very concerned that the proposed regulations provided DoD with the authority to reduce an employee's pay any number of times within the appraisal period. In response we have revised this section to specify that an employee's rate of basic pay may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

Other commenters felt that pay reductions should not be permitted for any reason and that pay reductions do not improve performance, are disruptive to the workplace, and have greater impact on an employee's family than on the employee. DoD believes it is

necessary to retain flexibility to reduce the pay of an unacceptable performer in order to achieve and retain a high-performing workforce.

During the meet-and-confer process, participating labor organizations recommended that § 9901.343 specify that the maximum 10 percent reduction will include any annual increase, local market supplement, or other pay increases withheld from the employee but given to employees who are similarly situated and rated above unacceptable. Similarly, the labor organizations recommended that the proposed regulations be revised to provide that the pay of employees who improve performance within 90 days will be adjusted retroactively to reflect pay increases they would have received if they had been performing at an acceptable level at the time such increases were effected for the rest of the workforce. Other commenters felt that a 10 percent limit on pay reductions is too high. The recommendation to count increases not received (e.g., minimum rate range adjustments) as part of the 10 percent reduction limit, to restore all lost pay if the employee's performance improves during a 90-day improvement period, and to lower the pay reduction limit are inconsistent with the intent of the NSPS pay system.

Commenters and the labor organizations participating in the meet-and-confer process recommended that § 9901.343 clarify that reductions in pay under this section are subject to adverse action procedures. Such clarification is unnecessary because § 9901.343 already refers to the regulations at § 9901.352 and § 9901.354 clarifying that such reductions are subject to adverse action procedures under subpart G (or similar authority).

Section 9901.344 – Other performance payments

Section 9901.344 of the regulations provides DoD with the authority to reward employees or groups of employees through other types of payments. Situations where such payments may be warranted include recognition of extraordinary individual performance and organizational or team achievements. This section further explains that an employee in receipt of an extraordinary pay increase (EPI) is expected to continue to perform and contribute at an exceptionally high level.

Both public comments and recommendations made by labor organizations participating in the meet-and-confer process suggested that funding for these payments should be separate from funding for the performance pay pools. Some of the comments expressed concern that use of these payments would unfairly divert funds from deserving employees to unfairly reward or overpay other employees. As stated previously, managers and supervisors at all levels will be held accountable for fairly and impartially making performance-based reward determinations. DoD implementing issuances will provide for checks and balances to mitigate the potential for abuse.

Commenters asked whether extraordinary pay increases (EPIs) are basic pay increases or bonuses. As previously stated, we have revised the definition of “extraordinary pay increase” or “EPI” in § 9901.304 to clarify that an EPI may be a basic pay increase or bonus. (See Section 9901.304 – Definitions.)

Commenters questioned whether an EPI could be revoked if an employee does not continue to perform at an exceptionally high level. Others recommended that the exceptionally high level performance expectation be removed from the regulations as an

unfair requirement. We believe that the extraordinary pay increase is an important flexibility and have not revised the language.

Commenters asked for clarification on whether payments in recognition for organizational or team achievement will be basic pay increases or bonuses and what other special circumstances might warrant additional payments. Under NSPS payouts based on organizational or team achievement could take the form of either basic pay increases or bonuses. Any other special circumstances will be addressed in implementing issuances.

*Section 9901.345 – Treatment of developmental positions*

Section 9901.345 of the regulations provides DoD with the authority to establish policies and procedures for adjusting the pay of employees in developmental positions. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify how such employees will progress through a pay band. Other commenters also asked for clarification and recommended that entry/developmental employees receive pay increases equivalent to GS entry/developmental pay increases. The language has been modified to clarify that entry/developmental pay adjustments may be made in lieu of or in addition to those authorized under § 9901.342. However, we have not modified the language to require that developmental employees progress in the same time frames as under the current system, because such a change would be inconsistent with a performance-based system.

During the meet-and-confer process, participating labor organizations also requested the addition of language so that employees in developmental positions will be given equivalent access to the training and assignments needed to meet standardized assessment or certification points and progress to the full performance band on a timely

basis. In many cases, employee training and development occurs within DoD on a decentralized basis. Since training and development opportunities are administered according to each unit's needs and competency requirements, it would be difficult to address these issues appropriately at the DoD-wide level. However, all of these programs must be consistent with the merit system principles. DoD will provide further guidance in implementing issuances regarding increases resulting from the acquisition of skills and competencies for employees in developmental positions.

Commenters questioned whether entry/developmental pay increases will come out of the performance pay pool. The Department will address the financial management of pay pools in financial policies.

*Section 9901.351 – Setting an employee's starting pay*

Section 9901.351 of the proposed regulations provides for DoD to set the starting rate of pay for individuals who are newly appointed or reappointed to the Federal service anywhere within the assigned pay band, subject to DoD implementing issuances. Some commenters expressed concern over the lack of specificity in this section and questioned what criteria will be used in setting pay for new employees. Other commenters expressed the belief that it is unfair to offer new employees higher salaries than current employees.

We have not changed the regulation in response to these comments. The Department needs maximum flexibility in setting starting rates of pay to be competitive when recruiting new talent. Appropriate parameters will be described in implementing issuances.

Commenters requested clarification on the meaning of the terms “newly appointed” and “reappointed” and whether this section will be used to set pay for

employees of other agencies who are “newly appointed” to an NSPS position. A commenter stated that any Government employee entering into the NSPS pay system should receive no reduction in basic pay. Except for the pay administration terms defined in § 9901.103, NSPS pay administration terminology and additional guidance as to how pay will be set for individuals moving into NSPS from outside the Federal Government and from other Federal agencies will be addressed in implementing issuances.

A commenter suggested that NSPS incorporate a signing or recruitment bonus authority in § 9901.351 or another section of the regulations. The enabling legislation does not give the Department the authority to waive the recruitment, relocation, or retention incentive authorities in 5 U.S.C. chapter 57. Therefore, these provisions remain applicable to NSPS employees.

*Section 9901.352 – Setting pay upon reassignment*

Section 9901.352(a) provides for DoD to set pay anywhere within the assigned pay band when an employee is reassigned, either voluntarily or involuntarily. Some commenters expressed concern over the lack of specificity in the regulations. Others expressed concern about the opportunity for management to show favoritism in setting pay. Except as discussed in this section of the Supplementary Information, we have not changed the regulation in response to these comments, thereby ensuring the Department has maximum flexibility in setting rates of pay when employees are reassigned from one position to another within a pay band or across comparable pay bands. However, we have clarified that appropriate parameters will be described in implementing issuances.

In response to comments regarding the applicability of the adverse action procedures to certain employees, we have revised § 9901.352(b) to clarify the procedures applicable to employees subject to actions not covered by subpart G.

A number of commenters strongly objected to providing DoD with the authority to reduce pay when an employee is involuntarily reassigned to a comparable band when not as a result of unacceptable performance or conduct. Commenters suggested that this authority could be used to punish employees and could result in significant pay reductions. Commenters asked whether pay retention would apply in such involuntary situations. The Department will address specific parameters and guidance concerning management's authority to set or reduce pay when an employee is involuntarily reassigned, to include defining appropriate circumstances for pay retention consistent with the changes in § 9901.355.

Commenters asked whether adverse action procedures apply to all pay reductions under § 9901.352. Commenters and the labor organizations participating in the meet-and-confer process recommended that § 9901.352(a) be amended to make any reduction in pay subject to adverse action procedures. However, there are situations when reductions in pay would not appropriately be covered by adverse action procedures (e.g., return of an employee to their position of record at the end of a temporary promotion). Therefore, we have not adopted this suggestion.

Other commenters agreed to the 10 percent limit on pay reductions, but were concerned that the adverse action procedures and methods for challenging performance ratings in the NSPS regulations are inadequate. We believe these concerns are appropriately covered in subparts D and G, respectively.

During the meet-and-confer process, participating labor organizations recommended that the language in § 9901.352 specify that the maximum 10 percent reduction will include any annual increase, local market supplement, or other pay increases withheld from the employee but given to employees who are similarly situated and rated above unacceptable. We believe counting increases not received (e.g., minimum rate range adjustments) as part of the 10 percent reduction limit is inconsistent with the intent of the NSPS pay system.

The labor organizations participating in the meet-and-confer process also recommended deleting the reference to “conduct” in § 9901.352(b), and other commenters stated that conduct should not be a basis for pay reductions. We believe we have appropriately addressed the issue of conduct as part of performance in our discussion of the definition of “performance” in subpart A.

A commenter asked whether § 9901.352 provides DoD with the authority to increase an employee’s pay upon reassignment to a different position in the same pay band. We have revised § 9901.352(a) to clarify that DoD may set pay anywhere within the assigned pay band when an employee is reassigned to a position in the same or comparable pay band. We have also added a new paragraph (c) to § 9901.352 to provide that when an employee completes a temporary reassignment or when an employee’s in-service probationary period is terminated, the employee’s rate of basic pay will be set at the same rate the employee received prior to the temporary reassignment or placement in the position requiring the in-service probationary period, with appropriate adjustment of the employee’s rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position.

Section 9901.353 – Setting pay upon promotion

Section 9901.353 of the proposed regulations allowed DoD to set pay anywhere within the assigned pay band when an employee is promoted to a position in a higher pay band, subject to DoD’s implementing issuances. During the meet-and-confer process, participating labor organizations expressed concern that no parameters were provided on pay setting actions and suggested a pay increase of at least a 6 percent increase over current pay when an employee is promoted under NSPS. Other commenters also expressed strong concerns that the proposed regulations did not guarantee pay increases upon promotion and provided for possible pay reductions.

In response, we have revised the final regulations to provide a general rule establishing a minimum percentage increase of 6 percent for promotions; however, regardless of the minimum percentage, the salary resulting from the promotion cannot be lower than the minimum of the rate range for the applicable pay band and no higher than the maximum of the rate range for the applicable pay band.

Commenters also requested that the regulations clarify what types of movements will be considered “promotions.” The Department will provide specific guidance on the types of movements which will be considered “promotions” for pay administration purposes under NSPS in implementing issuances.

Section 9901.354 – Pay setting upon reduction in band

Section 9901.354(a) of the proposed regulations allowed DoD to set pay anywhere within the assigned pay band when an employee is reduced in band, either voluntarily or involuntarily, subject to § 9901.354(b). Some commenters expressed concern over the lack of specificity in the regulations. Others expressed concern about

the opportunity for management to reduce an employee's pay repeatedly or for any reason. The Department will ensure appropriate parameters are described in implementing issuances. We have not changed § 9901.354(a) to provide more specificity. However, in response to comments requesting clarification, we have amended paragraph (a) to state that DoD may set pay anywhere within the assigned pay band subject to § 9901.354(b) and (c).

Some commenters objected to pay reductions of any amount upon reduction in band. Others felt that the 10 percent limit on pay reductions under § 9901.354(b) is too high. Some commenters agreed to the 10 percent limit, but were concerned that the adverse action procedures and methods for challenging performance ratings in the NSPS regulations are inadequate. Other commenters stated that conduct should not be a basis for pay reductions or reductions in band. We have not revised the regulations in response to these comments. We believe that allowing for reductions in pay within defined limits for unacceptable performance or conduct is an essential feature of a performance-based pay system. Consistent with NSPS as a performance-based system, the Department will address in implementing issuances the parameters and guidance covering circumstances which could lead to a reduction in pay as a result of a reduction in band and the appropriate percentage of the reduction.

During the meet-and-confer process, participating labor organizations recommended that the language in section § 9901.354(b) specify that the maximum 10 percent reduction will include any annual increase, local market supplement, or other pay increases withheld from the employee but given to employees who are similarly situated and rated above unacceptable. We believe counting increases not received (e.g.,

minimum rate range adjustments) as part of the 10 percent reduction limit is inconsistent with the intent of the NSPS pay system.

In response to comments regarding the applicability of the adverse action procedures to certain employees, we have revised § 9901.354(b) to clarify the procedures applicable to employees subject to actions not covered by subpart G.

Section 9901.354(c) of the proposed regulations provided that if an employee is reduced in band involuntarily, but not through adverse action procedures (e.g., termination of a temporary promotion or failure to successfully complete a supervisory probationary period), DoD would limit any reduction in pay in accordance with implementing issuances. During the meet-and-confer process, participating labor organizations recommended that we amend this section to ensure an employee reduced in band involuntarily, but not through adverse action procedures, will have his or her pay reduced to not less than the amount the employee would have received if he or she had not been temporarily promoted or assigned to a supervisory position. Other commenters raised similar concerns. Based on these recommendations, we have revised this section to state that such an employee's pay will be set at the level the employee would have received if he or she had not been temporarily promoted or assigned to a supervisory or other position requiring an in-service probationary period, including rate range and performance payout increases that occurred during the intervening period. We have also clarified that any resulting reduction in pay is not considered an adverse action under subpart G (or similar authority) consistent with the provision in § 9901.356(e) of the proposed regulations.

Section 9901.355 – Pay retention

Section 9901.355 of the proposed regulations provided that DoD would issue implementing issuances regarding pay retention. This section also provided that pay retention would be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate and that a retained rate will be compared to the range of rates of basic pay applicable to the employee's position. During the meet-and-confer process, participating labor organizations recommended that we address the lack of specifics on pay retention. Other commenters also suggested that the regulations provide more detail on pay retention entitlements.

Accordingly, we have revised the language in this section to clarify that (1) employees will receive pay retention for a 2-year period under appropriate circumstances, e.g., reduction in force or reclassification; (2) employees on pay retention may receive performance payouts as bonuses, not salary adjustments; (3) employees on pay retention will not receive minimum rate range adjustments; (4) employees on pay retention will receive local market supplements; and (5) local market supplements are not considered part of basic pay in applying pay retention. In addition, as previously discussed, we have revised § 9901.342(d)(6) to clarify how performance bonus payouts will be computed for an employee receiving a retained rate. (See Section 9901.342 – Performance pay increases for additional information.)

Commenters questioned whether grade or "band" retention will apply under the NSPS pay system. The NSPS pay system does not include a grade or "band" retention authority.

Section 9901.356 – Miscellaneous

Section 9901.356 provides miscellaneous pay administration rules for the NSPS pay system. Commenters were confused by § 9901.356(a) and asked whether an employee's pay can be less than the minimum rate of the pay band. Under the NSPS system, an employee's pay could drop below the minimum rate of the pay band if the minimum rate of the rate range for that band exceeds the employee's salary. This could occur if the employee has an unacceptable performance rating and does not receive a rate range adjustment under § 9901.323. However, this situation does not require the employee to be placed in a lower pay band. The employee's pay band is determined by work assignment.

Commenters asked whether the special pay increase under § 9901.356(d), which DoD may pay to an NSPS employee prior to moving to a GS position, will be paid to employees moving to GS positions in DoD and other agencies. DoD may apply § 9901.356(d) to an NSPS employee moving to a GS position within or outside of DoD.

During the meet-and-confer process, the participating labor organizations recommended that § 9901.356(e) be revised to require DoD to set an employee's pay upon expiration of a temporary reassignment or promotion under § 9901.354(c) and not be subject to separate implementing issuances. Other commenters asked whether §§ 9901.356(e) and 9901.354(c), which both cover pay-setting upon expiration of temporary promotions, are consistent. Other commenters requested a definition of "temporary reassignment" and expressed concerns that § 9901.356(e) provided a loophole DoD could use to reduce an employee's pay without following adverse action procedures. The term "reassignment" is defined in § 9901.103 of subpart A. The

specific conditions and considerations of pay setting upon reassignment are more appropriately addressed in implementing issuances. However, as previously discussed, we have revised §§ 9901.352 and 9901.354 to clarify that upon completion of a temporary reassignment or temporary promotion, an employee's rate of basic pay will be set at the same rate the employee received prior to a temporary reassignment or temporary promotion. In addition, we do not believe §§ 9901.356(e) and 9901.354(c) were inconsistent. However, to further clarify, we have moved the provision in § 9901.356(e) of the proposed regulations to new §§ 9901.352(c) and 9901.354(c) to provide that any reductions in pay at the conclusion of a temporary promotion or temporary reassignment would not be covered by adverse action procedures. We have removed § 9901.356(e) from the final regulations because it is no longer necessary. (See *Section 9901.352 – Setting pay upon reassignment* and *Section 9901.354 – Setting pay upon reduction in band* in this Supplementary Information for additional information.)

During the meet-and-confer process, participating labor organizations also recommended adding a new paragraph (f) to § 9901.356 to address determinations of ratings of record for employees who perform activities during duty time that are not DoD assignments (e.g., EEO counselors and union representatives) for the purpose of performance payouts and RIF retention. This issue will be addressed in implementing issuances.

#### *Section 9901.361 – General*

Section 9901.361 provides DoD with the authority to issue implementing issuances establishing premium pay provisions. A number of commenters strongly objected to providing DoD such authority. They did not understand why title 5 premium

pay provisions need to be waived and were concerned that DoD will reduce premium pay entitlements to save money. Commenters expressed concerns about the lack of specificity in this section and that this section provides DoD with too much authority to affect employees' pay. Other commenters questioned whether specific types of premium pay, such as environmental differential pay and compensatory time off for travel, would be waived under this authority. During the meet-and-confer process, participating labor organizations recommended adding a paragraph to this section providing that premium pay under NSPS will not be less than would have been applicable if employees had not been converted to NSPS. Other commenters made similar recommendations.

We believe the ability to modify premium pay in response to current and future Departmental needs is a critical feature of NSPS. This flexibility facilitates the Department's ability to accomplish its diverse missions. For example, it is essential that the Department have the ability to fully compensate deployed employees and employees supporting surge requirements; the ability to equitably compensate employees performing overtime work; and the ability to make premium pay provisions fair, equitable, understandable, and credible to our employees. Specific issues regarding premium pay, including payments made under subchapter V of chapter 55 as well as those made in lieu of subchapter V of chapter 55, will be addressed in implementing issuances. Implementing issuances are subject to continuing collaboration. Also, under § 9901.105, any policies regarding premium pay that differ from those that exist in Governmentwide regulations must be coordinated with OPM. We have revised § 9901.361(a) to clarify that these regulations are the source of the authority to waive the premium pay provisions, consistent with § 9901.303(a)(2).

Commenters stated that law enforcement officer availability pay should not be waived for NSPS law enforcement officers. Commenters noted that OPM has stated that Federal law enforcement officers should have consistency in terms of premium pay entitlements. Other commenters questioned why firefighter pay under 5 U.S.C. 5545b is not waivable, if DoD can waive availability pay.

Under 5 U.S.C. 9902(d)(2), DoD may waive premium pay provisions under 5 U.S.C. chapter 55, subchapter V, including availability pay for criminal investigators under 5 U.S.C. 5545a, but is prohibited from waiving pay for firefighters under 5 U.S.C. 5545b. DoD must coordinate with OPM prior to establishing policies regarding premium pay for law enforcement officers that differ from those in Governmentwide regulations. (See § 9901.105.)

Commenters also questioned whether this section provides DoD with the authority to change FLSA overtime pay. As previously discussed, since the FLSA authority is outside the waivable title 5 chapters, these regulations do not affect FLSA overtime pay entitlements. (See *Section 9901.104 – Scope of authority* for additional information.)

*Section 9901.371 – General*

Commenters requested that §§ 9901.371 through 9901.373, regarding the conversion of employees into the NSPS pay system, be revised to provide detailed information on converting employees in demonstration projects and alternative personnel systems to NSPS.

The Department recognizes the desire that the regulations provide greater specificity. However, employees in organizations currently covered by demonstration

projects and alternative personnel systems have the same rights and protections as other employees upon their conversion to the NSPS pay system. Sections 9901.372 and 9901.373 have been revised to clarify such protections. (See Section 9901.372 – Creating initial pay ranges and Section 9901.373 – Conversion of employees to the NSPS pay system.)

Commenters asked whether §§ 9901.371 through 9901.373 are applicable to employees coming into NSPS after the initial spiral for an organization. Other commenters asked whether the pay-setting rules in §§ 9901.351, 9901.352, and 9901.353 will apply to such employees. Another commenter stated that the language in § 9901.371(a), which excludes employees “reassigned or transferred” to the NSPS system, is not adequate, since employees could move into such positions by another pay action.

These sections apply only to employees in an organization at the time the organization undergoes its conversion to the NSPS pay system. They do not apply to an employee who moves into an organization after the organization has been converted to the NSPS pay system. We have revised § 9901.371(a) by replacing “are reassigned or transferred” with “move” to clarify that the conversion provisions exclude employees who move from a non-NSPS position to a position already covered by NSPS under any circumstances. The Department will issue implementing issuances detailing the conversion procedure for employees entering an organization after its conversion to the NSPS pay system.

Commenters requested a 3-year moratorium on any action that would reduce an employee’s pay after the employee’s conversion to the NSPS pay system. The

Department is not changing the conversion rules to provide a moratorium on such actions. The Department guarantees employees will convert into the NSPS pay system without a reduction in pay. However, subsequent employee pay actions will be based on pay-for-performance criteria.

*Section 9901.372 – Creating initial pay ranges*

Section 9901.372 provides DoD with the authority to set initial pay band rate ranges under subpart C. Some commenters supported the use of the General Schedule salary structure as the baseline for moving an employee into a new band to allay concerns that pay rates will be reduced. Other commenters recommended that the regulations guarantee that the initial rate ranges be at least equal to the employees' former rate ranges. During the meet-and-confer process, the participating labor organizations recommended that § 9901.372 be amended to require initial pay band rate ranges to link to the ranges that applied to employees in their former pay system. The Department has not changed the regulatory language in this area but will consider these comments when developing implementing issuances.

In response to comments regarding the applicability of the conversion rules to employees converted to the NSPS pay system from demonstration projects and alternative pay systems, we have revised § 9901.372 to provide that initial pay band ranges may link to the ranges that apply to employees in their previously applicable pay system, taking into account any applicable locality payment, special rate supplement, local market supplement, or “similar payment under other legal authority.”

Section 9901.373 – Conversion of employees to the NSPS pay system

Section 9901.373 provides the rules for converting employees into the NSPS pay system when that system is initially applied to a category of employees. Section 9901.373(a) provides that DoD will convert employees into the system without a reduction in their rate of pay.

In response to comments regarding the applicability of the conversion rules to employees converted to the NSPS pay system from demonstration projects and alternative pay systems, we have revised § 9901.373(a) to provide that DoD will convert employees to the system without a reduction in their rate of pay, including any applicable locality payment, special rate supplement, local market supplement, or “similar payment under other legal authority.” Also, consistent with other changes in subpart C, we have revised § 9901.373(b) to address other adverse action authorities for employees subject to actions not covered by subpart G.

Commenters stated that employees on temporary promotions will lose money at conversion under § 9901.373(d). Others stated that all employees on temporary promotions will be downgraded upon conversion into NSPS. Other commenters recommended that the regulations provide DoD components the option to terminate temporary promotions prior to conversion and repromote the employee immediately after conversion.

Under § 9901.372(d) employees will be returned to their permanent position upon conversion to the NSPS pay system. However, organizations may simultaneously reassign or repromote an employee to the position held prior to conversion. The

Department will issue implementing issuances detailing the pay-setting procedures for employees who are returned to a temporary position.

Many commenters requested details on whether employees would receive a pay increase for the time spent towards their next within-grade increase upon conversion into the system and recommended that the regulations provide explicitly for such increases. During the meet-and-confer process, the participating labor organizations also recommended that the regulations require such increases to be paid upon conversion. Other commenters stated that § 9901.373(e) is confusing, since it implies the Secretary of Defense could use this authority to reduce pay. Still others asked whether DoD will pay such increases to employees converting into NSPS from demonstration projects or alternative pay systems.

During the conversion to NSPS, the Department will provide a prorated pay increase based on the amount of service a GS or prevailing rate employee performing at an acceptable level has completed towards the next within-grade increase (WGI). Section 9901.373(e) is the authority under which the Department will provide the prorated pay increase – commonly referred to as a “WGI buy-in.” We have revised this paragraph to provide DoD with the discretion to pay conversion increases to employees in other pay systems, subject to DoD implementing issuances.

Some other commenters asked whether employees on a special rate would receive a pay increase for the time spent towards their next within-grade increase and others asked whether such a pay increase would be calculated using the applicable special rate table or the General Schedule base rate.

During the conversion to NSPS, the Department will provide a prorated pay increase to employees on a special rate. The increase will use the same formula for determining the prorated pay increase that will be used for employees on regular General Schedule rates.

Commenters requested details on whether employees would receive a pay increase for the time spent in grade towards a career-ladder promotion. During the meet-and-confer process, the participating labor organizations recommended that the regulations require that such increases be paid upon conversion. A number of other commenters made similar recommendations.

The Department does not consider prospective career-ladder promotions to be time-based. All promotions, even career-ladder promotions, involve the assignment of higher-graded duties to an employee. After employees have converted to NSPS, the system will provide sufficient capability to recognize the progression of trainees through pay increases under § 9901.345.

Commenters asked how employees on leave without pay (LWOP) and on other absences, such as suspensions, long-term training assignments, and Intergovernmental Personnel Act assignments, will be converted into the NSPS pay system. Other commenters asked how employees on grade and pay retention will convert into the NSPS system.

Employees are placed in a LWOP status for a number of different reasons. Each circumstance affects the conversion rules applicable to an employee. In recognition of this, the Department will issue implementing issuances governing the conversion procedures for employees in a LWOP status. Implementing issuances also will address

the conversion of (1) employees absent for various other reasons and (2) employees on grade or pay retention.

Commenters stated that employees outside CONUS could be negatively affected when they return to CONUS positions in NSPS because, unlike CONUS employees whose conversion will be based on base pay plus locality pay, employees outside CONUS do not have a locality pay rate which will result in a lower pay rate at the time of conversion.

Under the current title 5 provisions, employees returning to CONUS positions receive the applicable locality rate. Under NSPS provisions, employees returning to CONUS positions will receive the local market supplement applicable to their new position and geographic location. We anticipate that local market supplements will initially be set equal to the applicable locality pay rate.

Commenters asked for assurances regarding how pay will be set if employees leave NSPS and return to GS positions. Upon movement to a GS position, pay for NSPS employees will be set under the GS pay-setting rules at 5 CFR part 531, subpart B, subject to the gaining organization's pay-setting policies.

## **Subpart D – Performance Management**

### *General Comments*

A general concern expressed by many commenters, as well as labor organizations during the meet-and-confer process, was a lack of specificity in the proposed regulations. Many commenters wanted to see detailed requirements and procedures for how the classification, pay, and performance systems would operate. The regulations set forth the general requirements and establish a framework for the development of more specific

systems through a series of implementing issuances. For example, the performance management implementing issuances will address the specific processes and practices that will be used within the Department and its components regarding such matters as rating levels, core competencies, standard performance factors, and progress reviews.

By far the greatest concern expressed by commenters regarding the proposed performance management regulations involved the perception of fairness of the new system. This concern was expressed in a variety of ways, including the following:

- Potential for rater subjectivity, consistency of raters, rater favoritism, rater bias, and potential for “cronyism.”
- Equality of treatment across agency lines, i.e., employees performing the same amount and quality of work in one DoD agency could receive a lower performance-based pay increase than a counterpart in another DoD organization.
- Concern that employees with the same performance rating could receive two different amounts of money or that one could receive a pay increase and another a bonus.

Directly related to the concern for fairness was the concern that the new system provide adequate performance management safeguards and the recommendation that the new system provide adequate checks and balances over the exercise of discretionary authority of supervisors and managers to affect the pay of employees through performance. Some commenters assumed that the accountability measures provided in the proposed regulations were the only safeguards to be included in NSPS and therefore found the proposed regulations insufficient. Some understood that the implementing issuances would further define these tools, which could include the use of an oversight

panel, but preferred that they be specified in the enabling regulations. Others simply wanted to emphasize the importance of safeguards and checks and balances in a pay-for-performance system.

The regulations make every attempt to ensure that the NSPS performance management system will be fair. First, the regulations adopt guiding principles based on the performance management system criteria Congress has recently enacted with respect to chapters 47, 54, and 99 of title 5, United States Code. These principles require any performance management system(s) established by DoD to be fair, credible, and transparent and to adhere to the merit system principles found in 5 U.S.C. 2301. Second, the Department is committed to further developing these principles as it designs its performance management system through its implementing issuances. Section 9901.401 requires DoD to establish “effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance,” and § 9901.405(c) specifies supervisory and managerial responsibilities for effective performance management.

Many commenters recognized that conversion to the NSPS would require new skills, knowledge, and a change in organizational culture. These commenters overwhelmingly emphasized the need for DoD to include proper training programs for employees, but especially supervisors and managers, since they will carry the primary responsibility for administering a pay-for-performance system. The commenters further acknowledged the need for NSPS training programs to be properly funded and appeared to draw a nexus between fair administration of performance management and pay and the level of supervisory competency and training. A significant number of commenters were

also concerned about the participation of military supervisors in the administration of civilian performance management and pay under NSPS. These commenters were concerned about the potential effect military supervisors unfamiliar with civilian performance management and pay-for-performance processes might have on employees' pay and retention. They also raised concerns about the effect of frequent military assignment rotations on the familiarity of supervisors with the civilian subordinates' work and performance.

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 the training of managers and supervisors, including military members, and will focus that training on how to establish and communicate performance expectations, how to assess employee performance, and how to appropriately translate that assessment into pay adjustments. Finally, the Department is committed to creating a performance culture in DoD that sustains a high performance organization.

Commenters also suggested that there should be a formal evaluation of any performance management system. Section 9901.108 of both the proposed and final regulations includes the requirement for the establishment of procedures for evaluating regulations and the implementation of any regulations established under 5 U.S.C. 9902. Therefore, no change was made in subpart D to address this comment because the performance management system is covered by the overall evaluation requirement.

In addition, during the meet-and-confer process, participating labor organizations suggested including a requirement for the Government Accountability Office (GAO) to

conduct an annual review of the performance management system, including pay-for-performance provisions and payouts, and make a report to Congress. Congress has stated that it will carefully monitor the development and implementation of the NSPS. Furthermore, it would not be appropriate for DoD and OPM to mandate that GAO prepare an annual report to Congress.

Most of the suggestions discussed in the general comments section, as well as many others that suggest specific practices or processes, by their nature relate to the operation of the performance management system DoD will establish through implementing issuances. As such, they are not specifically addressed by these enabling regulations. These comments will be taken into account by DoD as it develops a more detailed picture of the NSPS performance management system through implementing issuances.

*Other Comments on Specific Sections of Subpart D*

*Section 9901.401 – Purpose*

Many commenters, including participating labor organizations during the meet-and-confer process, questioned the need to revise current performance management rules, stating that what NSPS proposes under the new performance management system could be done under the current rules, with additional training for management and staff, or through minor modifications of 5 U.S.C. chapter 43 rather than the redesign of the entire performance management system. Others recommended putting specific provisions from chapter 43 into the NSPS performance management requirements.

Section 9901.401 provides for the establishment of a DoD performance management system and sets out the guiding principles that govern it. These guiding

principles are based on the criteria Congress recently enacted with respect to chapter 99 of title 5, U.S. Code. The regulations are based on a clear mandate from Congress to strengthen the performance management system to support a high performance culture and serve as the basis for pay decisions, as explained in the Case for Action.

Section 9901.402 – Coverage

Section 9901.402 of the proposed regulations clarified which categories of employees are eligible for coverage under subpart D – Performance Management. Commenters recommended that this subpart be revised to exclude employees whose pay is set by other statute (e.g., overseas teachers). Other commenters raised questions concerning whether certain populations of employees would be covered by this subpart. Section 9902(a) of title 5, U.S. Code, provides authority for the Secretary of Defense to make such determinations upon establishment of the NSPS or after NSPS is established by regulation. Therefore, it is not necessary to determine inclusion/exclusion of each unique population within DoD in the enabling regulations. Consequently, no change was made to this section.

Section 9901.403 – Waivers

Section 9901.403 specifies that employee coverage under this subpart results in the waiver of the provisions of 5 U.S.C. chapter 43 with regard to that employee or category of employees. Many employees and labor organizations strongly recommended that we continue to manage performance subject to 5 U.S.C. chapter 43. However, for the reasons explained in the Pay for Performance discussion under Part VII, Major Issues, of this Supplementary Information, we have concluded that the waiver of chapter 43 is appropriate. No change has been made in this section.

Section 9901.404 – Definitions

Commenters asked for additional explanation of terms used in the proposed regulations or that we define additional terms. We have addressed some of these terms in the Supplementary Information regarding subpart A of the regulations, where we have defined common terminology that is used in several subparts of the regulations. Many of the terms are more appropriately left to implementing issuances. However, two of the terms related to this subpart that drew a number of comments are addressed here.

Several commenters expressed concern about the definition of “unacceptable performance” in § 9901.103. That definition defines “unacceptable performance” as “the failure to meet one or more performance expectations.” A few commenters expressed concern that under the proposed definition, performance measures could only define and differentiate “acceptable” and “unacceptable” performance. Other commenters were concerned that unattainable goals and expectations would be used in conjunction with the proposed definition. In response to these concerns, we have modified the definition of “unacceptable performance” found in § 9901.103. The new definition provides that performance expectations may be amplified through work assignments or other instructions, for which the employee is held individually accountable. As part of its implementation strategy, DoD will provide training on setting appropriate performance expectations.

During the meet-and-confer process, the participating labor organizations suggested that the definition of “performance expectations” in the proposed regulations be amended to require such expectations to meet certain characteristics (e.g., objective and observable or verifiable descriptions of manner, quality, quantity, timeliness, and

cost effectiveness). Many of the commenters also suggested that this language be modified to require that any performance expectation used in assessment of performance be “objective and measurable.” While many of these characteristics are noteworthy, due to the breadth of missions and types of work performed in DoD, such characteristics may not always be applicable to each and every performance expectation. In response to comments that the definition of “performance expectations” was too broad, we have revised the definition to explain that expectations are based on (1) the duties, responsibilities, competencies, and objectives associated with an employee’s position and (2) the contributions and demonstrated competencies management expects of an employee.

*Section 9901.405 – Performance management system requirements*

Section 9901.405 provides for the establishment of a performance management system under NSPS through the use of implementing issuances. This section also establishes the requirements that must be met by the NSPS performance management system.

During the meet-and-confer process, participating labor organizations proposed that the development of the performance management system be accomplished through a three-step process: continuing collaboration, national consultation, and finally bargaining. Such a cumbersome and inefficient process would inevitably lead to a fragmented and inconsistent implementation of the NSPS. Furthermore, it is inconsistent with the statutory prohibition against expanding the scope of bargaining (5 U.S.C. 9902(m)(7)) and the mandate that the collaborative process established by 5 U.S.C. 9902(f) be the exclusive process for involvement of employee representatives in the

planning, development, and implementation of the NSPS HR system. Therefore, this suggestion has not been incorporated into the final regulations, and continuing collaboration in the development of the implementing issuances will be the means for ensuring employee involvement in the design and implementation of the performance management system.

Many commenters had specific ideas and recommendations for the design and operation of performance management systems. We will address some of these concerns here, and others will be addressed more appropriately as DoD develops the implementing issuances. For example, a few commenters recommended more overtly embedding the concept of contribution in the enabling regulations. However, we find that the concept of contribution already is clearly presented in the enabling regulations, including a definition of the term in subpart A.

Other commenters suggested providing system transparency by requiring the agency to publish the performance ratings and payouts for all employees. We agree with the concept of incorporating additional transparency in the performance management system, but not at the expense of employee confidentiality and privacy. There are many other effective methods for providing transparency that do not require disclosure of individual performance ratings. Many of these methods are practiced today in DoD's pay-for-performance demonstration projects. While protecting individual identifying information, organizations often publish summary results and aggregate data such as average ratings and payouts within pay pools and career paths. Additionally, organizations often provide employees with comparative compensation data in the form

of scatter grams or similar graphic representations of payout statistics, in which data points are anonymous.

Several commenters proposed tying performance ratings to customer satisfaction and/or the use of 360-degree ratings. These suggestions are related to the operation of the performance management system, the details of which DoD will establish through implementing issuances. While we agree that the use of customer input and/or 360 degree ratings should be tools available to DoD Components in the implementation of this subpart, these tools are not appropriate for application to all types of work and work environments. Therefore, we did not adopt the suggestion to require their use Department-wide.

During the meet-and-confer process, the participating labor organizations recommended that appraisals be required once a year. Management agreed with this recommendation, and this section has been modified to include the requirement that performance appraisals occur at least annually.

*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.”

Regarding the requirements in § 9901.406(a), some commenters said it would be difficult to link individual performance to the Department’s strategic objectives, some thought the linkage already exists in the current system, and some recommended that DoD implementing issuances amplify how this be done. We agree that additional guidance will be helpful and that this degree of specificity is best accomplished through

DoD implementing issuances and/or DoD Component regulations and guidance.

Therefore, no changes were made in response to these comments.

We received comments concerning the content of § 9901.406(b), which also was a topic of discussion during the meet-and-confer process. A majority of commenters objected to the inclusion of “professionalism and standards of appropriate conduct and behavior, such as civility and respect for others” as indicators of performance. Most of these commenters believed assessment of these traits would lead to arbitrary and subjective determinations. Others thought this provision would be a tool for advancing favoritism or retaliation in the workforce. Still others interpreted this requirement to apply to nonsupervisory employees only and recommended the application of this requirement to supervisors and managers, as well. We have addressed these issues in our discussion of the definition of “performance” in subpart A. These requirements apply equally to all employees, including supervisors and managers.

During the meet-and-confer process, the participating labor organizations recommended changes to specify that performance expectations are appropriately and clearly communicated to employees. Management shared these concerns and agreed that the basic performance expectations should be provided to employees in writing. We have revised this section accordingly.

Other comments expressed concern that employees could be rated against expectations that had not been communicated or that employees would be rated against continually varying and changing expectations. We believe the regulations sufficiently address concerns about communication of performance expectations. This section of the proposed regulations clearly stated the requirement that performance expectations be

communicated to employees prior to holding the employee accountable for them. No changes were made in the regulations to address concerns about management flexibility to change performance expectations. Such flexibility is necessary to enable DoD to respond to changes in organizational mission and priorities.

Labor organizations participating in the meet-and-confer process, as well as many commenters, raised concerns regarding supervisory and managerial accountability. Specifically, they questioned how this would be accomplished, since many believe supervisors and managers are not held accountable now. Section 9901.406(c) expressly states that supervisors' and managers' performance expectations will include "assessment and measurements" of how well they complete their performance management responsibilities. DoD will provide training on the appropriate competencies to ensure that supervisors and managers are prepared to do this. In addition, supervisors' and managers' ratings of record will be based, in part, on how well they perform this important function. Ultimately, pay decisions for supervisors and managers will be affected by their performance of this function.

Section 9901.406(d) of the proposed regulations provides examples of a variety of forms performance expectations could take. Many commenters made suggestions regarding the purpose and content of performance expectations. Some of these commenters recommended the establishment of standard performance elements in order to promote consistency across organizational lines. Other commenters recommended the use of performance standards tied to each individual's area of responsibility. The performance management system envisioned by the Department will include both

standard performance elements and individual goals and objectives. These elements of the system will be addressed in the DoD implementing issuances.

In addition, individual commenters and participating labor organizations alike expressed concern that the explanation of performance expectations was too broad. In response, a new paragraph has been added to § 9901.406 to explain that performance expectations may be amplified through particular work assignments or other instructions, which need not be in writing, and 9901.406(d)(5), which allowed for the use of any other means as long as it would be clear to a reasonable person, has been deleted.

Several commenters objected to the language in § 9901.406(f) limiting employee involvement in developing performance expectations to “insofar as practicable.” In some cases, individual employees may not be directly involved in the development of particular performance expectations because the performance expectations were developed through a group endeavor, or the same expectations might be applied to an entire group of employees where a smaller group of employees was involved in their initial development. Some commenters also objected to reserving final decisions regarding performance expectations to the sole and exclusive discretion of management. This is no different than the current practice regarding performance elements and standards, and both performance elements/standards and performance expectations are part of assigning work, which is a management right.

*Section 9901.407 – Monitoring performance and providing feedback*

Section 9901.407 establishes the basic responsibility for supervisors to monitor employee and organizational performance and inform employees of their progress in meeting their performance expectations. This section received two primary comments:

(1) the recommendation that the regulation require more than one progress review per year and (2) the concern that interim performance or progress reviews would not occur despite regulatory language. We agree that multiple interim performance reviews and/or interim feedback are appropriate for many types of work and positions. However, since this is not true of all types of work, the enabling regulation will continue to specify a minimum interim performance review requirement of at least once during each appraisal period. We also made no change in response to comments indicating that regulations alone would not result in conducting interim performance reviews. We believe the proposed regulation provides sufficient language in subpart D to hold supervisors and managers accountable for effectively managing the performance of employees. (See our previous discussion regarding § 9901.406(c).)

*Section 9901.408 – Developing performance and addressing poor performance*

Section 9901.408 addresses two aspects of developing or improving performance: the continual improvement that is part of a high-performance culture and the remedial improvement that addresses poor performance.

Many commenters expressed concern that without the protections provided by mandatory improvement periods, management would be overly harsh in adverse actions related to poor performance. Similarly, during the meet-and-confer process and through written comments, participating labor organizations asked that employees be provided a reasonable opportunity to improve performance before an adverse action is proposed or initiated, except in the most extreme case of a performance deficiency that endangers national security or the safety of personnel. The proposed regulations provided for an improvement period as one of several options available to address or correct unacceptable

performance prior to taking an adverse action. We continue to believe an improvement period should be an option under the new system, but not a requirement as it is now under chapter 43 of title 5, U.S. Code. Therefore, we made no changes as a result of these recommendations. An agency may now take a performance action under chapter 75 without affording an improvement period. Additionally, as specified in subpart H, employees continue to have the right to appeal adverse actions.

At least two commenters recommended modification of the language in § 9901.408(c) to acknowledge adverse action appeal procedures for groups of employees not covered by subpart H of the NSPS regulations. In response to this recommendation, we have revised this section to reference appropriate appeal procedures for employees not covered by actions subject to subpart H.

*Section 9901.409 – Rating and rewarding performance*

Section 9901.409 establishes the requirements regarding rating and rewarding employee performance, including the use of a multi-level rating system, the purposes for which ratings may be issued, and procedures for challenging a rating of record.

Section 9901.409(a) received many comments indicating that DoD was taking a step backward in moving from, in some cases, a pass/fail performance management systems to a multi-level rating system. A few comments indicated that the new performance management system should require more than three rating levels. Since meaningful performance distinctions are an essential requirement in a pay-for-performance system, language requiring a multi-level rating system was retained. While the regulations specify minimum requirements, the details of the performance management system will be developed through the implementing issuances. Such details

would include specifying the number of rating levels and providing descriptions of the different levels of performance.

In regard to § 9901.409(b), some commenters were happy to see their performance rating of record used as a basis for pay. Most commenters, however, did not agree with the linkage of pay to performance and indicated their preference for pay based on longevity. As stated under the Pay for Performance portion in the Major Issues Section of the Supplementary Information, the enabling statute requires that the Department establish a “pay-for-performance” system that better links individual pay to performance. (See 5 U.S.C. 9902(b)(6)(I).) Also, we believe Congress and the American people want to see DoD’s employees compensated based on performance rather than longevity. Therefore, we retained the language establishing the rating of record as a basis for pay determinations.

In addition, commenters expressed concern that the authority to issue additional ratings may be vulnerable to abuse, especially during RIF. The authority to issue additional ratings of record enables management to issue new ratings of record to recognize significant deterioration or improvement in performance since the previous rating of record was issued. DoD will include appropriate safeguards in its implementing issuances.

Similarly, while some commenters were happy that performance would be used as a basis for determining reduction in force (RIF) standing, others thought performance should be given equal weight with seniority. However, most commenters thought seniority should continue to determine retention standing in the event of a RIF. Length of

service does play a role. However, we believe that it is essential that performance play a larger role in retention so no change was made in this section of the regulations.

We received a number of comments concerning § 9901.409(g). The majority of commenters thought the reconsideration process to challenge performance ratings should include an opportunity for third-party review. This issue was also raised during the meet-and-confer process with participating labor organizations. These organizations indicated their strong belief and desire that employees must have access to a negotiated grievance procedure and binding arbitration for the reconsideration process to be credible. In response to these concerns, § 9901.409(h) was added to enable bargaining unit employees to choose to use either an administrative reconsideration process under this subpart or a negotiated grievance process under § 9901.922(h), but not both.

In addition to concerns regarding the ability to grieve a rating of record, many commenters also expressed a similar concern regarding the ability to have a pay determination reconsidered. This was also a topic of discussion during the meet-and-confer process. We have made no changes in the final regulations in this regard. However, we recognize that changing a rating of record as the result of a reconsideration could lead to a conforming change in the employee's payout.

A few commenters recommended modification of § 9901.409(i) to recognize alternative reduction in force procedures for employee groups not covered by subpart F of these regulations. We agree and have modified this section accordingly.

## **Subpart E – Staffing and Employment**

### *General Comments*

As previously addressed in the subpart A supplemental information, commenters expressed concerns about the lack of specificity in subpart E of the proposed regulations on external recruitment and internal placement. Although some commenters found the staffing and employment concepts to be simple and supported our plan, many commenters felt the proposed regulations were too vague. They did not support issuing detailed guidance in internal implementing issuances because that process does not adequately allow for public comment.

Because of the lack of specificity, commenters recommended a number of different amendments to subpart E of the regulations to provide detailed criteria and conditions for addressing staffing and employment issues involving external hiring and internal placement. The commenters recommended the regulations:

- specify the time limits for probationary periods;
- limit probationary periods to the initial hire and the first supervisory appointment only;
- include information on crediting time toward completion of a probationary period and appeal rights;
- list the series that will be covered by direct hire authority and specify who may determine which series will be added or deleted;
- clarify whether time-in-grade still applies;
- specify what happens to career-conditional employees when they move into NSPS;

- identify the contemporary hiring practices that are acceptable, e.g., using headhunters, signing bonuses, newspaper ads; and
- address how NSPS will streamline the lengthy process of rating and ranking.

We understand the desire for the regulations to provide more specificity and assurances regarding NSPS staffing and employment. However, the regulations must also provide DoD with sufficient flexibility to design an agile system to attract high quality employees and the ability to place employees in a manner consistent with mission requirements and strategic human capital needs. These suggestions and requests for more detailed information will be considered in developing the implementing issuances.

Many commenters stated current hiring flexibilities were sufficient and felt the Department had not demonstrated why changes were needed in the staffing and employment areas or how our proposals would result in a less cumbersome or fairer hiring process. Still others indicated they saw little in our proposal that would substantially alter or improve management's ability to hire or move employees as mission-related requirements dictate. We disagree. For example, in § 9901.511(c), we have removed a time-consuming step in establishing a direct hire authority by providing DoD with the authority to make severe shortage and critical need determinations without approval by OPM. In addition, § 9901.515(a) permits limiting consideration under competitive examining to highly qualified applicants in a commuting area instead of having to consider potentially thousands of applications from across the country. Also, § 9901.511(d) provides DoD the capability to convert employees on time-limited appointments, which may be necessary because of funding or organizational issues, to career appointments, if such a possibility is stated in the vacancy announcement so that

interested persons may apply for the potential conversion opportunity. We believe these additional flexibilities will permit DoD to meet workforce and organizational goals in a much more timely fashion.

Numerous commenters also believed that management does not currently fully utilize existing hiring flexibilities. The Department will continue to provide training on existing hiring flexibilities, and we are confident that the extensive training planned for NSPS implementation will educate managers and employees about the new flexibilities NSPS will offer. Once managers are aware of these flexibilities, we believe they will utilize them to more effectively hire and place employees where their skills and knowledge will be most useful to the Department.

Several comments pointed out our proposals do not address the issue of lengthy background security checks or other impediments to hiring, such as funding problems and hiring freezes. While we understand that the administrative processes involved in completing background security investigations and resolving funding issues may play a significant role in the speed of the hiring process, they are outside the scope of the enabling legislation.

Commenters, including labor organizations participating in the meet-and-confer process, were concerned about a perceived threat of involuntary deployment, particularly to hazardous overseas locations. While they understand the requirement to support our military members in every way, some believe that NSPS is an attempt to institute a “backdoor draft.” Commenters also stressed that management should not have the ability to reassign or detail employees to perform similar or different duties at a moment’s notice. Our need to institute a flexible system with the ability to deploy the Department’s

personnel in a manner consistent with mission requirements does not mean that employees will be reassigned in a capricious, arbitrary manner or totally without warning. Under current law, management already has authority to assign work to be performed and to accomplish the mission of the Department, including the authority to reassign or detail employees. We intend to continue to treat our employees in a fair, credible, and respectful manner. We will develop the processes and procedures under NSPS that will help us to achieve this.

Several commenters, including labor organizations participating in the meet-and-confer process, raised questions about priority placement programs and how they will work under NSPS. Commenters inquired as to how pay-banded positions would be dealt with, how hiring flexibilities will impact the DoD Priority Placement Program, and whether or not the Governmentwide priority placement mechanism, the Reemployment Priority List, might be eliminated because it is inconsistent with a performance-based human resources system. The Department has a longstanding commitment to protect and assist employees who have been affected by its workforce shaping initiatives, and we will continue to honor that responsibility. DoD's Priority Placement Program will be modified to incorporate NSPS features, just as it has previously been modified to accommodate other changes throughout the years.

Many commenters referred to the requirement that DoD staffing and employment regulations be designed in a transparent and credible manner that involves employees and employee representatives. We agree that employee representatives should be provided an opportunity to participate in the development of implementing issuances. This issue is specifically addressed in the supplementary information in subpart A.

Comments on Specific Sections of Subpart E

Section 9901.501 – Purpose

Section 9901.501 of the proposed regulation explains the purpose of subpart E, which contains regulations for the establishment of qualification requirements; recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (k). During the meet-and-confer process, participating labor organizations recommended that we add paragraphs (d) and (e) to this section, as follows:

(d) The policies and procedures for staffing and employment will be planned and developed in accordance with 5 U.S.C. 9902(f)(1)(d), and will be subject to national consultation rights and the duty to bargain under 5 U.S.C. chapter 71.

(e) Compliance with the policies, procedures, issuances and provisions of collective bargaining agreements on staffing and employment will be subject to the negotiated grievance procedure and binding arbitration before an independent third party, an alternative dispute resolution process that is mutually agreed to by the parties, or the Merit Systems Protection Board, as appropriate.

These and other bargaining issues are specifically addressed in several places in the supplementary information under Major Issues, as well as in subparts A and I.

Section 9901.502 – Scope of authority

Section 9901.502 of the proposed regulation authorizes the modification and replacement of certain provisions of title 5 related to hiring and assigning employees when a specified category of employees, applicants, and positions is covered by this subpart. This section also authorizes DoD to prescribe, in accordance with § 9901.105,

implementing issuances to carry out the provisions of this subpart. Commenters objected to the proposed waiver and/or modification of various provisions of title 5; however, modification and/or replacement of the specified sections of title 5 is authorized by enabling legislation (5 U.S.C. 9902(k)) and is essential to the development of a more flexible system for hiring and assigning employees.

Section 9901.503 – Coverage

Section 9901.503 provides the Secretary the authority to determine employee eligibility and coverage in accordance with § 9901.102(b). Several commenters, including labor organizations participating in the meet-and-confer process, recommended that certain types of positions be excluded from coverage under the new personnel system, including Police Officers, Teachers, Civil Service Mariners, and National Guard Technicians under title 32. These and other coverage issues are specifically addressed in the supplementary information in subpart A.

Section 9901.504 – Definitions

In response to multiple comments requesting an explanation of, and/or improved distinctions between, similar terms, we have--

- Revised the definition of “temporary employee” to clarify the Department’s intent. A temporary employee is an individual not on a career appointment who is employed for a limited period of time not to exceed 1 year. The appointment may be extended, up to a maximum established by implementing issuances, to perform the work of a position that does not require an additional career employee.
- Revised the definition of “term employee” to clarify the Department’s intent. A term employee is an individual not on a career appointment who is employed for a

period of time of more than 1 year. The appointment may be extended, up to a maximum established by implementing issuances, when the need for an employee's service is not permanent.

- Revised the definition of “time-limited employee” to clarify the meaning. A time-limited employee is an individual appointed to a position for a period of limited duration (i.e., term or temporary) in either the competitive or excepted service.
- Added a definition of “initial probationary period” to subpart A to clarify the intent of § 9901.512 and ensure consistency between subpart E and subpart H. An initial probationary period means the period of time, as designated by the Secretary, immediately following an employee's appointment during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.
- Added a definition of “in-service probationary period” to subpart A to clarify the intent and ensure consistency between subpart E and subpart H. An in-service probationary period, such as a supervisory probationary period, means the period of time, as designated by the Secretary, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

Section 9901.511 – Appointing authorities

Section 9901.511(b)(2) of the proposed regulations provides for DoD and OPM to jointly publish a notice in the *Federal Register* when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service.

Further, the section requires a period of public comment prior to the establishment of such an authority unless a critical mission requirement exists. Commenters criticized this section stating that this authority and our lack of specificity will lead to a patronage or spoils system and corruption of the merit system. They generally opposed the Department's ability to establish a new appointing authority, even if a critical mission requirement exists, without first issuing a notice in the *Federal Register* allowing for a public comment period.

During the meet-and-confer process, participating labor organizations recommended that we add paragraph (iii) to 9901.511(b)(2) to state: "In exercising its authority under paragraph (b)(2)(ii) of this section, DoD will provide reasonable advance notice, where practicable, to the relevant congressional committees and to the respective labor organizations, of the reason(s) why the Secretary has elected to establish a new appointing authority to meet critical mission requirements or fill a severe shortage/critical hiring need without a preceding comment period." We do not agree. We recognize that if these hiring authorities are exercised and conditions of employment are impacted, local bargaining may occur in accordance with subpart I, as appropriate. We also agree that labor organizations, and indeed all employees, should receive notice via well-established processes, such as publication of notices in the *Federal Register*.

Some commenters did not understand the need for additional appointing authorities and viewed this flexibility as diminishing veterans' preference and as a mechanism for promoting nepotism, favoritism, and cronyism that will lead to more discrimination complaints and grievances. In a related issue, one commenter expressed concern over the lack of any reference to granting 5 or 10 preference points to veterans.

In establishing new appointing authorities, the regulations provide for review by OPM and, when an appointment is made using a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service, a requirement for public comment. Implementing issuances will provide additional guidance and parameters to ensure that these authorities are utilized for specified purposes in accordance with merit system principles and the principles of veterans' preference. NSPS does not change or diminish preference as indicated in § 9901.501(c).

Section 9901.511(c) authorizes the Secretary to exercise direct hire authority when there is a severe shortage of candidates or a critical hiring need. One commenter suggested that direct hire authority should be automatically allowed without extensive documentation for those positions for which a separate pay schedule is authorized. We have not adopted this suggestion. Other commenters wondered if the direct hire authorities could apply to career employees or if they were meant only for new hires. The specific criteria and instructions concerning direct hire authorities will be provided in the implementing issuances; however, generally, a direct hire authority is used to appoint applicants not currently employed in the civil service.

A technical correction was made to § 9901.511(c)(3) by removing the reference to paragraph (a).

Section 9901.511(d) authorizes the Secretary to prescribe procedures for making time-limited appointments and for converting those employees without further competition to the career service provided certain conditions are met. Commenters cited unease with our idea of time-limited appointments that they believe will result in NSPS

evolving into a system based on temporary employment. Some commenters do not believe temporary employees should have the ability to convert to permanent appointments without once again going through a competitive process. During the meet-and-confer process, participating labor organizations indicated that term employees should not perform work of permanent positions.

Regarding the comment about NSPS developing a system based on temporary employment, we have revised definitions for time-limited appointments, both temporary and term, in § 9901.504 to include specific information on appropriate timeframes for time-limited appointments. The Department will provide further guidance in implementing issuances on the appropriate use of time-limited appointments to meet mission needs. Regarding the comment about additional competition before converting a temporary appointment to a career appointment, we note that § 9901.511(d)(2) requires a time-limited vacancy announcement to include information about the possibility of noncompetitive conversion, if applicable, and that the individual be appointed to the time-limited appointment under NSPS competitive examining procedures. We believe that additional competition is not necessary due to the competition required for initial placement into the time-limited appointment. Also, in response to the comment during meet-and-confer, we have revised and clarified § 9901.511(d) to indicate that: (1) term employment will not be used for positions that should be filled on a permanent basis; and (2) term appointments may be used to accomplish permanent work in circumstances where the position cannot be filled permanently, e.g., the incumbent will be out of the position for a significant period of time, but is expected to return.

One commenter suggested that since there is no clear distinction between temporary and term employees, we should refer to these employees simply as time-limited and delete the example “(e.g., an individual employed on a temporary or term basis)” from § 9901.511(d)(2). We deleted this example as it is not necessary and we have clarified the distinction between temporary and term employees with the revised definitions in § 9901.504.

Another commenter suggested that we have only two appointment types, permanent and temporary, to simplify recruitment. We did not adopt this suggestion. Different circumstances and needs justify the use of both temporary employees and term employees.

*Section 9901.512 – Probationary periods*

Section 9901.512 of the proposed regulations provides that the Secretary may establish probationary periods, both initial and in-service, for employees appointed to positions in the competitive and excepted service covered by the National Security Personnel System. For clarity, we consolidated all information pertaining to probationary periods, both initial and in-service, in this section and deleted references to in-service probationary periods from § 9901.516. We have also added a definition of initial probationary period to subpart A of part 9901.

Commenters were disturbed by the lack of specificity on probationary periods. They pointed out that the opportunity for multiple or extended probationary periods may result in inconsistencies and abusive treatment by supervisors who might retain employees in a perpetual probationary status simply by moving them from one position to another. Commenters were concerned that managers will be able to make arbitrary

decisions as to who serves an in-service probationary period and when. Commenters, including labor organizations participating in the meet-and-confer process, indicated that probationary periods should not exceed 1 year. Some commenters asserted that probationary periods of longer than 1 year show a lack of faith in management to make decisions about an individual's ability to perform satisfactorily within that timeframe. Commenters wanted to either retain the Governmentwide probationary periods established by OPM or to establish specific probationary periods to be published in the *Federal Register*. A few commenters supported longer probationary periods, such as a 3-year probationary period to substitute for the career-conditional period that currently exists. However, other commenters expressed concern because probationary periods could be as long as 5 or 10 years. During the meet-and-confer process, labor organizations indicated that in-service probationary periods should apply to supervisory positions only.

Based on the comments received, including comments from labor organizations participating in the meet-and-confer process, we have revised the final regulations to set parameters on probationary periods and to indicate the types of circumstances that would lead the Department to establish longer probationary periods. The Department will retain the flexibility to create probationary periods of varying lengths within those overall time frames. Specifically, we revised § 9901.512 to include that: (1) probationary periods under NSPS will be between 1 year and 3 years; (2) probationary periods established for more than 1 year will be applied to categories of positions or types of work that require a longer time period to evaluate the employee's ability to perform the work; (3) in-service probationary periods will apply to certain groups of positions or occupations under

prescribed specific conditions; and (4) that an employee who fails to complete an in-service probationary period will be returned to a grade or band no lower than that held before the in-service probationary period and the employee will be entitled to have his or her pay set in accordance with the applicable section of subpart C. Implementing issuances will clarify that decisions to establish probationary periods longer than 1 year will be made at the Department level. In addition, we have clarified that nothing in this section prohibits an action against an individual serving an in-service probationary period for cause unrelated to performance.

*Section 9901.513 – Qualification standards*

Section 9901.513 provides for DoD to either continue to use qualification standards established or approved by OPM, or to establish its own for positions covered by NSPS. One commenter wanted to know what is wrong with the OPM qualification standards and if he/she would be required to have different qualifications from the position hired into; another commenter suggested that we obtain OPM approval for all qualification standards for positions covered by NSPS; several others suggested possible changes for NSPS qualification standards. One commenter stated that the first sentence of this section contradicts the second sentence and suggested we add the following at the end of the second sentence: “when OPM standards do not fully cover the occupation or are not available.”

We believe the Department may have a need to modify existing, or establish new, qualification standards to meet mission requirements. In addition, § 9901.105 of subpart A does include the establishment of alternative or additional qualification

standards as an item to be coordinated with OPM. Therefore, we have not revised this section.

Section 9901.514 – Non-citizen hiring

Section 9901.514 of the proposed regulations provides for DoD to establish procedures for appointing non-citizens to excepted service positions within the National Security Personnel System. During the meet-and-confer process, participating labor organizations recommended that we strike this entire section and also remove references to non-citizen hiring authority. Several commenters also disagreed with the hiring of non-citizens citing that such appointments are inconsistent with “national security” or might lead to the outsourcing of DoD functions. Many were skeptical that qualified U.S. citizens could not be found or trained. The Department currently has the authority, delegated by OPM, to hire non-citizens. Therefore, this provision simply codifies in the regulation the authority already given to the Department. We have retained the Governmentwide criteria that this authority can only be used in the absence of qualified U.S. citizens and when immigration and security requirements are met. Although the non-citizen hiring authority is rarely used, the Department does occasionally have situations where there are no qualified U.S. citizens available for critical positions.

Section 9901.515 – Competitive examining procedures

Section 9901.515 of the proposed regulations provides DoD authority to establish procedures for examining applicants for entry into competitive and excepted service positions in NSPS, including the use of traditional numerical rating and ranking or alternative ranking and selection procedures (category rating), and specifies which applications/applicants the Department must accept and consider after a period of public

notice. In response to comments we received on § 9901.515(a) asking who competitive examining procedures apply to, we have added wording to clarify that we are referring to applicants from outside of the civil service when we address who is recruited under competitive examining procedures. We have modified § 9901.515(a)(1) to reflect that DoD will accept applications for vacant positions from all “U.S. citizens,” as opposed to all “sources,” to reflect a commenter’s concern that the term “sources” implies we are referring to noncompetitive sources.

In a related matter, commenters expressed concern about DoD’s ability to narrow the groups of employees who will be considered for jobs, including the elimination of highly-qualified workers from various segments of society and the treatment of veterans. The ability to narrow the area of consideration will not preclude us from opening any recruitment action as broadly as we choose. However, because technology has made the Federal Government a more applicant-friendly employer, it has also increased the administrative burden involved to efficiently and effectively fill mission-critical jobs. At times, we are overwhelmed by the volume of applications that must be evaluated and considered, especially when filling a small number of jobs. In these instances, we need the ability to narrow the pool of applicants we consider, and there may be a sufficient number of qualified applicants within the local commuting area. DoD will continue to provide equal treatment and equal access and will comply with the merit system principles.

Section 9901.515(b) of the proposed regulations allows DoD to establish procedures for the examination of applicants for entry into competitive and excepted service positions in NSPS. Such procedures must adhere to the merit system principles in

5 U.S.C. 2301 and veterans' preference requirements as set forth in 5 U.S.C. 3309 through 3320, and include provisions for employees entitled to priority consideration in accordance with 5 U.S.C. 8151. In response to a comment we received suggesting that this paragraph should address preference eligibility in the competitive service as well as the excepted service under NSPS procedures, and to provide clarity regarding the application of veterans' preference, we have revised the second sentence of this section to include a reference to 5 U.S.C. 1302(b) and (c) concerning veterans' preference in employment. We also made a technical correction to the third sentence by removing the reference to 5 U.S.C. 1302(c).

*Section 9901.516 – Internal placement*

Section 9901.516 of the proposed regulations provides for DoD to prescribe implementing issuances regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. This section also addressed the establishment of in-service probationary periods by way of the implementing issuances. For clarity, we moved all references to probationary periods, to include in-service probationary periods, to § 9901.512. We made no other changes to this section.

**Subpart F – Workforce Shaping**

*General Comments*

Commenters, including comments during the meet-and-confer process, were concerned that subpart F provides the Department with excessive rights to make decisions concerning the staffing of organizations, the abolishment of positions, and the need to implement a reduction in force (RIF). We disagree. The Department has no

greater right to make restructuring decisions under subpart F than the Department presently has under section 351.201(a)(1) of OPM’s RIF regulations.

Commenters, including comments during the meet-and-confer process, were also concerned that because subpart F provides more weight to performance as a retention factor than under OPM’s 5 CFR part 351 RIF regulations, employees’ retention standing under subpart F would be primarily based upon performance ratings rather than upon tenure and veterans’ preference. In fact, subpart F provides that, consistent with OPM’s RIF regulations, tenure remains the most important retention factor, with veterans’ preference the second most important factor. Subpart F gives performance greater retention weight by providing that performance is the third most important factor, while creditable service is the least important of the four factors. Under OPM’s RIF regulations, creditable service is the third most important factor while performance is the least important factor. The additional weight on performance is consistent with the Department’s implementation of a performance-based HR system.

Table. Relative Weight of Retention Factors

Order of Retention Factors From Highest to Lowest	OPM’s 5 CFR part 351 RIF Regulations	NSPS 5 CFR 9901 subpart F Workforce Shaping Regulations
1	Tenure (i.e., type of appointment)	Tenure (i.e., type of appointment)
2	Veterans’ Preference	Veterans’ Preference
3	Creditable Federal Service	Performance Ratings
4	Performance Ratings	Creditable Federal Service

In order to ensure fairness in RIF actions and an impartial review of Department decisions, such as abolishing positions and crediting performance ratings, subpart F provides an appeal right under § 9901.611 for an employee who is reached for a RIF action resulting in separation, reduction in pay band, or furlough for more than 30

consecutive days (or more than 22 discontinuous workdays), and who believes that the Department improperly applied subpart F.

Commenters, including labor organizations participating in the meet-and-confer process, recommended that the design and implementation of subpart F should be subject to collective bargaining. This would be inconsistent with the enabling legislation (5 U.S.C. 9902(f)(4)), which makes the collaborative process the exclusive process for involvement of employee representatives in the planning, development, and implementation of the HR system. We have added language at §§ 9901.605(f) and 9901.606(e), which further clarifies that competitive areas and competitive groups are not subject to collective bargaining. Even so, in developing final subpart F regulations, we did consider all comments submitted by participating labor organizations, including comments during the meet-and-confer process.

*Other Comments on Specific Sections of Subpart F*

*Section 9901.601 – Purpose and applicability*

Section 9901.601 specifies that subpart F implements the Department's system to determine employees' retention rights resulting from organizational decisions such as realignment, reorganization, and closure.

As an alternative to the RIF system in the proposed regulation, commenters suggested that the Department retain or modify OPM's present 5 CFR part 351 retention regulations as an alternative to subpart F. These suggestions were inconsistent with a performance-based HR system and were not adopted.

Section 9901.602 – Scope of authority

As authorized by 5 U.S.C. 9902(k), § 9901.602 provides that subpart F modifies and then applies the statutory retention provisions in 5 U.S.C. 3501 through 3503, except for the veterans' preference provisions which are not modified in §§ 3501 and 3502. Finally, the section also provides that the Department will further implement subpart F through implementing issuances in accordance with § 9901.105.

Section 9901.603 – Definitions

Section 9901.603 defines specific terms for purposes of subpart F.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that subpart F clarify the definition of “competing employee.” The Department will publish implementing issuances clarifying who is a “competing employee” under subpart F.

In order to clarify how the Department will consider performance as a retention factor under § 9901.607(a)(3), we added a definition of “modal rating” to § 9901.603. For purposes of subpart F, “modal rating” means the rating of record that occurs most frequently in a particular competitive group. The Department will publish implementing issuances further clarifying the consideration of performance in RIF competition under subpart F.

Commenters, including comments during the meet-and-confer process, on both sections 9901.603 and 9901.607 (“retention list”) suggested that the definition of “retention factors” specifically address the provision that retention factors includes “such other factors as the Secretary considers necessary and appropriate to rank employees within a particular retention list.” Commenters were also concerned that this discretion in

the definition could lead to abuse in conducting RIF actions. After consideration of the comments, we decided to revise the definition of “retention factors” to reflect the actual ranking order of the four principal retention factors found in § 9901.607(a) (i.e., tenure first, veterans’ preference second, performance third, and creditable service fourth) without any additional changes to the definition. The Department will appropriately cover any consideration given to additional retention factors through implementing issuances. However, even if the Department chooses to give consideration to additional factors under authority of this definition, the Department must still follow the ranking order of the four factors found in § 9901.607(a).

A commenter suggested that a definition of “tenure” be added to § 9901.603. We did not adopt this suggestion. Section 9901.603 defines “tenure group” as the initial grouping of employees for RIF competition on the basis of the type of their appointments. Section 9901.607(a)(1) provides the ranking order of tenure as used in RIF actions under subpart F. The Department will publish implementing issuances on “tenure” to clarify for purposes of subpart F that tenure is granted and governed by the type of appointment under which an employee is currently serving without regard to whether his or her appointment is in a competitive position or an excepted position.

#### Section 9901.604 – Coverage

Section 9901.604 specifies which employees and which personnel actions are covered by subpart F.

Commenters suggested that § 9901.604(a) of subpart F specifically exclude National Guard technicians who have retention rights under 32 U.S.C. 709. The

technicians are not currently covered by OPM's RIF regulations; therefore, implementing issuances will similarly exclude the National Guard technicians from subpart F.

Commenters, including comments during the meet-and-confer process, suggested that the regulations specifically address the provision in § 9901.604(a)(2) providing that subpart F also applies to other employees "designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902." We retained the section as originally proposed. The Department will implement § 9901.604(a)(2) through implementing issuances.

A commenter suggested that subpart F include term employees, who in fact compete for retention in the ranking order covered in § 9901.607(a)(1). Other commenters, including comments during the meet-and-confer process, suggested that subpart F exclude term employees from RIF competition. We did not adopt this suggestion. The Department will clarify the coverage of term employees in subpart F through implementing issuances. In response to another comment, the Department will also clarify through implementing issuances the retention rights under subpart F of seasonal employees, employees on other nonpermanent appointments, and employees on probationary appointments.

Commenters, including comments during the meet-and-confer process, asked for clarification when subpart F would apply to employees of the Department. We agree that clarification is necessary. Proposed § 9901.604(b)(1) provided that subpart F applies to the release of a competing employee from a retention list by actions such as separation or reduction in band for a reason covered in § 9901.601 (e.g., realigning, reshaping, etc). After consideration of the comments, we revised § 9901.604(b)(1) to clarify that

subpart F also applies to a displacement action affecting a competing employee within a retention list.

A commenter agreed with the transfer of function provisions in § 9901.604(b)(2), which provides that the Department applies 5 CFR part 351, subpart C, of OPM's regulations to a transfer of function situation. Also, other commenters suggested that the Department develop its own transfer of function procedures for purposes of subpart F. After consideration of the comments, we revised § 9901.604(b)(2) and a conforming change in § 9901.602 to provide that, consistent with the requirements in section 5 U.S.C. 3503, the Department may through implementing issuances implement its own transfer of function procedures under subpart F.

Section 9901.604(b)(3) provides that the Department applies section 351.604 of OPM's regulations to implement a RIF furlough of more than 30 consecutive calendar days. Commenters suggested that the Department develop its own RIF furlough procedures for purposes of subpart F. However, we believe that only clarification is necessary. Consistent with the definition of "furlough" in 5 CFR 351.203 and the regulations in 5 CFR 351.604, we revised § 9901.604(b)(3) to provide that subpart F applies to the furlough of a competing employee for more than 30 consecutive days or more than 22 discontinuous workdays. The Department will implement § 9901.604(b)(3) through implementing issuances covering both continuous and discontinuous furloughs.

Section 9901.604(c)(2) provides that subpart F does not apply to a reduction in band based upon reclassification due to new classification standards or the correction of classification error. Demotions resulting from misclassification or a new classification standard are similarly excluded from OPM's RIF regulations. Commenters, including

labor organizations participating in the meet-and-confer process, suggested that § 9901.604(c)(2) be revised to apply subpart F to both a reduction in band and a reduction in pay resulting from a classification decision. We did not adopt this suggestion because the Department believes there is no need to establish rules that differ from the Governmentwide RIF regulations in this regard.

Section 9901.604(c)(7) provides that, with one exception, subpart F does not apply to a reduction in band based upon job erosion. The exception provides that subpart F applies to a reduction in band based upon job erosion when the agency has formally announced a reduction in force in the competitive area that will be effective within 180 days. Demotions resulting from job erosion are similarly excluded from OPM's RIF regulations, with a comparable exception. Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.604(c)(7) be revised to apply subpart F to both a reduction in band and a reduction in pay resulting from job erosion. We did not adopt this suggestion because the Department believes there is no need to establish rules that differ from the Governmentwide RIF regulations in this regard.

*Section 9901.605 – Competitive area*

Section 9901.605 covers “Competitive Area,” which defines the organizational and geographic boundaries within which employees compete for retention under subpart F.

Commenters, including labor organizations participating in the meet-and-confer process, believed that the minimum competitive area under § 9901.605(a) was too narrow and could encourage the Department to target employees for RIF actions. One

commenter supported the competitive area standard under § 9901.605(a). After consideration of comments on the competitive area standard, we have retained § 9901.605(a) without revision. Section 9901.605(a) provides the Department with the option of restricting RIF actions to organizations and positions directly affected by organizational decisions such as realignment, reorganization, and closure. The Department also retains the option to use a competitive area larger than the minimum standard (e.g., an entire activity could be defined as a single competitive area).

To ensure fairness in the Department's competitive area decisions, § 9901.605(e) requires that a competitive area must be established only on the basis of legitimate organizational reasons. The section prohibits establishment of a competitive area for the purpose of targeting an employee for a RIF action because of nonmerit factors. An employee who is reached for a separation, demotion, or furlough action, and believes that the Department improperly established a competitive area under subpart F, may appeal the Department's decision under § 9901.611.

Commenters suggested that subpart F clarify the competitive area standard and terminology under § 9901.605(a). Commenters also requested that subpart F clarify the Department's oversight role in reviewing competitive area decisions.

Another commenter suggested that subpart F clarify whether § 9901.605 potentially authorizes establishment of a one-person competitive area. Finally, commenters, including labor organizations participating in the meet-and-confer process, suggested that subpart F clarify the Department's procedures for approving a change in the competitive area definition within 90 days of the effective date of the RIF. The Department will

clarify the competitive area standard, its terminology, and related material in implementing issuances.

Labor organizations participating in the meet-and-confer process suggested that § 9901.605 be revised to provide that a competitive area may not include only preference eligibles. This suggestion was not adopted. Section 9901.605 provides that the Department establishes competitive areas solely on the basis of organizational and geographic decisions, not on the basis of the retention standing of individual employees in the competitive areas.

A commenter was concerned that a competitive area defined under § 9901.605 could result in the release of an employee with higher performance ratings than another employee in a different competitive area. We recognize that this scenario may result from any RIF situation, and could also occur today under current OPM regulations where employees compete for retention only within a single competitive area.

A commenter was concerned that a competitive area defined in § 9901.605 could limit the potential future promotion opportunities of an employee involved in RIF competition. That scenario, too, may result from any RIF situation, including actions taken today under OPM's regulations.

A commenter was concerned that an employee reached for a RIF action under subpart F could not appeal a competitive area decision. As previously noted, an employee may appeal the competitive area as part of a RIF appeal under § 9901.611.

Section 9901.606 – Competitive group

Section 9901.606 covers the “competitive group,” which serves as the basis for ranking employees on the basis of their relative retention standing. After the Department

applies the retention factors (i.e., tenure, veterans' preference, performance, and creditable service), the competitive group ranks employees in the order of their relative standing on a "retention list" that is similar to a "retention register" under 5 CFR 351.404 of OPM's RIF regulations.

Commenters, including labor organizations participating in the meet-and-confer process, were concerned that a competitive group established under § 9901.606(a) provides too narrow a basis for RIF competition. After consideration of comments on establishment of a competitive group, § 9901.606(a) is adopted without revision. Section 9901.606(a) provides the Department with an additional option to restrict RIF actions to organizations and positions directly affected by organizational decisions such as realignment, reorganization, and closure. The Department also retains the option to establish a larger competitive group that potentially could cover an entire activity.

A commenter was concerned that a competitive group defined in § 9901.606(a) could limit the potential future promotion opportunities of an employee involved in RIF competition. That situation could result in any RIF, including actions taken today under OPM's regulations.

Commenters suggested that subpart F clarify how and when the Department will establish and/or modify competitive groups. A commenter also suggested that subpart F clarify competitive group terminology. The Department will clarify its competitive group policies in implementing issuances.

Section 9901.606(c) provides that the Department uses employees' official positions of record to place employees into a competitive group. The section also provides that the Department "may supplement an employee's official position

description by using other applicable records that document the employee’s actual duties and responsibilities.” A commenter suggested that the Department place employees into a competitive group only on the basis of their official positions of record. Other commenters suggested that subpart F cover how the Department will use records other than official positions to establish competitive groups. After consideration of the comments, we have retained § 9901.606(c) without revision. Section 9901.606(c) provides the Department with maximum flexibility in establishing competitive groups based upon employees’ actual duties and responsibilities.

Commenters suggested revision of § 9901.606 to provide that the Department may not establish a competitive group comprised of fewer than 25 employees. Commenters, including labor organizations participating in the meet-and-confer process, also suggested revision of § 9901.606 to provide that the Department may not establish a competitive group comprised only of preference eligibles. We did not adopt these suggestions. The Department makes staffing decisions under subpart F based upon organizational considerations. Consistent with this premise, § 9901.606 provides that the Department establishes competitive groups based upon employees’ positions without regard to the number of employees performing those positions.

*Section 9901.607 – Retention standing*

Section 9901.607 covers “retention standing” on a “retention list” under subpart F. The Department ranks employees on a “retention list” on the basis of their relative retention standing. This section also covers access by employees and their representatives to the retention list.

Commenters suggested that subpart F clarify the ranking order of the factors the Department uses to establish retention lists under § 9901.607. In fact, sections 9901.607(a)(1)-(4) mandate the required order and weight of the retention factors (i.e., tenure has the most weight, creditable service has the least weight). The Department will publish implementing issuances further clarifying the ranking order of the retention factors in § 9901.607(a).

Section 9901.607(a)(1) provides that in ranking employees on the retention list, employees with career tenure, including employees serving an initial probationary period, are listed first, followed by employees on term and similar appointments as identified in DoD implementing issuances. Commenters, including comments during the meet-and-confer process, suggested that employees serving an initial probationary period on appointment to the Federal service be listed below employees with career tenure, and above employees with term or similar appointments. We agree with this suggestion and have accordingly revised § 9901.607(a)(1) to incorporate this change. Commenters suggested that § 9901.607(a)(1) be revised to clarify whether, before a RIF, the Department may convert a temporary noncompeting employee with no retention rights under subpart F to a permanent position that provides the incumbent with full retention rights. We did not adopt this suggestion. The Department has the right to take appropriate personnel actions before, during, and after the effective date of the RIF. A commenter suggested that § 9901.607(a)(1) be revised to include service as a tenure element. We did not adopt this suggestion. Creditable service is a separate retention factor covered by § 9901.607(a)(4).

Commenters noted that § 9901.607(a)(2) erroneously referenced 5 CFR 351.504(c) and (d) rather than 5 CFR 351.501(c) and (d) of OPM's RIF regulations. We corrected this misprint.

Commenters were concerned that § 9901.607(a)(2) reduces the relative weight of veterans' preference as a retention factor under subpart F. In fact, § 9901.607(a)(2) applies veterans' preference with the same retention weight as under OPM's current RIF regulations, which are referenced in § 9901.607(a)(2). Specifically, under § 9901.607(a)(2) veterans' preference is considered as a retention ranking factor immediately after tenure on the same basis as OPM's regulations consider veterans' preference in the context of tenure.

A commenter suggested that § 9901.607(a)(2) be revised to include a cite to the statutory basis for veterans' preference in RIF. This suggestion was not adopted. Section 9901.602 states that, without modification, subpart F applies the RIF and statutory preference requirements mandated by 5 U.S.C. 3501 through 3503. Also, § 9901.607(a)(2) references back to the provisions in 5 CFR 351.501(c) and (d) of OPM's reduction in force regulations that implement the retention preference requirements.

A commenter suggested that § 9901.607(a)(2) be revised to increase the relative weight of veterans' preference as a retention factor. This suggestion was not adopted. Section 9901.607(a)(2) provides veterans' preference with the same weight in determining RIF retention standing as under OPM's regulations.

As noted in the General Comments section above, commenters, including labor organizations participating in the meet-and-confer process, were concerned that

§ 9901.607(a)(3) excessively increases the relative weight of performance as a retention factor under subpart F. Section 9901.607(a)(3) considers performance as the third most important retention factor after tenure and veterans' preference. Under OPM's RIF regulations, performance receives the least weight as a retention factor. As we noted in the General Comments, the additional retention weight for performance is fully consistent with the goal of increasing the likelihood that higher-performing employees will be retained in the event of a RIF.

Commenters, including labor organizations participating in the meet-and-confer process, asked that § 9901.607(a)(3) clarify how the Department will provide additional weight to performance as a retention factor. The Department will publish implementing issuances clarifying the consideration of performance in RIF competition under subpart F. Other commenters requested clarification on how the Department will ensure that ratings are impartial and objective, as well as how an employee may contest a rating within the Department. These concerns are discussed in subpart D.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.607(a)(3) be revised to clarify that the Department will not always use a single rating of record to determine the weight of performance upon an employee's retention standing. We agree with this suggestion. The Department's implementing issuances covering the consideration of performance in RIF competition under subpart F will explain how employees will receive retention credit for their multiple ratings under the Department's personnel system. In a conforming change, § 9901.603 includes a definition of "modal rating" that the Department will use to

determine retention credit for employees who do not have any ratings of record under the Department's personnel system.

Commenters suggested that § 9901.607(a)(3) be revised to provide that performance receive the same or no greater retention weight than creditable service. This suggestion was not adopted. Consistent with the Department's personnel system that emphasizes performance, § 9901.607(a)(3) provides that performance receives greater weight as a retention factor than creditable service.

A commenter suggested that performance receive less weight under subpart F than veterans' preference. As previously noted, §§ 9901.607(a)(2) and (a)(3) provide that veterans' preference is considered as a retention factor before performance under subpart F.

Commenters suggested that § 9901.607(a)(3) be revised to increase the relative weight of performance over veterans' preference as a retention factor. This suggestion was not adopted. Section 9901.607(a)(2) considers veterans' preference on the same basis as under OPM's regulations determining RIF retention standing, while § 9901.607(a)(3) provides less weight to performance than veterans' preference as a retention factor.

Commenters suggested that subpart F provide retention credit for performance on the same basis as OPM regulations. This suggestion was not adopted. The additional weight for performance as a retention factor under subpart F is consistent with the increased emphasis on performance in the Department's new personnel system.

Commenters, including labor organizations participating in the meet-and-confer process, were concerned that § 9901.607(a)(4) excessively decreases the relative weight

of creditable service as a retention factor under subpart F. Section 9901.607(a)(4) considers service as the fourth and least important retention factor. Under OPM's RIF regulations, service is the third most important retention factor, while performance receives the least weight as a factor. Again, the decreased retention weight on service and the additional weight for performance are consistent with the increased emphasis on performance in the Department's performance-based personnel system.

A commenter suggested that subpart F clarify "length of service." Section 9901.607(a)(4) provides that employees receive retention credit for creditable civilian and Armed Forces service on the basis of 5 U.S.C. 3502(a)(A) and (B), and OPM's regulations in 5 CFR 351.503. However, we believe that clarification is necessary. We revised § 9901.607(a)(4) to provide that in calculating creditable civilian and uniformed service under subpart F, the Department uses 5 CFR 351.503 of OPM's RIF regulations, but without regard to provisions covering additional service credit for performance in 5 CFR 351.503(c)(3) and (e) of OPM's regulations. The Department will publish implementing issuances clarifying RIF service credit under subpart F.

In a clarifying edit, we added § 9901.607(a)(5), which provides that the Department may establish tie-breaking procedures when two or more employees have the same retention standing. This sentence was included in § 9901.607(a)(4) of the proposed regulations.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.607(c) be revised to provide that all employees have access to a retention list established under § 9901.607(a)(1). We did not adopt this suggestion because § 9901.607(c) provides that employees who have received a specific

written RIF notice have access to a retention list in accordance with 5 CFR 351.505 of OPM's RIF regulations. However, we believe that clarification is necessary. We revised § 9901.607(c) to provide that in allowing access to retention records, the Department uses section 5 CFR 351.505 of OPM's reduction in force regulations, but substitutes "retention list" for "competitive level" or "retention register." The Department will publish implementing issuances clarifying access to retention lists under 9901.607(c).

Section 9901.608 – Displacement, release, and position offers

Section 9901.608 covers personnel actions that result in displacement within the retention list or the release of an employee from a retention list under subpart F. A qualified employee reached for release from his/her present position because of position abolishment or displacement by a higher-standing employee on the retention list may potentially displace a lower-standing employee on the list before separation or furlough by RIF.

A commenter suggested that § 9901.608(a) be revised to clarify how the Department determines that a higher-standing employee is qualified to displace a lower-standing employee on the retention list. Another commenter suggested that § 9901.608(a)(1)(i) be revised to eliminate a requirement that the Department only uses 5 CFR 351.702 of OPM's retention regulations to determine employees' qualifications for displacing a lower-standing employee on the retention list under subpart F. We agree that clarification is necessary. We revised § 9901.608(a)(1)(i) to provide that in determining the qualifications of a higher-standing employee to displace a lower-standing employee under subpart F, the Department uses, as applicable, 5 CFR 351.702 of OPM's retention regulations, or its own qualifications, consistent with other requirements in

5 CFR 351.702. The Department will publish implementing issuances clarifying qualification determinations for displacement within a retention list under § 9901.608(a). We also added § 9901.608(a)(1)(iii) to clarify that a displaced employee must be in the same or lower pay band as the higher-standing employee who displaced him/her.

Commenters suggested that § 9901.608(a) be revised to clarify terminology such as “status” and “undue interruption.” The Department will publish implementing issuances clarifying terminology under 9901.608(a).

A commenter suggested that § 9901.608(a) be revised to require the Department to provide positive efforts that would increase the likelihood of higher-standing employees being qualified to displace employees with lower retention standing. We did not adopt this suggestion. We believe it would be unfair for the Department to pursue a program whose purpose is to increase the likelihood of one category of employees displacing a different category of employees in a RIF.

Commenters suggested that § 9901.608(b)(1) be revised to clarify the order in which employees are released from the retention list. Section 9901.608(b)(1) provides that, consistent with the order of retention required by § 9901.607(a), employees with the lowest retention standing are released before higher standing employees on the retention list.

Commenters also suggested that § 9901.608(b)(2) clarify displacement rights involving time-limited positions. We agree that clarification is necessary. We revised § 9901.608(b)(2) to provide that under subpart F a competing employee may not be released from a retention list containing a position held by a temporary employee when the competing employee is qualified for the position under § 9901.608(a)(1)(i). The

Department will publish implementing issuances clarifying release from retention lists under 9901.608(b).

A commenter suggested that § 9901.608(b) clarify the procedures that the Department uses to break ties in employees' relative retention standing. The Department will publish implementing issuances clarifying tie-breaking procedures in releasing employees from retention lists. Section 9901.607(a)(5) of the final regulations covers the Department's right to establish tie-breaking procedures.

A commenter suggested that § 9901.608(b)(3) clarify how the Department will use exceptions to the regular order of release from the retention list. We agree that clarification is necessary. We revised § 9901.608(b)(3) to provide that in temporarily postponing the release of an employee from the retention list, the Department uses 5 CFR 351.506, 351.606, 351.607, and 351.608 of OPM's RIF regulations, but substitutes the term "retention list" for the term "competitive level" where part 351 uses that term in the four identified sections. The Department will publish implementing issuances further clarifying exceptions to the usual order of release under § 9901.608(b)(3).

Commenters suggested that § 9901.608(c) clarify whether the Department will consider employees' retention standing in offering vacant positions under subpart F. We agree that clarification is necessary. Section 9901.608(c) provides that the Department must use retention standing in offering a vacant position in the same competitive area to an employee released from a retention list under subpart F. We revised § 9901.608(c) to clarify that the Department must use retention standing when offering a vacancy in the same competitive area to an employee who is competing on the retention list under § 9901.608(a)(1) because of either position abolishment or displacement by an employee

with higher retention standing. The Department will publish implementing issuances clarifying offers of vacancies under § 9901.608(c).

A commenter asked whether a released employee who is offered a vacancy under § 9901.608(c) has any potential rights to pay retention. The Department will publish implementing issuances clarifying employees' entitlements to pay retention under § 9901.608(c). However, in a conforming change, we have revised § 9901.355 of subpart C to provide additional information on pay retention.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.608(d) be revised to provide that, in lieu of RIF separation or furlough, an employee released from a retention list would have potential displacement rights to positions held by lower-standing employees on other retention lists similar to “bump” and “retreat” regulations provided to released employees under subpart G of part 351 of OPM’s RIF regulations. This suggestion was not adopted. Section 9901.608(d) provides the Department with flexibility to restrict RIF actions to organizations and positions directly affected by organizational decisions such as realignment, reorganization, and closure. In a related clarification, we revised § 9901.608(d)(2) to provide that the furlough of an employee released from a retention list is covered by § 9901.604(b)(3). The Department will publish implementing issuances clarifying actions following the release of employees from a retention list under § 9901.608(d).

*Section 9901.609 – Reduction in force notices*

Section 9901.609 covers the notice that the Department must issue to each employee before release from the retention list under subpart F. The Department must

issue a specific written notice a minimum of 60 days before the employee is reached for release from the retention list by a RIF action (e.g., separation or furlough).

Commenters suggested that § 9901.609 be revised to provide 120 days written notice. This suggestion was not adopted. The requirement for a minimum 60 days notice of a RIF action is consistent with the requirements of 5 U.S.C. 3502(d)(1)(A) for OPM's regulations published in 5 CFR 351.801(a)(1). The Department will publish implementing issuances clarifying the content of RIF notices issued under § 9901.609.

In a clarifying change consistent with management flexibilities provided by 5 CFR 351.801(b), § 9901.609 is revised to provide that when the Department applies subpart F because of circumstances not reasonably foreseeable, the Secretary, at the request of a component head or designee, may approve a RIF notice period of less than 60 days. The notice period must cover at least 30 days before the date of release from the retention list. The Department will publish implementing issuances covering a RIF notice period of less than 60 days under § 9901.609.

#### *Section 9901.610 – Voluntary separation*

Section 9901.610 covers voluntary separation from the Department as a RIF action. Under this option, the Department may allow an employee to volunteer for separation from the service by reduction in force when the action avoids the RIF separation of another employee.

One commenter suggested that the Department use the voluntary separation option to avoid RIF actions. The Department will publish implementing issuances clarifying the applicability of voluntary RIF separations under § 9901.610.

Section 9901.611 – Reduction in force appeals

Section 9901.611 covers RIF appeals. An employee who is reached for a RIF action resulting in separation, reduction in band, or furlough under § 9901.604(b), and who believes that the Department improperly applied subpart F, has the right to appeal to the Merit Systems Protection Board. Also, commenters during the meet-and-confer process suggested, as an alternative to appealing RIF actions to the Board, employees should instead have the right to file a grievance. We did not adopt this suggestion. Section 9901.611(a) references 5 CFR 351.901 of OPM’s regulations in providing the same impartial right to appeal a RIF action under subpart F as provided to an employee under OPM’s retention regulations.

For clarification, we revised § 9901.611(a)(3) to provide that an employee has the right under subpart F to appeal a furlough of more than 30 days, as defined in § 9901.604(b)(3).

Commenters, including labor organizations participating in the meet-and-confer process, suggested that § 9901.611(a) be revised to provide a right to appeal a RIF action under subpart H of part 9901 (“Appeals”). This suggestion was not adopted. Subpart H of part 9901 only covers appeals of certain adverse actions taken under subpart G of part 9901 (e.g., removals, suspensions for more than 14 days, furloughs of 30 or less consecutive days, and reductions in pay band – or a comparable reduction). The procedures in subpart H are appropriate for reviewing an adverse action appeal (i.e., an appeal of a personnel action that the Department took for cause). In contrast, § 9901.611(a) provides for the right to appeal a RIF action (i.e., an appeal of a personnel

action that the Department took for an organizational reason) on the same basis as under OPM's RIF regulations.

Commenters suggested revision of § 9901.611(a) to provide for expedited Board review of appeals under subpart F. This suggestion was not adopted. Section 9901.611 provides for the right to appeal a RIF action to the Board using the same procedures as an appeal under OPM's regulations.

Commenters, including labor organizations participating in the meet-and-confer process, suggested revision of § 9901.611(b) to provide for the right to appeal to the Board, or another third-party appellate body, an action taken under internal Department placement programs. This suggestion was not adopted. Section 9901.611(b) does not provide the right to appeal an internal placement action (including a placement under the Priority Placement Program). An employee who believes that the Department failed to properly effect an internal placement action may contest the action through a grievance or other remedy available for the review of the Department's internal staffing decisions.

## **Subpart G – Adverse Actions**

### *General Comments*

Many commenters, including labor organizations participating in the meet-and-confer process, objected to the provisions in subpart G. They felt that the proposed regulations would adversely impact due process rights, discrimination and whistleblowing claims, and the ability to retain staff. We disagree. Under the enabling legislation, DoD is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including reprisal for whistleblowing or unlawful discrimination. The regulations therefore do not modify

these protections in any way. The enabling legislation also requires DoD to ensure that employees are afforded the protections of due process, which we have done. In accordance with U.S. Supreme Court decisions, the regulations ensure employees notice, a right to reply, a final written decision, and a post-decision review when the Secretary proposes to deprive them of constitutionally protected interests in their employment. Although we have made changes to the proposed regulations, due process and other legal protections are preserved as required by Congress, and we do not believe the regulations in this subpart will have any negative effect on retention efforts.

*Section 9901.701 – Purpose*

This section outlines the purpose of this subpart and provides for the development and publication of DoD implementing issuances. During the meet-and-confer process, the participating labor organizations stated that DoD does not have the authority to prescribe implementing issuances to carry out the provisions of this subpart. We disagree. The enabling legislation expressly states that the Secretary and the Director will jointly prescribe regulations for the system. This carries with it the authority for the Secretary to provide further clarification, guidance, and instruction on these regulations through implementing issuances. It is also consistent with the continuing collaboration process described in § 9901.106 which implements 5 U.S.C. 9902(f)(1)(D).

*Section 9901.702 – Waivers*

This section specifies the provisions of title 5, U.S. Code, that are waived for employees that are covered by the NSPS adverse action system established under subpart G. During the meet-and-confer process, the participating labor organizations recommended that this provision be deleted. We do not agree with this recommendation

because it is inconsistent with the enabling legislation, which allows waiver of certain provisions of title 5, U.S. Code, and the creation of new adverse action procedures. We have made no changes to this section.

Section 9901.703 – Definitions

This section defines terms relevant to this subpart. The labor organizations participating in the meet-and-confer process recommended that the definition of “adverse action” be amended to include “demotion” and exclude the words “or other comparable reduction.” We disagree. The term “demotion” is not used in the regulations. The concept of demotion is covered through reduction in pay band (or comparable reduction). The term “comparable reduction” is taken directly from the enabling legislation. These labor organizations also recommended that a definition be added for “band.” Commenters, and labor organizations during the meet-and-confer process, recommended that a definition be added for “day.” We agree and have added definitions for those terms. A definition of “reduction in pay” has also been added to clarify that nonreceipt of a pay increase (such as a rate range adjustment, supplemental adjustment, or a performance pay increase) does not constitute a reduction in pay and therefore is not an adverse action.

During the meet-and-confer process, labor organizations also suggested that the definitions of “indefinite suspension,” “pay,” and “suspension” be modified. Since the definitions for these terms are essentially identical to current statutory and regulatory definitions, we see no basis for making the suggested modifications. Finally, labor organizations, as well as commenters, recommended the deletion of “mandatory removal

offenses” (MROs). We disagree because of that term’s relevance to this section and the fact that the concept of MROs is retained.

Section 9901.704 – Coverage

Section 9901.704 describes the types of actions and employees covered by and excluded from coverage under the subpart. Commenters, as well as labor organizations participating in the meet-and-confer process, recommended that employees who are serving in-service probationary periods be given appeal rights. We have clarified that employees who are serving an in-service probationary period will have appeal rights if they are not returned to a grade or band and pay rate no lower than that held before the in-service probationary period. The labor organizations, during the meet-and-confer process, also recommended that we add a provision stating that employees who are excluded from the enabling legislation are not covered by this provision. Such a provision is unnecessary because employees excluded from coverage under the enabling legislation are not covered by any provision of the NSPS regulations.

We received many comments suggesting we add reduction in force (RIF) actions to coverage. We believe the NSPS appeal system should be limited to removals, suspensions for more than 14 days, furlough for 30 days or less, and reduction in pay or pay band (or comparable reduction) as set forth in 5 U.S.C. 9902(h)(4)(A). Employees subject to RIF actions will continue to have the same appeal rights as they do today and that is made clear in subpart F of the regulations. Commenters recommended clarification as to whether adverse actions resulting from agency suitability determinations are excluded. We believe such clarification is unnecessary since agency suitability actions, including removals, are taken under 5 U.S.C. chapter 73. Suitability

actions under chapter 73 are by definition not adverse actions. Moreover, the enabling legislation expressly excludes from its coverage suitability actions taken under 5 U.S.C. chapter 73. See 5 U.S.C. 9902(d)(2). Other commenters recommended that term employees be excluded from coverage. The Department wishes to maintain the status quo with respect to term employees' appeal rights. One commenter suggested that the movement of an employee to a lower pay band not be considered an adverse action under NSPS when such movement is the result of a less than fully successful performance rating. We disagree. The enabling legislation identified a reduction in pay band as an appealable action.

Section 9901.711 – Standard for action

This provision describes the standard for taking an action against an employee as “for such cause as will promote the efficiency of the service.” During the meet-and-confer process, participating labor organizations, as well as most commenters, agreed with this provision. However, some commenters stated that this standard provides management too much discretion. We have retained this long-standing and well established “efficiency of the service” standard.

Section 9901.712 – Mandatory removal offenses

This provision gives the Secretary the authority to identify Mandatory Removal Offenses (MROs), which are offenses that have a direct and substantial impact on the Department's national security mission. An employee who commits such an offense must be removed from Federal service, unless the Secretary determines in his or her sole and exclusive discretion that a lesser penalty is appropriate. Commenters as well as participating labor organizations during the meet-and-confer process stated that this

provision should be deleted in its entirety because in their view, the establishment of MROs exceeds DoD's authority under the enabling legislation and is open to abuse. Some commenters stated that MROs should be defined and subject to public comment through the formal rule-making process. Commenters expressed concern that the Secretary can issue and change the list at will. Some commenters stated that the Secretary should not be the only mitigating authority for MROs and that his non-reviewable discretion is inappropriate for a political appointee. In addition, commenters stated MROs do not leave any room for flexibility based on individual circumstances or mitigating factors and takes the flexibility away from DoD supervisors. Other commenters expressed concern that if an MRO offense is not sustained, an employee can still be charged with a non-MRO offense based on the same facts.

We disagree that the establishment of MROs exceeds the Department's authority. The enabling legislation expressly provides authority to waive the current statutory provision governing adverse action in establishing the HR system. Although no MROs have been established, the provision that allows for the establishment of MROs must be retained to support the vital mission of the Department. We have revised the proposed regulations to provide, at a minimum, that MROs will be (1) identified in advance as part of the Department's implementing issuances, (2) publicized upon establishment via notice in the *Federal Register*, and (3) made known to all employees on a periodic basis, as appropriate, through means determined by the Department. Examples of potential MROs are provided under Major Issues: Adverse Actions and Appeals. The offenses that may be identified as MROs will be so egregious as to have a direct and substantial adverse impact on the Department's national security mission, and therefore would not

properly be subject to mitigation except in unusual circumstances as determined by the Secretary. Employees who commit such offenses must be removed from the Department and the Federal service. The support of the national security mission outweighs any loss of flexibility in the system. We disagree that it is inappropriate for the Department to have the ability to take a subsequent action if the offense is found to not be an MRO. We believe that if an employee's misconduct is found to qualify as an MRO, it does not mean that the misconduct should not be addressed. For misconduct amounting to an MRO, mitigation of penalties, review of notice letters, and designation of offenses must be at the highest levels of the Department to prevent abuse, ensure judicious use of the authority, and provide maximum transparency for employees. In light of the above, we believe that MROs need not be subject to public comment through the formal rule-making process. They will, however, be subject to continuing collaboration with employee representatives. This ensures transparency in the process of establishing MROs.

Section 9901.714 – Proposal notice

This provision outlines procedures for issuing proposal notices, including a shorter advance notice period of at least 15 days. Commenters and labor organizations participating in the meet-and-confer process recommended retaining the current 30-day written notice of a proposed adverse action. Other commenters argued that due process is denied because of the potential inability to gather and review evidence within the proposed time frame. We disagree that the advance written notice period should be 30 days. The shortened notice supports the NSPS goal of streamlining the adverse action process and provides adequate time for consideration of evidence. We have clarified in the regulations that the 15-day notice period represents the minimum period of time for

advance notice to the employee. We have further modified this section to clarify that notice of proposed adverse action or opportunity to reply are not required in the event of a furlough of 30 days or less without pay due to unforeseeable circumstances.

This provision also shortens the minimum notice period from 7 to 5 days in situations where there is reasonable cause to believe a crime has been committed. Commenters and labor organizations participating in the meet-and-confer process recommended retaining the current crime provision notice period of 7 days. We believe that 5 days is the appropriate amount of time to allow for notice and reply in such situations given the need to take action in these situations. Commenters expressed concern over the lack of an explicit requirement that the Department have actual knowledge of a criminal investigation or criminal charges being filed against an employee before imposing the 5-day notice period. Commenters also recommended that “reasonable cause” be defined. The criteria under which the crime provision may be invoked is well established in current statute, regulation, and case law and was not changed in the proposed regulations. We do not believe it necessary to define reasonable cause in these regulations. Each case is unique and considerable guidance is provided in existing case law.

Labor organizations during the meet-and-confer process recommended including a requirement for DoD to provide employees copies of all evidence including exculpatory evidence during the notice period. While the regulations do not require that copies of evidence be delivered to the employee, the Department will ensure that the employee is informed of his or her right to review the Department’s evidence supporting the proposed action. There is no need to specifically require DoD to make exculpatory evidence

available to the employee during the notice period since all evidence relied upon by the decision-maker must be made available to the employee.

Labor organizations during the meet-and-confer process also recommended modifying the proposed regulations with regard to the status of an employee during the notice period. Under current law and regulation, an employee is normally entitled to be in a pay status during the notice period. A Component may place an employee in a different position or even in a non-duty status, but the employee must continue to be paid. The labor organizations recommended that the Department's authority to assign an employee to other duties or to place the employee in a non-duty pay status should be substantially limited, even if the Department determines that the employee's continued presence would have an adverse impact on the Department's mission. The labor organizations recommended deleting "the Department's mission" as a possible justification for assigning an employee to a different status or position. We do not believe such modification is appropriate. Deleting "the Department's mission" as a reason for reassigning an employee to other duties or placing him or her in a non-duty pay status would adversely impact the Department's flexibility in accomplishing the mission.

Commenters stated the Department should not be allowed to require an employee to use personal leave during the notice period. We disagree with the labor organizations' recommended deletion of language in this area. We do not envision requiring an employee to use personal leave during a notice period; however, an employee may voluntarily elect to request leave. If, in the exceptional case, the Department places an employee on personal leave involuntarily, such action would constitute an adverse action

and be subject to the procedural requirements of subpart G and, depending on the facts of the case, could potentially be appealed under subpart H. This is consistent with current law and the proposed language is not intended to modify the status quo.

Section 9901.715 – Opportunity to reply

This provision outlines procedures related to the opportunity to reply and provides that employees be granted at least 10 days to reply (or 5 days when there is reasonable cause to believe the employee has committed a crime). Commenters and labor organizations participating in the meet-and confer process recommended employees be provided at least 30 days to reply instead of 10 days, and at least 7 days when there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. They believe the minimum 10-day (or 5-day, under the crime provision) reply period is not sufficient time for the employee to provide a response and that the shortened time period limits managers' ability to fully consider the employee's reply. Other commenters stated the regulations should allow for the extension of time limits. Commenters and labor organizations participating during the meet-and-confer process also recommended deletion of the requirement that a reply period run concurrently with a notice period.

We disagree that the reply period should be increased and believe the proposed minimum 10-day reply period (or 5 days when the "crime provision" is invoked) is ample time for an employee to prepare a response. We also believe that such a period provides sufficient time for a manager to consider an employee's reply. Furthermore, both the 15-day notice period and the 10-day reply period represent minimums and may be extended as necessary at the Department's discretion. We believe that the reply period should run

concurrently with the notice period. This is consistent with the goal of streamlining the procedure and is unchanged from current law. The reply period does end prior to the end of the notice period; however, this is necessary to allow time for managers to consider the reply and make a timely decision.

Commenters and labor organizations participating in the meet-and-confer process requested clarification of provisions in this section which refer to an employee being represented by an individual “at the employee’s expense.” The circumstances under which the employee will be responsible for paying for his or her own representation (e.g., non-Federal employee representative) were clarified during the meet-and-confer process and are reflected in the final regulations. They also recommended deletion of the provision that covers disallowing an individual to serve as the employee’s representative, stating that the exclusion of representative standard is too broad and should not be within the discretion of the Department. We disagree with this recommendation because such procedures are necessary for the orderly and fair resolution of the action. We disagree that the standard is too broad, as the criteria are specifically related to the Department’s mission.

During the meet-and-confer process, the participating labor organizations also recommended extending the reply period when the Department is considering an employee’s medical condition in regard to a proposed adverse action. We disagree that extending the reply period in such situations is necessary in regulation. The 10-day reply period set forth in § 9901.714 represents a minimum and may be increased at the Department’s discretion.

Commenters stated that regulations do not allow duty time for the employee to prepare a response and one commenter suggested that we clarify what is meant by a “reasonable amount of official time” to review the evidence. Commenters stated the regulations do not discuss whether the employee’s representative will be allowed official time to assist the employee. We disagree that the regulations do not allow duty time for the employee to prepare a response. The employee may receive official time to review the Department’s supporting evidence and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status. With regard to an employee’s representative being allowed official time, the proposed regulation is essentially the same as current law.

Section 9901.716 – Decision notice

This provision outlines procedures for issuance of decision notices. During the meet-and-confer process, participating labor organizations gave alternative proposals regarding the delivery of the decision notice to the employee. One proposal recommended providing the decision notice to the employee on or before the effective date and deleting all language providing guidance if unable to deliver the notice in person. The other proposal recommended delivery by electronic mail and certified mail, return receipt requested if unable to deliver the notice in person. During the meet-and-confer process, participating labor organizations also stated that the Department had no legal authority to mail a decision letter to the last known address. We believe that in circumstances when the Department is unable to deliver the decision notice in person, there must be guidelines provided to ensure all parties understand their responsibilities; therefore, we did not delete the guidance contained in the subsection. However, in

response to discussions with labor organizations during the meet-and-confer process and public comments received, the language was modified to broaden delivery methods to include mail, overnight or express delivery service or the use of a messenger service. The regulations will retain the language that the Department will deliver the decision letter to the last known address of record, if unable to deliver in person, as the method of last resort.

Section 9901.717 – Departmental record

This provision describes the Departmental Record. During the meet-and-confer process, participating labor organizations recommended that we amend this provision to be consistent with 5 U.S.C. 7513(e) by deleting the requirement to retain documents pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. Additionally, they recommended that this provision be amended to require the retention of exculpatory evidence and any material relevant to the action. Some commenters stated that the Department should retain any information that the employee requests to be retained as a part of the official record of any adverse action. We did not revise this provision. This provision establishes sound recordkeeping procedures which are substantively the same as those in 5 U.S.C. 7513(e) except that the proposed provision provides more guidance regarding recordkeeping procedures. Any and all directly relevant evidence will be retained regardless of whether the employee requests the Department do so. One commenter suggested that notation be made in an employee's official records in cases where an employee under investigation for misconduct resigns prior to issuance of a proposal notice. The commenter argued that such documentation could prevent the future employment of an employee who might present a security risk.

We do not believe such a notation, based on an ongoing investigation, would be appropriate.

## **Subpart H – Appeals**

### *General Comments*

Subpart H modifies current MSPB appellate procedures for certain adverse actions taken under subpart G. Such changes include establishment of streamlined appellate procedures, providing for Department review of initial decisions, limited discovery, summary judgment, and expedited timeframes. Commenters, including labor organizations participating in the meet-and-confer process, objected to the provisions in subpart H, stating that DoD does not have the authority to make changes in MSPB appellate procedures. They argued that there was no evidence that current procedural protections or the decisions of an arbitrator or MSPB jeopardize national security/defense and there is no need to improve efficiency of the MSPB process. They asserted that it is not necessary for MSPB to provide greater deference to DoD than to any other agency. We disagree. Section 9902(h) expressly authorizes the Secretary to establish an appellate process for employees covered by NSPS, including establishing legal standards and procedures, including standards for applicable relief. In addition, § 9902(d) makes waivable the current statutory requirements for the appeals process. Section 9902(b)(5) also states that the system established under section 9902(a) is not to be limited by any law or authority that is waived in the NSPS regulations. The modifications in this subpart were made following consultation with MSPB officials, as called for in the enabling statute.

In addition, some commenters argued that any modification of current rules regarding an employee's ability to make and have an allegation of discrimination reviewed was beyond the authority of NSPS. We believe these regulations do not impermissibly modify existing EEO procedures and fully retain the right of employees to have allegations of discrimination fully and fairly reviewed and adjudicated. Under these regulations, employees can raise allegations of discrimination as part of any appeal or grievance of an adverse action and, if dissatisfied with the final DoD decision, obtain full MSPB and EEOC review of such allegations.

Commenters also stated that the current personnel system already allows separation or removal to be effected rapidly if in the interest of national security under 5 U.S.C. 7532. Section 7532 is limited in its scope regarding the basis for action and employee appeal channels; therefore we don't believe it appropriately addresses the broad range of offenses and penalties that are necessary to ensure the well disciplined workforce needed to carry out the Department's mission.

Finally, many commenters objected to the Department's review of AJ decisions, questioning the neutrality and impartiality of the review process, as well as its negative impact on due process. While the Department has the authority to review initial AJ decisions, that authority will be limited to those decisions for which either party has timely filed a request for review. The Department may remand, modify or overturn the AJ's decision only based on the criteria in § 9901.807(g)(2)(ii)(B) of these final regulations.

We will continuously monitor and evaluate the appeals process to ensure that these changes are fair.

Other Comments on Specific Sections of Subpart H

Section 9901.802 – Applicable legal standards and precedents

These regulations state that in applying existing legal standards and precedents, MSPB and arbitrators are bound by the legal standard set forth in § 9901.107(a)(2). Section 9901.107(a)(2) provides that these regulations must be interpreted in a way that recognizes the critical national security mission of the Department. Each provision must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission as defined by the Secretary; DoD's and OPM's interpretation of NSPS regulations must be accorded great deference. During the meet-and-confer process, the participating labor organizations recommended that we delete the requirement that the MSPB consider DoD's mission when applying legal standards not inconsistent with this subpart. Some commenters also recommended DoD and OPM not be given deference in their interpretations of NSPS regulations.

The authority to require MSPB to give deference to DoD's and OPM's interpretation of NSPS regulations derives from 5 U.S.C. 9902, including § 9902(h)(3), which authorizes establishment of legal standards. It is also based on longstanding standards of legal interpretation, which provides that considerable weight be given to an agency's interpretation of its own regulations. Accordingly, we have not modified this section. We believe that the Department's and OPM's interpretation of the regulations in part 9901 must be given great deference to ensure that appropriate recognition is given to accomplishment of the Department's national security mission when appeals decisions are made. Also during the meet-and-confer process, the participating labor organizations recommended that we modify the language of this section to include references to

5 U.S.C. 2301 and 9902(h)(2) and (3). The suggested additional citations are not necessary as the law and citations noted in this subpart adequately provide for all requirements.

Section 9901.803 – Waivers

This section specifies the provisions of title 5, U.S. Code, that are waived for employees covered by the NSPS appeals process established under subpart H. This section also specifies that the appellate procedures in subpart H replace those of the Merit Systems Protection Board (MSPB) to the extent MSPB's procedures are inconsistent with these regulations, and that MSPB must follow these regulations until it issues conforming regulations. Some commenters recommended we delete the reference to modification of 5 U.S.C. 7702 stating this was beyond the authority of NSPS. During the meet-and-confer process, the participating labor organizations also voiced concern that NSPS does not give DoD the authority to waive or modify discrimination complaint procedures. The Department's authority to modify 5 U.S.C. 7702 is found in 5 U.S.C. 9902(h), which authorizes the establishment of a new appeals process. Consistent with § 9902(h)(7), we may modify or adapt the mixed case process in these regulations, provided employee rights and remedies are preserved. The final regulations modify some of the procedures for processing mixed cases, while preserving the rights and remedies as required by § 9902(h)(7). These rights include the right to seek EEOC review of an MSPB decision in a mixed case pursuant to 5 U.S.C. 7702(b), which has not been modified. They also preserve judicial review in such cases. Consistent with the enabling legislation, these regulations assure due process and appropriately streamline the procedures of the appeals process dealing with mixed cases.

Section 9901.804 – Definitions

During the meet-and-confer process, the participating labor organizations recommended that we amend or delete a number of definitions, such as “request for review” and “mandatory removal offense.” We did not accept these recommendations because the proposed changes would alter the essence of underlying procedural concepts that are critical to the successful implementation of NSPS.

Section 9901.805 – Coverage

This section of the proposed regulation provided that the appeals process covers employee appeals of certain adverse actions taken under subpart G. Commenters and labor organizations participating in the meet-and-confer process suggested we add reduction in force (RIF) and demotions as covered actions. Commenters also recommended that suspensions of 14 days or less be a covered action. Commenters, as well as labor organizations participating in the meet-and-confer process, stated that exclusion of RIF actions from NSPS coverage under the NSPS appeals process contradicts § 9901.611 which states that RIF actions are appealable to the MSPB under 5 CFR 351.901. We disagree that these are contradictory. The provisions indicate that RIF actions are not included as appealable actions under NSPS but are independently appealable to the MSPB. We believe the NSPS appeal system should be limited to those actions set forth in the enabling legislation. Inclusion of additional actions (such as suspensions of 14 days or less) goes beyond the intent of the enabling legislation. “Demotions” in NSPS are covered by the concept of reduction in pay band (or comparable reduction), which is covered under § 9901.805(a).

One commenter recommended that we specify when appeal rights are granted or denied based on failure to maintain a condition of employment and explain why appeal rights vary depending on whether the condition of employment was specified at the time of appointment or subsequent to appointment. The applicability of appeal rights when an adverse action is based on failure to maintain a condition of employment requires an individualized assessment of an employee's status and the specific facts of the case. It is not possible to specify a broad rule that would cover all such actions.

Section 9901.806 – Alternative dispute resolution

This section of the proposed regulations encouraged the use of alternative dispute resolution (ADR) methods to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. The proposed regulations also recognize that these methods may be subject to collective bargaining to the extent permitted by subpart I of part 9901. During the meet-and-confer process, participating labor organizations endorsed the concept. Commenters endorsed the concept of ADR and urged a stronger statement on the use of ADR. Commenters suggested that we establish ombudsman offices at each component in order to follow the “best practices” noted elsewhere by the Government Accountability Office, and to facilitate resolution of disputes at the lowest possible level. We believe that the proposed regulations adequately stress the importance of ADR and have made no changes to this section.

Section 9901.807 – Appellate procedures

This section established streamlined appellate procedures and provided for such things as Department review of initial decisions, limited discovery, summary judgment,

and expedited timeframes. Commenters and labor organizations participating in the meet-and-confer process stated that this section of the proposed regulations was not organized well and was difficult to follow. We agree and have reorganized the material as indicated below with the previous section designation in brackets. For example, “9901.807(a)(1) [9901.807(a)]” indicates that “9901.807(a)(1)” is the new designation in the final rules and “[9901.807(a)]” is the old designation in the proposed rules. Some commenters recommended that the entire section be deleted, stating DoD does not have the authority to make the changes set forth in this section. We disagree. Section 9902(h) expressly authorizes the Secretary to establish an appeals process. In addition, § 9902(d) expressly authorizes the waiver of the current statutory appeals process. Commenters noted that § 9901.807 does not include a provision for MSPB to re-open a decision of its AJs. This is consistent with the enabling legislation which limits MSPB review to the Department’s final decisions which have been appealed to the Board and thus does not authorize Board reopening of initial AJ decisions. Adequate and appropriate review of AJ decisions will result from the Request for Review (RFR) and Petition for Review (PFR) processes.

Section 9901.807(a)(1) [9901.807(a)]

There was no change in this provision. It was merely redesignated.

Section 9901.807(a)(2)(i) [9901.807(b)(1)]

There was no change in this provision. It was merely redesignated. This provision of the proposed regulations is introductory in nature. The actual changes are set forth in later provisions. While there was discussion during the meet-and-confer

process and comments on the system elements, we will discuss those comments in the applicable sections.

Section 9901.807(a)(2)(ii) [9901.807(b)(2)]

This provision provides that the AJ will adjudicate appeals and deliver his or her decision to each party and to OPM. During the meet-and-confer process, participating labor organizations recommended that NSPS processing rules be deleted and that the full MSPB have overall and exclusive authority in adjudicating appeals. We disagree. As written, the regulations meet the goals of ensuring appropriate deference to DoD's decisions and penalty determination in adverse actions and streamlining the way such cases are handled while continuing to preserve and safeguard employee due process protections.

Section 9901.807(a)(3) [9901.807(e)]

This provision allows OPM to participate or intervene in the appeal at any time it believes that an erroneous decision may result which will have a substantial impact on civil service law, rule, regulation or policy directive. During the meet-and-confer process, participating labor organizations stated that this provision should be deleted. We do not agree with the recommendation, as we believe this provision is consistent with current law and is necessary for OPM to carry out its mission.

Section 9901.807(a)(4)(i) and (ii) [9901.807(g)(1) and (2)]

There were no changes in these provisions. They were merely redesignated.

Section 9901.807(a)(5) [9901.807(j)]

There was no change in this provision. It was merely redesignated.

Section 9901.807(a)(6) [9901.807(k)(1)]

This provision sets the time limit for an employee to file an initial appeal through the NSPS appeal system at 20 days. Commenters noted that EEOC regulations provide complainants 30 days to file an appeal with the MSPB after agency decision in mixed cases. Other commenters and labor organizations during the meet-and-confer process expressed concern because the employees were given less time in the appeal process. In regard to the comments on EEOC regulations, we note that the 30-day period provided in EEOC regulations simply reflects the Commission's adoption of the time limit provided in the Board's current regulations.

Section 9901.807(a)(7) [9901.807(k)(2)]

This provision covers disqualification of a party's representative at any time during the appeal process. During the meet-and-confer process, participating labor organizations stated that this provision should be deleted. Commenters stated it was not necessary to provide for procedures to disqualify a party's representative. Some commenters expressed concern that there are no listed criteria for disqualification. We believe this provision is necessary in order to ensure an orderly and fair adjudication. Decisions regarding disqualification will be at the discretion of the AJ and should be consistent (to the degree not inconsistent with these regulations) with current Board rules at 5 CFR 1201.31(b) which provide criteria under which a representative may be disqualified. One commenter requested that we clarify that Department representatives will avoid the appearance of conflict of interest, but may not be disqualified solely on the basis of having advised management on the processing of underlying matters where such

advice was within the scope of their responsibilities. For purposes of these regulations, we believe the proposed language adequately covers the disqualification issue.

Section 9901.807(b) [9901.807(k)(4)]

This provision allows the AJ to suspend processing a case only if jointly requested by the parties. During the meet-and-confer process, participating labor organizations recommended that a joint case suspension request requirement be deleted. Commenters recommended allowing the AJ to suspend the case if a single party shows good cause since appellants might need extra time to hire an attorney or locate witnesses. We believe the proposed regulations provide sufficient time to prepare a case, provide an appropriate means to suspend a case, and comport with the goals of NSPS. No changes have been made to this section.

Section 9901.807(c)(1) and (2) [9901.807(i)(1) and (2)]

These provisions discuss settlements. They prohibit the presiding MSPB AJ from requiring settlement discussions. Where the parties agree to participate in formal settlement discussions, these discussions will be conducted by an official other than the presiding AJ. During the meet-and-confer process, participating labor organizations recommended deletion of § 9901.807(i)(1). Commenters were in favor of settlement discussions; however, some believe that the proposed regulations do not encourage such discussions. Some commenters stated that settlement discussions being conducted by the presiding AJ allows the AJ latitude in this area to facilitate settlement and eliminate additional formal settlement procedures. The regulations do encourage settlement; however, we believe strongly that settlement should be completely voluntary and based on the parties' individual interests. Also, we believe that settlement proceedings should

be conducted by an official who is not adjudicating the case to avoid actual or perceived conflicts of interest on the part of MSPB adjudicating officials. We have made no change in this section.

Section 9901.807(d)(1), (2), and (3) [9901.807(k)(3), (i), (ii), and (iii)]

These sections modify discovery procedures by placing limits on the extent of discovery. During the meet-and-confer process, participating labor organizations stated that the limits are too restrictive and may be easily abused. Commenters stated the limits would prevent adequate methods to gather evidence necessary for the case and that the limits are arbitrary, placing the employee at a disadvantage. Commenters stated the regulations are unfair, hamper due process, and limit employee defense. We believe these limits will usually allow adequate methods for discovery of evidence, are fair, and do not violate due process. Additionally, we have clarified in these regulations that the AJ may grant additional discovery for necessity and good cause. One commenter requested that we clarify whether the new limitations on discovery replace or augment the existing motion to compel process. To the extent existing rules on discovery, including provisions regarding motions to compel process, are inconsistent with these new limitations on discovery, the existing provisions are modified. Another commenter requested that we limit the number of all requests for production to a total of 50 per case. The regulations already limit the number of requests for production to 25 per pleading. However, the AJ may grant a party's motion for additional discovery upon a showing of necessity and good cause. We believe that this provides appropriate limits on requests for production while providing an avenue for additional discovery if appropriate. Therefore, we choose not to adopt the suggestion.

Section 9901.807(e)(1), (i), (ii), and (iii) [9901.807(d)(1), (i), (ii), and (iii)]

These provisions describe the standard of proof, which must be met by the Department for a decision to be sustained. Preponderance of the evidence is the single standard of proof under NSPS. Commenters have stated the burden of proof for employees has been increased; however, this is inaccurate. The only change in the level of proof is that the regulations adopt a single burden of proof – preponderance of the evidence -- for cases based on performance and/or misconduct. (Under current law, agencies must only meet a substantial evidence burden of proof in performance cases taken under chapter 43 of title 5. This is a lower burden than preponderance of the evidence.) The burden remains the same for an appellant. Other commenters stated that the differences between conduct and performance should be acknowledged by maintaining the previous standard (“substantial evidence”) for performance cases. We do not believe the differences warrant different standards and note that under current title 5 provisions, actions taken under chapter 75 based on unacceptable performance are subject to the higher standard of proof. The single (“preponderance”) standard for all cases, whether taken for reasons of performance, or conduct, or a combination of both, simplifies the appeals process and assures consistency without compromising fairness or burdening the employee. No changes have been made to these provisions.

Section 9901.807(e)(2) [9901.807(k)(5)]

This provision covers the AJ’s ability, when some or all material facts are not in dispute, to issue an order to limit the scope of the hearing or issue a decision without holding a hearing. During the meet-and-confer process, participating labor organizations stated that they accepted the use of summary judgment where the facts of the case are not

in dispute; however, they recommended the AJ not be able to render such a decision on his or her own initiative. They also recommended that credibility determinations should not be made absent a hearing. Commenters stated that the burden of proof for the employee has been increased before the employee is allowed a hearing. Other commenters stated a hearing should be held if a material fact is in dispute and there is a credibility question. Some commenters also stated summary judgments have not worked in other forums. Additionally, there were concerns that the employee entitlement to a hearing has been diminished. We did not revise this provision. We believe that the AJ should have the authority to rule in this area on his or her own initiative when some or all material facts are not in dispute. Allowing summary judgment when no material facts are in dispute eliminates the requirement for unnecessary and time-consuming hearings, expediting the process for both parties. Similarly, when a hearing is appropriate, limiting the scope of such hearing to matters in dispute serves the interests of all parties. Both of these measures will streamline the appeals process without compromising due process. Summary judgments are a well-established and effective way of fairly handling cases where material facts are not in dispute. When material facts are in dispute, the normal hearing process will be followed.

Section 9901.807(f)(1) [9901.807(k)(7)]

This provision covers the 90-day time limit in which an AJ must make an initial decision. During the meet-and-confer process, participating labor organizations stated that they accepted expediting the process to require that decisions be issued within 90 days by the MSPB AJ. Commenters expressed concern these time limits, with no provisions for extension, will result in inadequate time for case preparation, settlement

discussions, and discovery, and fail to take into account unavoidable witness unavailability. Other commenters suggested that this section be modified to require AJs to issue decisions within 30 or 45 days of the last day of a hearing, or the last written response to a summary judgment motion. We did not revise this provision as we believe the 90-day time frame provides ample time for the AJ to make a fair decision and for appropriate pre-hearing and witness arrangements. The new time frame also facilitates the efficient and expeditious resolution of an appeal without impairing due process protections.

Section 9901.807(f)(2)(i) – (v) [9901.807(k)(6)]

These provisions cover mitigation of a penalty and require great deference to the Department's penalty determination. While mitigation is allowed, it is allowed under a limited standard. The labor organizations participating in the meet-and-confer process objected to the deference being shown to the Department in penalty determination and the wholly without justification mitigation standard. They further stated that the proposed language placing a standard for review on the full MSPB is not permissible and stated that the fact finder or reviewing entity should consider the factors as set forth in Douglas v. VA, 5 MSPR 280, 305-06 (1981), in determining whether the proposed penalty is appropriate. We also received numerous comments expressing concern regarding the mitigation standard of wholly without justification and the appearance that the Department will have to meet a lower threshold to sustain the penalty. Commenters expressed concern that MSPB has less latitude to modify decisions and protect employee rights. Commenters objected to the fact that adjudicators would be required to give deference to the Department's penalty determination. Based on these comments and

concerns we have reconsidered this provision and have removed the full MSPB from coverage by this standard. The standards for review for the full MSPB are provided in 5 U.S.C. 9902(h)(5). We will also consider placing pertinent circumstances in an implementing issuance to be used for consideration in penalty determination.

Furthermore, we agree to revise the “wholly without justification” standard for MSPB AJs that are used as part of the Department’s appeals process, as well as arbitrators. Since § 9901.922(f)(2) broadly provides that arbitrators hearing a matter appealable under 5 U.S.C. 7701 or subpart H are bound by the rules in part 9901 (which include the standard for mitigation), we have deleted the references to arbitrators in § 9901.807(f)(2) as superfluous. The standard has been revised to preclude mitigation except when the action is “totally unwarranted in light of all pertinent circumstances.” This standard is similar to that recognized by the Federal courts and is intended to limit mitigation of penalties by providing deference to an agency’s penalty determination. The Department has statutory authority to establish new legal standards. (See 5 U.S.C. 9902(h)(2).) In this case, the Department is electing to adopt a legal standard that meets the need of the Department by ensuring deference is provided to the Department’s penalty determinations along with the requirement that AJs give consideration to the Department’s national security mission. The Department bears full accountability for national security; therefore, it is in the best position to determine the most appropriate penalty for misconduct or unacceptable performance. In the past, MSPB has exercised considerable latitude in modifying agency penalties, sometimes to the detriment of DoD’s mission. The MSPB AJ and arbitrator may still mitigate penalties for all types of offenses, except mandatory removal offenses. The intent is to restrict the breadth of their

discretion to mitigate penalties to only those situations where the penalty is totally unwarranted in light of all pertinent circumstances. When mitigating a penalty, MSPB AJs and arbitrators must apply the maximum justifiable penalty, using the applicable agency table of penalties or other internal guidance.

Section 9901.807(f)(3) and (4) [9901.807(d)(2) and (3)]

These provisions cover the review of charges and performance expectations. They provide that neither the MSPB AJ nor the full MSPB may reverse the Department's action based on the way in which the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge. Similarly, an MSPB AJ or full MSPB may not reverse the Department's action based on the way a performance expectation is expressed, provided the performance expectation would be clear to a reasonable person. The labor organizations participating in the meet-and-confer process stated that the AJ or the full Board should have the authority to consider the way in which the charge is labeled, the conduct is characterized, or the way the performance expectation is expressed in determining whether the agency's penalty is appropriate. We received many comments stating that the elimination of the requirement to clearly articulate the charge is unfair, does not provide the employee sufficient information to prepare a defense, and should not be permitted. Other commenters expressed concern over whether the AJ would be allowed to mitigate the penalty if the AJ found that the stated charge was mischaracterized or mislabeled. These commenters also questioned whether "factual allegations" meant the same as "basis for the action." We did not revise this provision, as we believe that as long as the employee has sufficient notice to respond to the allegations

of a charge, the Department will have complied with the notice and due process requirements of these regulations. The Department must prove by preponderance of the evidence that an action taken against an employee promotes the efficiency of the service. Mitigation may also be appropriate in such cases provided it meets the standards established in these regulations. Additionally, this section requires that performance expectations be clearly conveyed in a manner understandable to a “reasonable person.” MSPB AJs and the full MSPB will judge the Department’s expression of performance expectations by a “reasonable person” standard. These provisions are written to eliminate overly technical and legalistic aspects of the current appeals process, while preserving employees’ due process rights.

Section 9901.807(f)(5), (i) and (ii) [9901.807(c), (1) and (2)]

These provisions covered the granting of interim relief. They stated the full MSPB may not grant interim relief until after the Department’s final decision. During the meet-and-confer process, participating labor organizations recommended that interim relief be granted by the full MSPB as a matter of course if the AJ finds in favor of the appellant. We received comments stating that the enabling legislation does not specifically allow DoD to limit the full MSPB’s authority to grant interim relief in this way. Commenters also stated this limitation might impermissibly alter EEO procedures. Commenters, including labor organizations during the meet-and-confer process, stated DoD should not have discretion to temporarily place an employee in a different position when interim relief is ordered by the full MSPB. Commenters also questioned what the employee’s pay status would be while on excused absence. Other commenters recommended we allow the AJ to grant interim relief or, in the alternative, establish a

procedure for interlocutory appeal to allow a stay until the Board hears the full case. Commenters objected to attorney fees not being paid until a final MSPB decision. We believe the limitation on the AJs' authority to grant interim relief is necessary. In addition, it is consistent with the enabling legislation, which prohibits granting interim relief unless it is specifically ordered by the full Board (5 U.S.C. 9902(h)(4)). It is premature for the AJ to grant interim relief when DoD has filed a request for review. To provide for the efficient accomplishment of the mission and to avoid disruption in the workplace, DoD should have discretion in determining the placement of an employee during the period of interim relief. Explanation of the pay status of employees in a period of excused absence is not required because, by definition, excused absence is an absence from duty without loss of pay and without charge to leave. Finally, the provision relating to attorney fees represents no change from current law.

*Section 9901.807(f)(6)(i) and (ii) [9901.807(h)(1) and (h)(2)]*

These provisions of the proposed regulations established a new standard for recovering attorney fees, which was intended to simplify the process. Comments received on the proposed regulations and labor organizations, during the meet-and-confer process, argued that the new standard was unreasonable, unfair, would discourage employees from challenging wrongful terminations, violated the Back Pay Act, and would result in uneconomical, piecemeal litigation. After consideration of these comments, we have revised the NSPS regulations to retain the pre-NSPS statutory standard under which such fees may be awarded; therefore, all objections to proposed changes have been addressed.

Section 9901.807(g) [9901.807(k)(8)]

This provision covers the procedures utilized to arrive at the Department's final decision in appeals of adverse actions. Commenters, and participating labor organizations during the meet-and-confer process, stated that the provisions for the RFR process and the Department's review of AJ decisions should be deleted from the regulations. Commenters also recommended simplifying the process and placing deadlines in the Department's review of AJ decisions. Further, commenters stated that the RFR process is unwarranted, fails to preserve due process protections, and detracts from the goals of streamlining the appeals process. These provisions will not be deleted from the regulations. Though somewhat detailed, the Secretary is expressly authorized by 5 U.S.C. 9902(h) to establish an appeals process. The process contained in this regulation is necessary to assure that the Department's national security mission is appropriately considered in adverse action appeals decisions. The Department will be constrained in the exercise of this authority by the provisions of § 9901.807(g)(2)(ii). We anticipate that relatively few cases will be reviewed by the Department under this authority.

Section 9901.807(g)(1) [9901.807(k)(8)(i)]

This provision covers who will receive and act on an RFR. During the meet-and-confer process, participating labor organizations stated that the proposed regulations did not specify the official who would remand, modify, or reverse the MSPB AJ's initial decision. We also received comments regarding the extension of the strict time frames within the NSPS appeals process. DoD will establish the process for receiving and acting on an RFR, including time limits for the Department to take action on an RFR, in

implementing issuances. We have clarified that in light of the expedited time frames in the appellate process, an extension for the request for review will be granted if a good reason for the delay is shown.

Section 9901.807(g)(2)(i), (ii), (A), (B) and (C) [9901.807(k)(8)(ii), (iii), (A), (B), and (C)]

These provisions cover the RFR process where, under limited circumstances, the Department may affirm, remand, modify, or reverse an AJ's initial decision for which an RFR has been filed. Commenters and labor organizations during the meet-and-confer process stated that this review authority is arbitrary, capricious and a violation of due process. Comments were received regarding additional complexity, expense, and length added to the appeal process by the internal DoD review. We agree that the internal appellate process must be credible and preserve due process. It preserves due process for reasons stated in the general comments on adverse actions and appeals. To that end, the Department is committed to establishing an internal entity that adheres to merit system principles. This process provides the Department the necessary authority to review initial AJ decisions to ensure that such decisions interpret NSPS and these regulations in a way that recognizes the critical mission of the Department and to determine which of those cases are of a precedent-setting nature. Although the process may be lengthened in some aspects, we have gained efficiencies and mission-related benefits in other areas that more than offset any potential increases in time or costs at any step of the process. Moreover, we anticipate relatively few cases will be reviewed by DoD, since DoD may reverse or modify initial AJ decisions only under the limited criteria specified in § 9901.807(g), thus minimizing any increase in processing time.

Some commenters questioned two of the bases for modifying or reversing an AJ decision: the Department's national security mission and conflict with Governmentwide rules. These commenters stated that impact on national security mission alone, regardless of the appellant's guilt or innocence, would not be grounds to modify or reverse an AJ decision. The second point the commenters made was that the Department lacked expertise to interpret Governmentwide regulations. We recognize that the wording of the regulation regarding the Department's modification or reversal of an AJ's decision based on national security fails to specifically reference the employee's guilt or innocence. However, an employee's culpability is a prerequisite to sustaining an action. Additionally, the requirement for all actions to promote the efficiency of the service and further review by the full MSPB provide additional safeguards for employees. We believe the Department has sufficient expertise to determine compliance with Governmentwide regulations.

Lastly, we received comments regarding vague remand provisions and lack of time for the AJ to make a decision if a summary judgment was remanded with a direction to hold a hearing. We will establish timelines and remand provisions for the Department's review of the AJ's decision in an implementing issuance. Further, we have revised the regulation to allow the AJ more time, 45 days versus 30 days, to make a decision in those instances where they are directed to hold a hearing in a case involving summary judgment.

*Section 9901.807(g)(3)(A) and (B) [9901.807(k)(8)(ii), (A) and (B)]*

This provision covers the precedential effect of a Department decision. Commenters and labor organizations participating in the meet-and-confer process stated

that the Department should not be allowed to determine which cases would set precedent, and they recommended revising the regulation to state that any AJ decision is precedential unless it is reversed or modified by the full MSPB. Commenters stated that Departmental decisions should be considered precedential even if subsequently overturned by the full MSPB. We believe the Department should be able to determine that some Department decisions are important enough to serve as precedent even though not acted upon by the full MSPB. Further, we believe that the Department must be governed by the rulings of the full MSPB, if the Department's decision is reversed or modified by the full MSPB, unless overturned by a court.

Section 9901.807(g)(4) [9901.807(k)(8)(ii)]

This provision covers the publication of precedential decisions. During the meet-and-confer process, participating labor organizations stated that there were not any details regarding the publication of decisions. Commenters echoed this concern. We agree with the labor organizations and have added clarifying language regarding publication of DoD precedential decisions, the details of which will be provided in implementing issuances.

Section 9901.807(h)(1) [9901.807(f)]

This provision provides for filing for a Petition for Review by a party or the Director of OPM. During the meet-and-confer process, participating labor organizations stated that the Department should delete the provision which allows OPM to petition MSPB for review. We disagree. While OPM is responsible for providing guidance and assistance to DoD in developing a new human resources management system, it also has responsibility for protecting Governmentwide institutional interests regarding the civil service system. Therefore, we believe that OPM must have the authority to act if it

believes a decision will have substantial impact on civil service law, rule, regulation, or policy directive. One commenter requested that we clarify whether this provision eliminates MSPB's right to reopen an appeal on its own motion. In accordance with § 9901.807, MSPB may only review those decisions for which a petition for review has been filed by the Department, OPM, or an employee.

Section 9901.807(h)(2)(i), (ii), and (iii)(A)(B)(C) and (iv) [9901.807(k)(9) and (10)]

These provisions cover the petition for review process to the full MSPB. Further, these provisions cover the standards for the full MSPB review as stated in 5 U.S.C. 9901(h). During the meet-and-confer process, participating labor organizations accepted expediting the process to require decisions be issued within 90 days by the full MSPB. However, these provisions have been clarified by including the review standards as stated in 5 U.S.C. 9901(h).

Section 9901.807(h)(3) [9901.807(k)(11)]

This provision covers OPM's request for reconsideration of an MSPB decision. During the meet-and-confer process, participating labor organizations recommended that this provision be deleted. We did not accept this recommendation because this provision is consistent with current law. This provision is necessary for OPM to carry out its mission, which includes protecting Governmentwide institutional interests regarding the civil service system.

Section 9901.807(h)(4) [9901.807(l)]

This provision addresses the failure of MSPB to meet established deadlines and the reporting requirements. Commenters recommended that this reporting requirement be deleted while other commenters recommended that MSPB submit quarterly or annual

reports. We did not accept the recommendations to change the provisions as we consider the timelines placed on MSPB as being an integral part of streamlining the Department's appellate process. This reporting requirement is only imposed if a deadline is missed. We are confident that MSPB will rarely, if ever, fail to meet the required deadlines. As a result, any report required by this provision will rarely be necessary.

Section 9901.807(i) [9901.807(m)]

This provision covers the Department's authority to seek judicial review of MSPB decisions. We made a technical correction to delete the reference to the Department seeking reconsideration by MSPB of a final MSPB decision because the Department has that ability under current MSPB rules.

Section 9901.808 – Appeals of mandatory removal actions

This provision covers appeals of mandatory removal actions (MROs). It states that only the Secretary may mitigate the penalty for a sustained MRO. Additionally, it states that if the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action based in whole or in part of the same or similar evidence. During the meet-and-confer process, participating labor organizations stated that this provision should be deleted in its entirety. Commenters and labor organizations in the meet-and-confer process stated that the Secretary should not be the only authority to mitigate MROs and that limiting the full Board's ability to mitigate MROs is contrary to the enabling legislation. Commenters also stated that the proposed provisions inappropriately give DoD "two bites at the apple" when an action is not found to amount to an MRO since the Department may take a subsequent action on the same evidence.

Other commenters were concerned that an employee might not be entitled to attorney fees even if the employee prevailed on the MRO issue, but failed in prevailing in a subsequent action based on the same facts. We disagree that this provision should be deleted. The Secretary is expressly authorized under 5 U.S.C. 9902(h) to establish appeals procedures and standards for relief, including standards for mitigation of penalties. This process is necessary to support the national security mission of the Department. We do agree, however, that the enabling legislation allows mitigation of MRO penalties by the full MSPB and have modified the provision accordingly. We disagree that it is inappropriate for the Department to have the ability to take a subsequent action if the offense is found to not be an MRO. Though an employee's misconduct may not be found to qualify as an MRO, it does not mean that the misconduct should not be addressed. Subsequent proposal of an adverse action based in whole or in part on the same or similar evidence is consistent with what can occur today under current law. Finally, we believe attorney fees will be fairly awarded based on the latest change to these regulations.

*Section 9901.809 – Actions involving discrimination*

This provision outlines the processes for handling appeals of actions in which discrimination is alleged. During the meet-and-confer process participating labor organizations stated that this provision should be deleted because it inappropriately modifies processes for discrimination claims. We disagree. Section 9902(h) expressly authorizes the Secretary to establish legal standards and procedures for employee appeals. Consistent with § 9902(h)(7), we may modify or adapt the mixed case process in these regulations, provided employee rights and remedies are preserved. The final regulations

modify some of the procedures for processing mixed cases, while preserving the rights and remedies as required by § 9902(h)(7).

Some commenters stated this provision is unclear and suggested that we delete the provision or rewrite it. Several commenters stated that the provision should be modified to eliminate potential confusion over language that appears to require the Department to forward to MSPB a non-appealed action. We agree with this comment and have amended the regulations to provide that an appellant may choose to pursue his or her allegation of discrimination even when no PFR is filed with the Board. In such cases, the appellant can request the Department to refer the discrimination issue to the Board, the Board will then issue a final decision on the discrimination allegation which may then be pursued to EEOC or district court. Some commenters recommended we delete the reference to modifying 5 U.S.C. 7702 stating this was beyond the authority of NSPS. We believe the proposed regulations do not impermissibly modify existing EEO rights and remedies. To clarify this section, we have modified some of the proposed language without altering any of the proposed intent.

## **Subpart I – Labor-Management Relations**

### *General Comments*

Commenters, including, labor organizations participating in the meet-and-confer process, objected to subpart I in its entirety arguing that Congress did not authorize the Secretary and Director to modify 5 U.S.C. 71 beyond providing for bargaining above the level of unit recognition and the establishment of a new independent third party to review and resolve labor management disputes. We disagree. In enacting chapter 99, Congress expressly recognized the need for the Department to design a labor relations system that

both addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and allows for a collaborative issued-based approach to labor management relations. The labor relations system established in subpart I does this by creating a new, tailored approach to labor relations. While the scope of bargaining is reduced in some areas, such as management rights, to enable the Department to better utilize its civilian workforce to support rapidly changing national security challenges, such as the Global War on Terrorism and supporting humanitarian assistance missions here and abroad, employee representatives are given opportunities to participate in new areas that have a substantive impact on the daily lives of the workers they represent. However, through continuing collaboration (§ 9901.107), employee representatives will have the opportunity to participate in the planning, development, and implementation of the Department's implementing issuances, which will cover subjects ranging from the pay and performance management systems to staffing and classification.

The labor relations system is consistent with the general parameters Congress provided, including the process for involving employee representatives (see 5 U.S.C. 9902(m)(3) and (4)). It mandated that the new system may not *expand* the scope of collective bargaining beyond the scope of bargaining available today under chapter 71, even where provisions of title 5 are waived or waivable (5 U.S.C. 9902(m)(7)), and required that employees be authorized to organize and bargain collectively *within the framework established in chapter 99*, that is, within the framework of a system that promotes a collaborative issue-based approach to labor relations and which is developed,

established, and implemented to enable the Department's civilian workforce to better support the Department's national security mission (5 U.S.C. 9902(b)(4)).

These commenters also argued that there is no legal authority to invalidate provisions in collective bargaining agreements with implementing issuances or issuances. Again, we disagree. First, Congress authorized the Department to establish and *implement* the HR system by providing an alternative to collective bargaining for involving employee representatives in the planning, development, and implementation of that system and making this the exclusive process for their involvement (5 U.S.C. 9902(f)). It would be impossible to implement the HR system authorized by Congress without overriding conflicting provisions of existing collective bargaining agreements.

Moreover, in taking the steps necessary to establish and adjust the labor relations system, Congress specifically recognized that the provisions of this system will supersede existing collective bargaining agreements covering Department employees and negotiated pursuant to the provisions of chapter 71 except as otherwise determined by the Secretary (5 U.S.C. 9902(m)(8)). The proposed regulations stopped well short of this authority by providing for a process that would not supersede collective bargaining agreements in their entirety. Instead, the proposed regulations provided a much more constrained approach, providing only that those specific provisions of collective bargaining agreements conflicting with these NSPS regulations or NSPS implementing issuances would be superseded. This very narrow authority is essential to enable the Department to establish and implement one NSPS across the Department. Absence of this authority would effectively defeat the intent of Congress by denying the Department the ability to have a single HR system to support the Department's national security mission.

During the meet-and-confer process, it became clear that there was confusion over which type of issuance would supersede conflicting provisions of collective bargaining agreements. Some commenters, and labor organizations participating in the meet-and-confer process, recommended that collective bargaining agreements should not be superseded before their expiration. Participating labor organizations effectively argued that the Department did not need the authority to immediately supersede collective bargaining provisions with issuances not implementing NSPS. We agree and have amended the final regulations to provide that conflicting collective bargaining agreement provisions will not immediately be superseded by issuances, although such provisions must be brought into conformance with the issuance upon expiration of the agreement or renegotiation of the provision during the term of the agreement.

However, to ensure consistent implementation of NSPS across organizations with representation by different bargaining units, we continue to believe that implementing issuances must take effect immediately and thus supersede any conflicting provisions of collective bargaining agreements for NSPS-covered employees. While DoD plans to implement the labor relations system DoD-wide immediately, the HR system will be implemented in spirals. The implementing issuances for the HR system will only apply to employees who are covered by the NSPS HR system.

Commenters, including labor organizations during the meet-and-confer process, also recommended that the design and implementation of every aspect of the proposed NSPS, including the pay, performance, and classification system and appeals process, be subject to collective bargaining. Congress expressly prohibited expanding the scope of collective bargaining in 5 U.S.C. 9902(m)(7) which provides that nothing in § 9902 will

be construed to expand the scope of bargaining with respect to provisions in title 5 that may be waived, modified, or otherwise affected under § 9902. In lieu of bargaining, Congress charged OPM and DoD to establish the mechanism for continuing involvement of employee representatives in 5 U.S.C. 9902(f)(1)(d) and (m)(2). With this in mind, we provided a number of mechanisms to ensure the substantive involvement of labor organizations in such things as the development of implementing issuances, the administration of the Department's new pay system, and the nomination of members to the National Security Labor Relations Board (NSLRB or Board). Other concerns related to the scope of bargaining are addressed in the discussion of the related sections of subpart I that follow.

We also expressly provided two specific mechanisms to address the mandate that the labor relations system should allow for a collaborative, issue-based approach to labor relations. National level bargaining, as provided for in this regulation, and which is expressly authorized in the enabling legislation (5 U.S.C. 9902(g)), allows for an issue-based approach to addressing matters of significance to the Department as a whole. Multi-unit bargaining, as provided for in these regulations, allows for a collaborative, issue-based approach to addressing matters of interest to specific communities of interest within DoD, such as military installations that house multiple organizations and multiple bargaining units.

#### *Other Comments on Specific Sections of Subpart I*

##### *Section 9901.901 – Purpose*

The proposed regulation restates the enabling legislation's purpose to provide DoD and OPM with a labor-management relations system that addresses the unique role

that Department employees have in supporting the Department's national security mission and to promotes a collaborative issue-based approach to labor management relations. In their comments and during the meet-and-confer process, participating labor organizations recommended that we include in this section a statement that labor organizations and collective bargaining are in the public interest, consistent with the enabling legislation's preservation of collective bargaining rights.

We have decided to retain the originally proposed language, while adding an express reference to the collaborative issued-based approach authorized by the enabling legislation. This section of the regulations recognizes and stresses the fundamental purpose underlying the enabling legislation and the statutory mandate to build a flexible HR system that supports the unique mission of DoD and the role of DoD civilian employees as a critical part of the Department's Total Force. Consistent with the enabling legislation, the labor relations system specifically recognizes the right of employees to organize and bargain collectively subject to limitations established by law, including these regulations, applicable Executive orders, and any other legal authority.

Section 9901.902 – Scope of authority

A number of commenters, including labor organizations participating in the meet-and-confer process, presented their views that the enabling legislation did not authorize the Department and OPM to modify provisions of 5 U.S.C. chapter 71. We disagree. The enabling legislation authorizes the Secretary, together with the Director, to *establish* and *adjust* a labor relations system in support of the overall HR system *notwithstanding* the provisions of the current system, as set forth in chapter 71 (5 U.S.C. 9902(d)(2) and 5 U.S.C. 9902(m)(1) and (2)). In addition, as discussed in General Comments, Congress

provided the parameters for that system, including, for example, prohibiting the expansion of the scope of bargaining; requiring that the system address the unique role that the Department's civilian force work plays in supporting the Department's national security mission; authorizing the system to allow for a collaborative issue-based approach to labor management relations; requiring that employees be authorized to bargain collectively, as provided for in chapter 99 (not as provided for in chapter 71); mandating that the system provide for third party review of decisions; and authorizing the system to utilize national level bargaining (an authority separately established in 5 U.S.C. 9902(g)).

Section 9901.903 – Definitions

In their comments and during the meet-and-confer process, participating labor organizations recommended that the current definition of “conditions of employment” be expanded to include the classification of any position. A number of commenters, including labor organizations participating in meet-and-confer process, also recommended that we modify the definition of conditions of employment to eliminate the exclusion of pay. As a general matter, the classification or pay of Federal employees is not subject to negotiation today. This restriction is consistent with the prohibition on any expansion of the scope of bargaining in 5 U.S.C. 9902(m)(7). Therefore, we have not adopted this suggestion.

Some commenters, including labor organizations participating in meet-and-confer process, also raised concerns that the revised definition of “confidential employee” was overbroad and could be subject to misapplication. They recommended that we retain the definition of “confidential employee” contained in 5 U.S.C. 7103. We agree with the recommendation and have modified the regulation accordingly.

During the meet-and-confer process, the impact of issuances on the collective bargaining process and existing collective bargaining agreements was discussed. During these discussions it became apparent that there was confusion surrounding the distinction between “implementing issuances” and “issuances.” To address these concerns, we have modified the definitions, including the definition of “implementing issuance” as it appears in subpart A. In addition, we have cross-referenced the definitions of both “issuance” and “implementing issuance” that appear in subpart A so that the differences in the two types of issuances will be readily apparent.

The labor organizations participating in the meet-and-confer process expressed concerns that any manager could simply sign an issuance or implementing issuance and thereby invalidate legitimate provisions of a collective bargaining agreement. They recommended that we restrict the authority to sign such issuances to the Secretary or Deputy Secretary alone. We believe that restricting this authority to the Secretary or Deputy Secretary is far too restrictive for such a large and diverse Department. Therefore, we have revised the language to make clear that only the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments may sign an “implementing issuance.” In addition, we have revised the language to make clear that only these same officials may sign an “issuance,” which may limit the scope of collective bargaining as provided for in this regulation. This is a very high level of approval and requires extensive coordination within the Department. We believe that this change addresses the legitimate concerns of the commenters while providing the Department the necessary flexibility to meet changing national security requirements and to efficiently manage its workforce.

A number of commenters and labor organizations participating in the meet-and-confer process recommended that we not change the definition of “supervisor” with regard to nurses and firefighters. We agree, and have revised the definition of “supervisor” as it relates to firefighters and nurses to be consistent with what is in chapter 71 today. Commenters also expressed a range of concerns regarding the portion of the definition of “supervisor” dealing with supervision of members of the armed forces. A number of commenters questioned if the intent was that military technicians who supervise members of the reserves, such as on drill weekends, would be considered supervisors. While we believe this language is clear, the comments lead us to believe that it has been misunderstood. This provision only affects civilian employees and was intended to apply to those situations where a civilian is exercising supervisory control over military members. With regard to military technicians who are required to hold military reserve positions in addition to their civilian positions, this definition would only be applicable while serving in their civilian capacity. Thus, an individual who is not a supervisor in his or her civilian status, but supervises reservists while in military status, would not meet the definition of “supervisor” for purposes of subpart I. If an individual is exercising supervisory duties and authorities over military personnel, as defined in the regulation, we believe that individual is a member of the management team, and his or her inclusion within a bargaining unit would create an inherent conflict of interest. Therefore, we have retained that portion of the definition of “supervisor” with respect to the supervision of members of the armed forces.

Section 9901.904 – Coverage

During the meet-and-confer process, the participating labor organizations recommended that the labor relations system be phased in spirals like the HR system rather than implemented concurrently Department-wide. In fact, the participating labor organizations asserted that the requirement to phase in the HR system was equally applicable to the labor relations system. We disagree. The provisions authorizing the establishment of a labor relations system (5 U.S.C. 9902(m)) are clearly separate from the authority to establish an HR system (5 U.S.C. 9902(a)) and the requirement for phased implementation in 5 U.S.C. 9902(l) is not applicable to the labor relations system. We have therefore not adopted this recommendation.

We also received comments that certain groups of employees were unique and therefore should not be covered by the labor relations system. Specifically, commenters suggested that teachers should be excluded from coverage as they do not play a combat support role and already sign mobility agreements giving management all the flexibility it needs. We disagree. Their contributions in teaching the children of our service men and women and the civilian employees who support them are absolutely critical to the successful accomplishment of the Department's national security mission. Thus, the final regulations continue to cover teachers in the labor relations system. Another group of employees that commenters recommended for exclusion from the labor relations system based on their unique characteristics are employees covered under the Civilian Mariner or CIVMARS program. While we agree that some of the rules governing these employees are unique within the Department, these employees are presently covered by chapter 71. Given that fact, we find no compelling argument that these employees should not now be

covered under the labor relations provisions of these regulations and we have therefore not adopted the recommendation.

Some commenters, including participating labor organizations, stated that there was no indication in the proposed regulations that DoD or OPM responded to the intent of Congress that “in designing the labor relations system the Secretary should take into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department.” The commenters are referring to the Conference Report on H.R. 1588, the “National Defense Authorization Act for Fiscal Year 2004,” H. Rpt. 108-354, page 760. While the proposed regulations were silent regarding this provision in the conference report, we have taken into consideration the unique requirements and contributions of public safety employees in supporting the national security mission of the Department. The role of public safety employees was considered throughout the design process for the labor relations system. While we agree that these employees are unique within the Department, they are presently covered by chapter 71 and we found no compelling reason that these employees should not now be covered under the labor relations provisions of these regulations.

*Section 9901.905 – Impact on existing agreements*

Commenters, including labor organizations participating in the meet-and-confer process, expressed concern that Congress did not intend the Department to have the authority to supersede valid provisions of collective bargaining agreements through the promulgation of implementing issuances and issuances. These commenters argued that conflicting provisions of collective bargaining agreements should remain intact until renegotiated regardless of the extension of a new Department policy through

implementing issuances or issuance. We disagree with respect to “implementing issuances,” but agree as to “issuances,” for the reasons explained under General Comments. We have added a new subparagraph, § 9901.905(c) to make clear that any provision of a collective bargaining agreement that is inconsistent with issuances that do not implement NSPS will remain in effect until the expiration, renewal, or extension of the agreement, whichever occurs first.

Commenters also expressed concern that 60 days is not sufficient time to bring into conformance the remaining negotiable provisions of a collective bargaining agreement, following invalidation as authorized by § 9901.905 of the regulations. We disagree. This bargaining will be limited to only those specific contract provisions that are rendered unenforceable, or require changes to their language to conform to the implementing issuance or these regulations. Therefore, we believe that 60 days is sufficient time for bargaining, given the limited scope. For these reasons, we have not adopted the recommended changes.

We received several comments that this section is confusing. We agree with these comments and have revised the language in § 9901.905(b) to make clear that it is only those collective bargaining agreement provisions that are directly affected by the collective bargaining agreement provisions rendered unenforceable by this regulation or an implementing issuance that must be brought into conformance.

We have also substantively modified the provisions in § 9901.905 (b) in response to concerns raised during the meet-and-confer process that the language in the proposed regulations would have the effect of forcing the parties to wait until expiration of the 60-day period to seek assistance with any bargaining impasse. We agree with this concern

and have modified the language in the final regulation to permit the parties to utilize § 9901.920 impasse procedures to obtain assistance at any time.

Section 9901.906 – Employee rights

Commenters recommended that we delete this section as it is essentially identical to 5 U.S.C. 7102 and, thus, unnecessary. We disagree. Although this provision is essentially the same as the chapter 71 provision, we believe that it is important to clearly restate these rights in subpart I to provide employees notice of their statutory rights. Therefore, we have not adopted the recommended change.

Section 9901.907 – National Security Labor Relations Board

Commenters raised the concern that the NSLRB will not be fully staffed and operational before the onset of bargaining disputes arising from implementation of subpart I. We agree with this concern and have modified the regulation to provide the Secretary with the authority to determine the effective date for the establishment of the NSLRB.

Commenters objected to the creation of the NSLRB, and recommended that the regulations preserve the authority of FLRA, FMCS, and FSIP. They remarked that these agencies, which are independent, impartial, and already funded, currently adjudicate the labor disputes that the proposed regulations authorize the NSLRB to resolve. In this regard, they challenged the independence and impartiality of any NSLRB member appointed by the Secretary. Therefore, they objected to any change to the status quo.

We disagree that the NSLRB will not be an independent and impartial third party. The proposed regulations provide that NSLRB members may only be removed by the Secretary for inefficiency, neglect of duty, or malfeasance in office. This is the same

standard that currently applies to members of the FLRA. Since this standard and the establishment of the NSLRB itself are provided for in these enabling regulations, they are beyond the scope of the Secretary's authority to change unilaterally. In addition, these regulations authorize the NSLRB to issue its own rules and operational procedures. The concatenation of these provisions assures the NSLRB's independence. Moreover, while there will be costs associated with the establishment of the NSLRB, we believe these costs will be offset by the increased efficiency in the resolution of labor disputes.

Commenters recommended that the final regulations set strict tenure requirements and limit the tenure for NSLRB board members to one term, with no possibility for renewal or extension. We note that the proposed regulations set the term of NSLRB member appointments at 3 years, but we do not agree that there should be a prohibition on members serving an additional term. These individuals may be viewed as exemplary adjudicators not only to management, but also to the labor organizations. To unilaterally exclude members from serving additional terms would limit the applicant pool and possibly lead to extended vacancies. We therefore have not accepted the recommendation.

However, commenters, including labor organizations participating in the meet-and-confer process, recommended that we provide for more union involvement in the appointment of NSLRB members. We agree with these commenters and, thus, have modified the regulations to provide a process whereby employee representatives may submit a list of nominees for the Secretary's consideration for appointment of non-chair members of the NSLRB. We have also provided that the Secretary may consult with

employee organizations to obtain additional information regarding any nominee submitted.

Other commenters approved of the proposal to establish the NSLRB, indicating that the NSLRB would afford the Department greater regularity and consistency in case processing than currently provided by FLRA. Labor organizations participating in the meet-and-confer process noted that the “one-stop shop” concept of the NSLRB was preferable to the division of prosecutorial, adjudicatory, and mediation responsibilities provided for in the current system. We agree.

Commenters suggested that we pursue a new statutory authority for direct judicial review of NSLRB decisions. While such a proposal is reasonable, enactment would be time consuming, uncertain, and subject to significant revision during the legislative process. Our proposed process as authorized by § 9902(m)(6) subjects certain final NSLRB decisions to FLRA review, which in turn would be subject to judicial review as it is under chapter 71. We believe this is a more expeditious and appropriate approach. This process affords the parties the opportunity to obtain review of an NSLRB decision without the need for court proceedings and, in many cases, the FLRA review may be sufficient to resolve the dispute. Therefore, we have not adopted this suggestion.

However, comments related to judicial review revealed confusion regarding the process for judicial review, and we have, therefore, eliminated the reference to judicial review in § 9901.907. We have instead added a new paragraph (c) in § 9901.909 that describe the process for appellate review of NSLRB decisions. To be absolutely clear, § 9901.909 provides the mechanism for obtaining judicial review beginning with the appellate review of the FLRA. We have also modified paragraph (d) (paragraph (c) in

the proposed regulation) of § 9901.909 by adding language reflecting our intent that judicial review of FLRA decisions is obtained pursuant to 5 U.S.C. 7123, which is modified only to conform relevant citations in chapter 71 to the corresponding provisions in subpart I.

Although many commenters, including labor organizations participating in the meet-and-confer process, did not support its establishment, we have decided to retain the NSLRB. As we indicated in the Preamble accompanying the proposed regulations, it ensures that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that the Department faces in carrying out its mission.

*Section 9901.908 – Powers and duties of the Board and Section 9901.909 – Powers and duties of the Federal Labor Relations Authority*

Commenters recommended that FLRA retain greater jurisdiction over the Department's labor disputes. Specifically, they expressed the view that not all labor relations disputes arising under NSPS will significantly impact the DoD's mission enough to warrant their removal from FLRA jurisdiction. We disagree. It is imperative that the NSLRB retain jurisdiction over matters that require efficient review and understanding of the Department's mission. This is consistent with the requirement in 5 U.S.C. 9902(m)(1) that the system OPM and DoD establish address the unique role that the Department's civilian workforce plays in support of the Department's national security mission. As a result, the final regulations give the NSLRB jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and related exceptions to arbitration awards. In addition, the final regulations clarify that

the FLRA will review Board decisions on unfair labor practices (except when the Board declines to adjudicate the matter), arbitration awards under § 9901.908, and negotiability disputes.

Commenters further inquired about the NSLRB's authority to investigate unfair labor practices and other labor disputes. We agree that the NSLRB should have the authority to investigate and have modified the regulations to provide the NSLRB with authority to establish procedures for investigations in their regulations. In addition, we have clarified that the Board has the authority, similar to that exercised today by the FLRA General Counsel, to exercise unreviewable discretion to dismiss unfair labor practice allegations.

Commenters expressed concern that the Board would not be fully equipped to handle the extreme workload related to the implementation of the labor relations system at stand up. We agree. We have added a new § 9901.908(a), to reflect the change discussed under § 9901.907, National Security Labor Relations Board, which provides the Secretary with the authority to determine the date of establishment of the NSLRB. Pending establishment of the NSLRB, the regulations also provide the Secretary discretion, in consultation with the Director, to designate another third party to exercise the authority of the Board in the interim.

Commenters questioned why the proposed regulations authorized the NSLRB to issue, at the request of any party, binding opinions on matters within its jurisdiction that would be subject to FLRA and judicial review. They further questioned who would have standing to seek review, other than the initial requester, since there would be no specific labor dispute at issue, and recommended the deletion of this provision. In response to

these concerns, we have revised the language to strike the phrase “binding Department-wide opinions” and replaced it with “guidance,” thus allowing the NSLRB to issue non-binding guidance. While we have struck the language that would have allowed FLRA and judicial review of this guidance, we anticipate that the guidance will be accorded deference by other third parties in the cases before them. We also received a comment suggesting that the procedures to request an opinion under this provision are confusing. We disagree and have made no changes to this process.

Commenters raised concerns about the NSLRB’s authority under § 9901.908(a)(3) of the proposed regulations to resolve disputes concerning requests for information under § 9901.914(b)(5). Accordingly, we have deleted this provision. Disputes concerning denial of information requests are processed as unfair labor practices, which are included in § 9901.908(b)(1).

Commenters, including labor organizations participating in the meet-and-confer process, expressed concern with the NSLRB’s authority to resolve national consultation disputes. We agree and have amended the regulations to retain FLRA jurisdiction over disputes regarding the granting of National Consultation Rights. Accordingly, we have deleted § 9901.908(a)(8) of the proposed regulations, which had reserved this authority to the NSLRB.

Some commenters expressed concern with the limitation on the Board’s authority to issue *status quo ante* awards. These commenters argued that the authority to order *status quo ante* remedies to make aggrieved employees whole was essential for employees to perceive the NSLRB as legitimate. We disagree. We believe that the limitations on the award of *status quo ante* remedies appropriately recognize and correctly balance the Department’s national security mission and the unique role that

DoD civilian employees play in supporting that mission. We believe the limitations provided in the regulations are appropriate and have not accepted the recommendations.

A labor organization expressed concern that the Board's *de novo* review authority of an arbitrator's findings of fact made the proposed system illegitimate. We disagree. We believe it is necessary for the Board to review the underlying facts in any dispute to ensure that a correct determination has been rendered.

Commenters also recommended that we define the Board's remedial authorities. We do not believe that this is necessary, just as it was unnecessary to define the FLRA's remedial authorities under chapter 71.

Commenters also raised concerns regarding the Board's authority under § 9901.908(a)(1) and (a)(5) of the proposed regulations to decline jurisdiction over individual labor disputes. We share their concerns and have amended the proposed language to give the Board the added authority to reject unfair labor practices and negotiation impasses.

#### Section 9901.910 – Management rights

Commenters, including labor organizations participating in the meet-and-confer process, recommended that we retain the current language in 5 U.S.C. chapter 71 with regard to management rights, arguing that the proposed regulations unduly limited the scope of bargaining. Specifically, commenters expressed concern that limiting collective bargaining over the assignment of equipment and shifts could compromise public safety. These commenters recommended that management retain the right to permissively bargain certain subjects when appropriate, rather than replacing the requirement to bargain with a requirement to consult with the labor organizations concurrent with taking

action. Moreover, commenters suggested that labor organizations should be able to bargain appropriate arrangements prior to management taking an action that potentially could adversely affect bargaining unit employees rather than providing for post implementation bargaining. Commenters, most notably labor organizations, objected to the prohibition of bargaining procedures concerning management rights at § 9901.910(a)(1) and (2). Labor organizations also suggested that the right to negotiate procedures for management rights at § 9901.910(a)(3) is illusory. Labor organizations suggested that no justification has been provided to restrict bargaining over procedures and this restriction is contrary to law. Finally, commenters objected to the provision that allowed management to deviate from established procedures because they believe such an action is unreasonable.

Although these issues were discussed during the meet-and-confer process, the employee and management representatives were unable to fashion a recommendation to resolve these differences that would be acceptable to all parties. The labor organizations participating in the meet-and-confer process, while willing to discuss some modifications to the procedures in chapter 71, held fast to their position that the existing labor relations system only needed slight modifications to meet the Department's need for flexibility and agility to support its national security mission. We disagree with the labor organizations' suggestion that implementing issuances and issuances should be subject to an adaptation of the FLRA's compelling need standard, which requires a link between the policy to be implemented and national security, to override collective bargaining agreements. Furthermore, we believe that, even with modifications discussed with the labor organizations during the meet-and-confer process, to interpret the emergency provisions

of chapter 71 more liberally and to allow post-implementation bargaining in certain limited situations, the current statute does not give the Department the flexibility necessary to carry out its vital national security mission. Today, the Department is increasingly faced with an enemy that can attack with little or no advance warning. The Department must be agile enough to respond to the emerging and rapidly evolving threats inherent in 21<sup>st</sup> century warfare.

Finally, we have modified the regulations to permit bargaining, in the sole, exclusive, unreviewable discretion of the Secretary, over the procedures that would be followed in exercising the expanded operational management rights. We have also modified the regulations to permit bargaining, at the election of the Secretary, over appropriate arrangements on the routine matters related to the expanded operational management rights. The Secretary may authorize such bargaining to advance the Department's mission accomplishment or promote organizational effectiveness. Mid-term agreements on appropriate arrangements and procedures for (a)(1) and (a)(2) management rights are not precedential or binding on subsequent acts, or retroactively applied, except at the Secretary's sole, exclusive, and unreviewable discretion. Procedures and appropriate arrangements in term agreements are binding, except that nothing will delay or prevent the Secretary from exercising his or her authority under subpart I. For example, the Secretary may authorize deviation from such agreements when it is necessary to carry out the Department's mission. This authority is comparable to what occurs today when an emergency exists.

We have also made some minor changes to the section to make technical corrections and to clarify intent. Specifically, in § 9901.910(e) we have corrected the

citation from “§ 9901.913” to the correct citation of “§ 9901.917.” In response to another commenter, we have removed the “foreseeable, substantial, and significant” standard from § 9901.910(e)(2)(i) because it is unnecessary given the language in § 9901.917(d)(2). We have also added references to sections 9901.918 and 9901.919 to conform to the authorities in those sections for multi-unit bargaining and bargaining above the level of recognition, respectively.

*Section 9901.911 – Exclusive recognition of labor organizations*

Labor organizations recommended that we delete the section as it is duplicative of the introductory provisions in 5 U.S.C. 7111. We disagree. Although labor organization recognition remains unchanged from 5 U.S.C. chapter 71, we believe that it is important to affirmatively state in these regulations that labor organizations will be recognized under subpart I in the same manner as they are under chapter 71.

*Section 9901.912 – Determination of appropriate units for labor organization representation*

The proposed regulations under § 9901.912(b)(3) and (4) would exclude all employees engaged in personnel work and individuals employed in attorney positions. In response to comments received, particularly from labor organizations participating in the meet-and-confer process, which opposed these exclusions as unnecessary and overbroad, we have revised the language to reflect the current language in 5 U.S.C. chapter 71.

Although the proposed regulations did not explicitly provide special rules for bargaining unit inclusion or exclusion for employees holding security clearances, there were multiple comments on the subject. Commenters suggested that employees with security clearances should be excluded from bargaining units because of national security

concerns. Labor organizations participating in the meet-and-confer process recommended an alternative approach that would require an employee with a security clearance to be excluded if that employee's duties required independent judgment in the formulation of national security policy. While we understand the complexity of the issue, we disagree with both recommendations because we believe the existing approach of case-by-case exclusion is appropriate. Given the sensitivity of the issue, we believe a universal approach to security clearance exclusion would be inflexible and ineffective.

Section 9901.913 – National consultation

Commenters, including labor organizations participating in the meet-and-confer process, recommended deleting these provisions because, in their view, they are unlawful deviations from chapter 71. We disagree for the reasons stated under General Comments. Commenters further recommended that the FLRA should retain jurisdiction over national consultation issues. We have adopted this recommendation and modified the language accordingly. We also received comments suggesting that the phrases “substantial number of employees” and “reasonable time” are vague. However, this is the exact language that appears in chapter 71 and the FLRA has a long history of interpreting this language. Therefore, we have retained the language.

Section 9901.914 – Representation rights and duties

Commenters, including labor organizations participating in the meet-and-confer process, strongly objected to the elimination of the right of an employee to request representation when examined by representatives of the Office of the Inspector General and other independent Department and Component organizations whose mission includes criminal investigations. These commenters argued that such representation protects

employees against abusive or illegal interview techniques and provides reassurance and guidance to employees. We agree, and have revised the regulations to eliminate these restrictions on representation.

We also received comments, including comments from labor organizations participating in the meet-and-confer process, that opposed the restrictions on the union's right to attend formal EEO proceedings. Alternatively, other commenters strongly supported this restriction. We have carefully considered the comments and have come to the conclusion that the often sensitive nature of discrimination complaints, coupled with the fact that the employee has exercised an option to not use the negotiated grievance procedure, supports this limitation on a labor organization's right to attend such discussions. We believe the procedures as described in the proposed regulations provide the best balance between the unions' institutional interest in the matter and the employee's right to privacy. Consistent with this determination, we have added clarifying language in § 9901.915(a)(2)(C).

Commenters, including labor organizations participating in the meet-and-confer process, expressed the view that there is no valid reason to restrict the union's right to attend formal discussions over operational matters. Some of these comments appear to confuse this right as it currently exists under chapter 71. Some commenters suggest that any formal meeting with employees requires an invitation for union attendance. This is clearly not the case today, and case law is clear that it must be a formal meeting where a change to existing conditions of employment is discussed. Many meetings where operational matters are discussed, such as the routine assignment of work, do not rise to the level of requiring union participation. Furthermore, we believe that allowing managers to respond to basic questions regarding conditions of employment, such as a

routine question by a newer employee regarding how an overtime roster operates, should not require union participation as the manager is merely reiterating existing policy. Management and employees must be able to freely communicate on such routine matters if the Department is to operate efficiently. Furthermore, such a communication in no way diminishes the role of the union, and does not in any way authorize a manager to discuss changing these procedures without union participation. For the forgoing reasons, we have not accepted the recommendation and have retained the language as it appeared in the proposed regulation.

Labor organizations participating in the meet-and-confer process and other commenters also recommended that we retain the “flagrant misconduct” standard for employee conduct while serving as union officials. Commenters argued that union representatives are different than other employees because they have the right to speak, write, associate, and petition for the redress of wronged employees. However, all employees, regardless of whether they are union representatives, are expected to express their concerns in an appropriate manner, particularly in scenarios where there could be a safety or security violation. The intent is not to prevent honest and open discussion, but rather to ensure that such discussions are undertaken in a professional and courteous manner. Under the proposed standard, there is no requirement that a union representative not assert the union’s position. The only conduct the revised standard is intended to stop is the rare, but utterly unacceptable use of vulgar or sexually explicit language, as well as physical intimidation by union officials. We believe the revised standard is appropriate, particularly in a military organization that has a longstanding tradition of professionalism and courtesy. We have therefore not accepted this recommendation.

Commenters, including labor organizations participating in the meet-and-confer process, objected to the limitations on management's obligation to provide information to a union under the proposed regulations. Generally these comments focused on the provisions allowing an authorized official to block the release of information if that official determines the release would compromise mission, security, or employee safety. These provisions generally codify current case law in which the right of the union to information is weighed against the rights of employees and management. This language simply clarifies the existing state of affairs. Thus, we have not adopted the recommendations to eliminate these provisions.

Several commenters also suggested that the 30-day period for agency head review was unreasonably short. The process of agency head review, including the 30-day limitation, as provided for in § 9901.914(d)(1)-(4) is based on, and adopts, the authority of heads of agencies that exists today under 5 U.S.C. 7114(c). This standard has been in effect for many years under 5 U.S.C. chapter 71 and has worked efficiently. Thus, we believe that this is sufficient time for agency head review to occur and we have retained the 30-day time frame. We have modified § 9901.914(d)(2) and (3) to conform the provisions to the revised definition of "issuances" that could serve as the basis for disapproval of conflicting provisions of collective bargaining agreements upon agency head approval. We have also adopted a comment to revise § 9901.914(d)(5) to clarify that agreements are unenforceable because they conflict with applicable law, rule or regulation, or issuance, rather than because an authorized agency official has made such a determination. We have added clarifying language to this paragraph in response to numerous comments regarding the impact of issuances on collective bargaining

agreements. The revised language clarifies that collective bargaining agreement provisions that conflict with issuances remain in effect until expiration of the agreement at which time the agreement must be brought into conformance with the issuance.

Section 9901.916 – Unfair labor practices

Commenters, including labor organizations participating in the meet-and-confer process, recommended that DoD should not be permitted to enforce a rule or regulation that is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation. We agree with these recommendations to the extent that the rule or regulation is not implementing NSPS and have amended the regulations to reflect the current 5 U.S.C. 7116(a)(7) unfair labor practice with a modification to exclude implementing issuances, which under these regulations, will immediately supersede conflicting provisions of collective bargaining agreements.

Commenters, including labor organizations participating in the meet-and-confer process, suggested that employees or employee representatives should have more than 90 days to file an unfair labor practice with the Board. We concur and have revised the regulation to provide six months, which is consistent with the current filing limits under chapter 71. Finally, to conform this section to the changes made to § 9901.908 and to clarify the Board's authority with respect to unreviewable discretion, we have eliminated reference to the term "charge" and inserted instead the generic term "allegation." This also supports our goal for the Board to use a single, integrated, streamlined process for resolving labor relations disputes, including unfair labor practices.

Section 9901.917 – Duty to bargain and consult

Commenters, including labor organizations participating in the meet-and-confer process, objected to the establishment of a 30-day time limit to complete mid-term bargaining, as proposed in § 9901.917(c). We have modified this section to allow the parties, by mutual consent, to continue mid-term negotiations beyond the proposed 30-day limitation. This change to § 9901.917(c) parallels identical language in § 9901.917(b).

Additionally, based on comments made during the meet-and-confer process that it was illogical to restrict the parties' ability to seek bargaining assistance early in the process, we changed the proposed language in § 9901.917(b) and (c) to allow either party, at any time prior to going to the Board, to refer matters at impasse to FMCS or, if mutually agreeable, to another third party.

We made technical changes to the language in § 9901.917(d)(1) to conform it to the revised definitions of “implementing issuance” and “issuance.” Commenters found the § 9901.917(d)(2) limitation on bargaining to be unnecessary and unclear. First, commenters suggested that the lead phrase, “except as otherwise provided in 910(c),” was unnecessary. We disagree. The phrase is intended to convey that labor organizations will have a right to consult on procedures in exercising management rights at § 9901.910(a)(1) and (2) even though § 9901.917(d)(2) limits consultation to otherwise negotiable changes in conditions of employment subject to the foreseeable, substantial and significant standard. In other words, this requires consultation on procedures for these particular management rights although “bargaining” on procedures is prohibited at § 9901.910(b). Commenters also raised concerns about the application of the

§ 9901.917(d)(2) standard, given that it contains a number of undefined words and phrases, e.g., “foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.” Commenters fear that, absent a definition of these terms and phrases, DoD management could interpret them in a way that would render employee and union rights meaningless. Commenters recommended that we delete the provision altogether and rely on the FLRA’s existing *de minimis* standard. We have not adopted these suggestions. While we agree that the standard is subject to interpretation, we anticipate that a body of case law will develop to guide the parties in applying this standard, just as there is a body of case law regarding the FLRA’s *de minimis* standard.

Section 9901.918 – Multi-unit bargaining

Commenters expressed concern that while unions could request multi-unit bargaining, the Secretary has sole and exclusive authority to grant such request. While we recognize this concern, we believe that the Secretary is in a unique position to determine when an issue is appropriate for multi-unit bargaining given variations in mission and organization across the Department. We are also unclear as to how one union could require another union to participate in multi-unit bargaining. We have therefore rejected recommendations to allow unions to require multi-unit bargaining. However, we have modified the language to clarify the Secretary’s authority to require multi-unit bargaining.

Commenters, including labor organizations participating in the meet-and-confer process, expressed strong opinions regarding the prohibition on ratification of contracts. While we understand that ratification is an internal union process, we believe it would be

untenable to give each individual bargaining unit veto power over a multi-unit agreement after the parties have reached agreement. Thus, we have adopted the recommendation to eliminate the prohibition on ratification, but added a provision that when an agreement is reached under this section, individual bargaining units may not opt out of or veto that agreement.

*Section 9901.919 – Collective bargaining above the level of recognition*

Several comments questioned the procedures that will be used for bargaining above the level of recognition, such as the approval process for official time requested by union officials who may be under different Military Departments. In response, we have added a provision that the Department will prescribe implementing issuances on the procedures associated with collective bargaining above the level of recognition.

Commenters, including labor organizations participating in the meet-and-confer process, acknowledged that bargaining at the national level could be appropriate, under certain circumstances. They objected, however, to giving the Secretary the sole and exclusive discretion over the use of this special bargaining authority as well as the provisions requiring these negotiations to supersede all conflicting provisions of existing collective bargaining agreements. We disagree. These provisions are required by 5 U.S.C. 9902(g)(2). In addition, we believe they are necessary for effective national level bargaining.

Commenters also objected to the prohibition on ratification in § 9901.919(b)(5). Based on the same rationale relating to this issue with regard to multi-unit bargaining, we have adopted the recommendation to delete the proposed ratification language. In its

place, § 9901.919(b)(5) now provides that individual labor organizations cannot opt out of, or veto, a final national level bargaining agreement.

Section 9901.920 – Negotiation impasses

Labor organizations objected to the NSLRB adjudicating negotiation impasses because they assert that the NSLRB is not an independent third party. We disagree with this assertion for the reasons discussed in the Major Issues section. During the meet-and-confer process, the participating labor organizations recommended using arbitrators to resolve negotiation impasses. We disagree because such a system would lead to inconsistent and inefficient results. Use of the NSLRB will, over time, result in an established body of precedent upon which both management and unions may rely.

We have made a conforming change by adding § 9901.905 to the list of sections for which the parties may submit disputed issues to the Board. We also made a technical correction deleting a reference to judicial review for unfair labor practices involving negotiation impasses since this is already provided for in § 9901.909.

Section 9901.921 – Standards of conduct for labor organizations

Labor organizations objected to this section as duplicative of 5 U.S.C. chapter 71. However, we have decided to retain it to ensure that labor organizations are cognizant of applicable standards of conduct.

Section 9901.922 – Grievance procedure

Commenters recommended that the term “administrative” be reinserted into the description of the negotiated grievance procedure in order to retain access to judicial review. As the Government’s brief in the pending case Whitman v. DOT (S. Ct. No. 04-1131) demonstrates, we do not believe the inclusion of the word “administrative” in

chapter 71 was intended to authorize judicial review of grievances. Nonetheless, since some courts and parties have taken the position that the addition of the word “administrative” authorized judicial review, we have removed that term from the regulation to avoid any suggestion that this regulation would authorize judicial review. Because this change clarifies that judicial review over many issues is not available, it does not restrict an employee’s right to obtain MSPB or EEOC review of adverse actions and subsequent judicial review of those decisions. Therefore, we have rejected the recommendation and retained that language as proposed.

Commenters, including the labor organizations participating in the meet-and-confer process, recommended that classification issues should be subject to the grievance procedure. However, the classification of positions generally has been excluded from the grievance procedure. We believe that consistency of classification, while always important, becomes critical as we move into a pay-for-performance environment. Subjecting classification decisions to inconsistent interpretations by arbitrators would undermine the system. This would result in a fragmented classification system throughout the Department with similarly situated employees being treated differently. Such a result would be inconsistent with the NSPS Guiding Principles and KPPs, which require that the system be credible and trusted. Therefore, we have not adopted this recommended change.

Commenters, including labor organizations participating in the meet-and-confer process recommended that pay be subject to the grievance procedure. We note that pay has almost exclusively been excluded from the grievance procedure as it historically been covered by Governmentwide regulation or law. The exclusion of pay from the grievance

procedure is in keeping with this longstanding practice as we move into a pay for performance system. As with classification, subjecting pay determinations to inconsistent arbitrator interpretations would undermine the pay system and be inconsistent with statutory requirements that the pay system be fair, credible, and transparent. Thus, we have retained the language as proposed.

Many commenters, including labor organizations participating in the meet-and-confer process, presented strong arguments that employee ratings of record should continue to be subject to the grievance procedure and binding arbitration. Most commenters expressed concern that receiving an accurate performance rating was crucial to employees because that rating will be used in determining an employee's pay. Thus, employees need a credible system to challenge ratings of record that they believe are inaccurate. We agree and have provided employees the right to grieve their performance ratings of record through the negotiated grievance procedure. Moreover, during the meet-and-confer process, the unions agreed that the use of panels, consisting of an arbitrator, a management official and a union official, to decide grievances regarding ratings of record should be an option for employees. Thus, we have modified the regulations to provide that an employee may challenge a rating of record either through the negotiated grievance procedure using either a panel or traditional arbitration. Employees also have the option of using the administrative reconsideration process as set out in § 9901.409(g).

We have also added language to reflect case law which prevents an arbitrator, or a panel, from conducting an independent evaluation of performance or otherwise substituting his or her judgment for that of a manager. We have made clear that the

arbitrator or panel has no authority to determine appropriate share payouts under the pay-for-performance system, as such determinations are made by management based on the rating of record. We believe that these changes address the concerns of commenters and will serve to instill confidence in the performance rating process.

Finally, a commenter recommended that appealable adverse actions be removed from the scope of the negotiated grievance procedure because of other available forums for redress. We agree that there is a statutory right to file an appeal with the Merit Systems Protection Board (MSPB), but the option to grieve these adverse actions as an alternative to the MSPB is a well established employee right. To address the requirement that the appeals process be fair and to ensure that the Department's national security mission is considered, we have retained regulatory language ensuring uniform review and interpretation of arbitral awards and AJ decisions. Thus, we have rejected this comment.

We also made a technical change to § 9901.922(e) to assure that mixed cases processed through a negotiated grievance procedure can properly be reviewed by the Equal Employment Opportunity Commission.

*Section 9901.923 – Exceptions to arbitration awards*

Labor organizations participating in the meet-and-confer process suggested that we reconsider subjecting exceptions from arbitration decisions on appealable adverse actions to the Merit Systems Protection Board for appellate review. We disagree. The Secretary must retain full authority to review an arbitrator's decision on an appealable adverse action, similar to the need to review decisions of MSPB Administrative Judges, to ensure that the arbitrator interprets NSPS and these regulations in a way that recognizes the critical mission of the Department and to ensure that deference is provided

to the Department's interpretation of these regulations. This provision is designed to ensure uniformity of interpretation and application of NSPS and these regulations. Allowing direct judicial review of arbitration decisions would create an inconsistent approach in how MSPB Administrative Judges and arbitrator decisions are treated on identical matters.

Section 9901.924 – Official time

Commenters found the proposed regulations to be unclear as to how official time would be allocated among union officials from different locals when they are engaged in multi-unit and/or national level bargaining. We note that the proposed regulations provide that the Secretary will prescribe implementing issuances on the procedures and constraints associated with multi-unit bargaining. These issuances will address a variety of issues including the granting of official time. However, the comment revealed that a parallel provision for collective bargaining above the level of recognition has been inadvertently omitted for § 9901.919. Although multi-unit bargaining may also be at the level of recognition, there are situations where it could occur above the level of recognition. Therefore, to ensure clarity, we have amended this section to provide that the Secretary will prescribe implementing issuances on the procedures and constraints associated with bargaining above the level of recognition.

Section 9901.925 – Compilation and publication of data

Commenters recommended that this section be deleted as its sole use and purpose, in their view, is to facilitate the Board's unlawful functioning. We disagree for the reasons explained under General Comments, and have retained this section.

Section 9901.926 – Regulations of the Board

Commenters recommended that this section be deleted as its sole purpose, in their view, is to facilitate the Board's unlawful functioning. Commenters asserted that the Board must develop its own regulations and that the Department does not have the authority to issue interim regulations for an independent Board's operation. We agree that the Board should issue its own regulations and have provided the Board with that authority. However, we believe that it would be impractical for the Board to operate without interim rules until such time as the Board issues its own regulations. Thus, we have retained the Secretary's authority to develop interim NSLRB regulations.

Section 9901.927 – Continuation of existing laws, recognitions, and procedures

Commenters recommended deletion of this section on the basis that invalidation of collective bargaining agreements provisions before the expiration of their term is, in their view, unlawful. Again, we disagree for the reasons explained under General Comments.

Commenters also suggested that the statements concerning the continuation of existing collective bargaining agreements and labor organization recognitions are unnecessary. We disagree because we want to ensure that there is no misunderstanding that these regulations will not dissolve established bargaining units within the Department nor cancel entire collective bargaining agreements.

Section 9901.928 – Savings provisions

We received comments recommending deletion of this section because the commenters believe that excluding administrative remedies for pending grievances is contrary to law. We disagree. To the extent that an award is prospective in nature, it

must comply with the applicable procedures, whether established through law, rule, regulation or collective bargaining agreement.

## **Next Steps**

### **A. NSPS Implementation**

#### **1. Employee Transition Plan (Spiral Strategy)**

The Secretary adopted an “acquisition model” to design and implement NSPS. Eligible employees will transition to NSPS in phases or “spirals.” The spiral concept allows the Department to introduce NSPS in successive waves—to initially deploy the new personnel system to a number of organizations so that we can manage implementation and troubleshoot, evaluate, and report on the results in a timely manner. As with any new system, especially one with the size and complexity of NSPS, we may need to make refinements as we roll it out to the rest of the workforce. The first spiral, spiral one, is limited to General Schedule (GS and GM), Acquisition Demonstration Project, and certain alternative personnel system employees. As required by 5 U.S.C. 9902(l), the NSPS HR system under 5 U.S.C. 9902(a) may be implemented to a maximum of 300,000 employees without having to make a determination that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b). Spiral one will cover up to the statutory limit of 300,000 employees.

After the assessment cycle and certification of the performance management system are completed, the second spiral will deploy. Spiral two includes Federal Wage System employees, overseas employees, and other eligible employees. Spiral three will comprise the DoD labs, currently excluded by 5 U.S.C. 9902(c), should the Secretary make the determination required by that section.

## **2. HR and Labor Relations Transition**

Transition to the HR system occurs when employees convert or spiral into NSPS. Employees covered by the HR system are under the appeals process. Upon conversion, employees will be covered by the NSPS performance management, classification, pay, reduction in force, adverse action, and appeals regulations.

The labor relations provisions will be implemented DoD-wide for all eligible DoD employees at the same time. The labor relations provisions apply to all eligible employees even if the HR system does not cover them.

### **B. Development of Implementing Issuances and Continuing Collaboration**

The Secretary will engage in continuing collaboration with employee representatives in developing implementing issuances. This will provide employee representatives an opportunity to submit written comments and discuss their views on human resources management issues. In some areas, such as classification and pay matters, law or other agency rules have governed decisions with no avenue for labor organizations to provide input to DoD. Continuing collaboration provides an historic opportunity for employee representatives to have input into the development of the Department's human resources management system, as well as certain aspects of the adverse actions, appeals, and labor relations programs not specifically covered by these regulations. It is an opportunity for their views and interests to be heard and considered in the development process and gives the Secretary the benefit of their insight. We encourage employee representatives to take advantage of this process and the benefits it offers.

The Secretary will provide the employee representatives draft copies of implementing issuances for review and comment. If necessary and appropriate, continuing collaboration could include face-to-face meetings or any other means to exchange information and ideas. We expect continuing collaboration to begin shortly after these final regulations become effective.

### **C. Training**

The NSPS training plan presents a comprehensive, well-planned learning strategy to prepare the DoD workforce for the transition to NSPS. The plan is grounded in the belief that participants need to be informed and educated about NSPS and trust and value it as a system that fosters accountability, respects the individual, and protects his and her rights under the law. In building the plan, the Department seeks to educate employees about NSPS, teach the skills and behaviors necessary to implement and sustain NSPS, foster support and confidence in NSPS, and facilitate the transition to a performance-based, results-oriented culture.

The plan adopts a two-fold strategy centered around two interrelated training domains: the NSPS functional domain covering the NSPS system elements contained within the human resources, labor relations, and appeals sections of the regulations; and the change management domain, which focuses on the skills, attitudes, and behaviors necessary for success under NSPS. The plan incorporates a blended learning approach featuring Web-based and classroom instruction supplemented by a variety of learning products, informational materials, and workshops to effectively reach intended audiences with engaging, accurate, and timely content.

Within the functional domain, the Department will offer specialized courses for all of the functional areas covered by the NSPS regulations, tailored for specialized audiences (e.g., supervisors/managers, human resources practitioners, attorneys, and non-supervisory employees). These courses will cover pay banding, staffing flexibilities, performance management, labor relations, the appeals process, and other matters. The Department has a robust training infrastructure already in place to train and educate its personnel and will leverage that infrastructure as we implement NSPS-specific training.

Managers and supervisors, including military managers and supervisors, are key to the success of NSPS and extensive training will be given to ensure their understanding of the system and the key role they play. Courses aimed at managers and supervisors will focus heavily on the performance management aspect of NSPS. DoD's Program Executive Office is developing these courses now and will make them available to Components in time to train employees in advance of NSPS implementation. Training will focus on improving skills needed for effective performance management, such as setting clear goals and expectations, communicating with employees, and linking individual expectations to the goals and objectives of the organization.

The Department is also focusing attention on change management training to address the behavioral aspects of moving to NSPS and to better prepare the workforce for the changes NSPS will bring. The behavior-based training provides the foundation for future NSPS learning activities and facilitates increased communication between supervisors and employees as they discuss and jointly develop performance objectives tied to the overall organization's mission. This is essential if this new system is to be successful. Some of the Component behavior-based training has already begun, and

other courses are in development and will be available to train all affected employees in advance of NSPS implementation. Course offerings include interpersonal communication, team building, and conflict management to help facilitate interaction between employees and supervisors. In addition, Components continue to offer a variety of informational forums and learning activities with sponsorship and active continuing involvement by DoD's senior leadership.

The design of the pay-for-performance system includes the use of pay pools, and we will also provide training for pay pool managers covering the pay pool process, goals and objectives, authorities, funding considerations, documentation, effective panel characteristics, etc. Roles and responsibilities of the pay pool manager and participating supervisors will also be covered extensively. The training will also feature a mock pay pool panel process that takes pay pool panel members through the full assessment process to include mock payout and employee feedback. This training builds in accountability and supports the needs of both employees and managers by providing an opportunity to experience the process and identify and correct procedures prior to undergoing the actual pay pool experience.

The PEO training plan was based on our extensive experience with previous demonstration projects. Training needs will vary by individual and organization depending on their familiarity with the fundamentals of a performance-oriented work environment. The core functional training courses available will include—

- 18 hours for managers and supervisors;
- 13 hours for employees; and

- 25 to 40 hours for HR practitioners (depending on the functional area of expertise; includes training on labor relations and appeals).

Although the time spent in training represents the Secretary's commitment to preparing the workforce, it is focusing on the results and outcomes of that training, as opposed to a prescriptive "one size fits all" strategy.

Employees will receive functional training through three primary vehicles:

Print Materials – directed to various targeted audiences to raise awareness and educate them on key NSPS elements and performance management concepts.

Web-based Training – two hour-long courses, "Fundamentals of NSPS" and "NSPS 101," providing introductory, on-line training delivered in a consistent manner in a self-paced, on-demand format. The "NSPS 101" course serves as a prerequisite for the classroom sessions.

Classroom Sessions – the primary vehicle to communicate critical information, classroom sessions are under development for employees, managers and supervisors, human resources practitioners, and labor relations practitioners. The sessions will provide key operational information on all NSPS systems elements, with particular emphasis on performance management. Topics will include the performance management cycle, developing performance objectives, performance evaluation and assessment, performance coaching, and performance-based communication. Classroom training will be conducted using a train-the-trainer strategy, with trainers who participate in a train-the-trainer program leading all classroom training.

Trainers will be provided with instructor guides and will include basic instructional content supplemented by video vignettes and interactive exercises.

Classroom training is scheduled to occur on a “just-in-time” basis, approximately 4 to 6 weeks prior to NSPS implementation.

The Department’s leadership recognizes and is committed to providing the necessary training. Secretary England, during testimony to the Senate Armed Services Committee, stated that “[t]raining is one of the most critical elements for a smooth and successful transition to NSPS. The Department is fully committed to a comprehensive training program for our managers, supervisors and employees. All employees will be trained to understand the system, how it works, and how it will affect them.”

The necessary resources are available to provide the training. To address these requirements, the PEO allocated \$2 million in FY05 and anticipates allocating another \$3 million in FY06 to fund development and delivery of core NSPS training courses and delivery of the “train-the-trainer” sessions.

## **Regulatory Requirements**

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

DoD and OPM have determined that the National Security Personnel System (NSPS) is a significant regulatory action as enacted by Section 1101 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136, November 24, 2003) because there is a significant public interest in revisions of the DoD civilian employment system. DoD and OPM have analyzed the expected costs and benefits of NSPS to be implemented by DoD and that analysis is presented here.

Integral to the administration of the new performance-based personnel system is a commitment to the DoD workforce to the maximum extent practicable, for fiscal years 2004 through 2008, that the aggregate amount allocated for compensation of DoD

employees under NSPS will not be less than if they had not been converted to NSPS. This takes into account potential step increases and rates of promotion had employees remained in their previous pay schedule. In addition, NSPS implementing issuances will provide a formula for calculating the aggregate compensation amount for fiscal years after fiscal year 2008. The formula will ensure that, to maximum extent practicable, in the aggregate, employees are not disadvantaged in the overall amount of pay available as a result of conversion to the 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 might impact pay levels.

Accordingly, the NSPS performance-based pay system carries with it potential implications relative to the base pay of individual employees, depending upon local labor market conditions and individual, team, and organizational performance. However, actual payroll costs under this system will be constrained by the amount budgeted for overall DoD payroll expenditures, as is the case with the present GS pay system. DoD anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The creation of the performance-based NSPS will result in some initial implementation costs, which can be expressed in two basic categories: (1) Program implementation costs and (2) NSLRB start-up costs. The program category refers to the costs associated with designing and implementing the system. This includes the start-up and operation of the Program Executive Office, executing the system design process, developing and delivering new training specifically for NSPS, conducting outreach for employees and other parties, engaging in collaboration activities with employee

representatives, and modifying human resources information systems, including personnel and payroll transaction processing systems. In the areas of training and HR automated systems, the costs associated with implementing NSPS will not be extensive, since DoD has significant training and information technology infrastructures in place for current operations. DoD will not have to build new systems or delivery mechanisms, but rather will modify existing systems and approaches to accommodate changes brought about by NSPS.

The other cost category refers to the cost to establish the National Security Labor Relations Board (NSLRB). This includes typical organizational stand-up costs, as well as staffing the NSLRB with members and a professional staff. It is expected that the NSLRB will develop streamlined processes and procedures and leverage existing infrastructures and technology to minimize startup and sustainment cost.

As has been the practice with implementing other alternative personnel systems, DoD expects to incur an initial payroll cost related to the conversion of employees to the pay banding system. This is often referred to as 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 the NSPS final regulations, WGIs no longer exist; once under NSPS, such pay increases will be based on performance. Accordingly, the total cost of the accelerated WGI “buyout” should not be treated as a “new” cost attributed to implementation of NSPS, since it is a cost that DoD would bear under the current HR system in the absence of the enabling legislation and corresponding regulations. The portion of the 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. In the absence of NSPS, WGIs would be spread out over time instead of being paid “up front.” 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.

In addition, DoD will incur costs relating to such matters as training development, support, and execution; reprogramming automated payroll and human resources information systems; developing guiding issuances, implementation planning, scheduling, and monitoring; design, production, and distribution of communication materials; conducting employee education and communication activities; developing and conducting pay surveys to determine future pay adjustments in relation to the labor market; conducting surveys and data analysis to ensure key performance parameters are met; the establishment of the National Security Labor Relations Board (NSLRB); and the overall operation of the NSPS Program Executive Office. The extent of these costs will be directly related to the level of comprehensiveness desired by DoD.

DoD estimates the overall costs associated with implementing the new DoD HR system – including the development and implementation of a new human resources system and the creation of the NSLRB – will be approximately \$158 million through 2008. Less than \$100 million will be spent in any given 12-month period.

The primary benefit to the public of this new system resides in the flexibilities that will enable DoD to build a high-performance organization focused on mission accomplishment. The new job evaluation, performance-based pay and management

system provides DoD with an increased ability to attract and retain a more qualified and proficient workforce. The new and improved processes in labor management relations, adverse actions, and appeals will afford DoD greater flexibility to manage its workforce in the face of constantly changing threats to the United States and to successfully support its primary mission of Defense and the Global War on Terrorism. Taken as a whole, the changes included in these final regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

### **Regulatory Flexibility Act**

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

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

This 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 that these regulations will not have Federalism implications because they will apply only to Federal agencies and employees. The regulations will 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.

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

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

### **Unfunded Mandates**

These regulations will 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**

**Department of Defense**

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**Linda M. Springer**  
Director

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**Donald Rumsfeld**  
Secretary

Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management amend title 5, Code of Federal Regulations, by establishing chapter XCIX consisting of part 9901 as follows:

**CHAPTER XCIX – DEPARTMENT OF DEFENSE HUMAN RESOURCES  
MANAGEMENT AND LABOR RELATIONS SYSTEMS (DEPARTMENT OF  
DEFENSE – OFFICE OF PERSONNEL MANAGEMENT)**

**PART 9901—DEPARTMENT OF DEFENSE HUMAN RESOURCES  
MANAGEMENT AND LABOR RELATIONS SYSTEMS**

**Subpart A – General Provisions**

Sec.

- 9901.101 Purpose.
- 9901.102 Eligibility and coverage.
- 9901.103 Definitions.
- 9901.104 Scope of authority.
- 9901.105 Coordination with OPM.
- 9901.106 Continuing collaboration.
- 9901.107 Relationship to other provisions.
- 9901.108 Program evaluation.

**Subpart B – Classification**

GENERAL

- 9901.201 Purpose.
- 9901.202 Coverage.
- 9901.203 Waivers.
- 9901.204 Definitions.
- 9901.205 Bar on collective bargaining.

CLASSIFICATION STRUCTURE

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

CLASSIFICATION PROCESS

- 9901.221 Classification requirements.
- 9901.222 Reconsideration of classification decisions.

## TRANSITIONAL PROVISIONS

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

## **Subpart C – Pay and Pay Administration**

### GENERAL

- 9901.301 Purpose.
- 9901.302 Coverage.
- 9901.303 Waivers.
- 9901.304 Definitions.
- 9901.305 Bar on collective bargaining.

### OVERVIEW OF PAY SYSTEM

- 9901.311 Major features.
- 9901.312 Maximum rates.
- 9901.313 National security compensation comparability.

### SETTING AND ADJUSTING RATE RANGES

- 9901.321 Structure.
- 9901.322 Setting and adjusting rate ranges.
- 9901.323 Eligibility for pay increase associated with a rate range adjustment.

### LOCAL MARKET SUPPLEMENTS

- 9901.331 General.
- 9901.332 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 Treatment of developmental positions.

### PAY ADMINISTRATION

- 9901.351 Setting an employee's starting pay.
- 9901.352 Setting pay upon reassignment.
- 9901.353 Setting pay upon promotion.

- 9901.354 Setting pay upon reduction in band.
- 9901.355 Pay retention.
- 9901.356 Miscellaneous.

#### PREMIUM PAY

- 9901.361 General.

#### CONVERSION PROVISIONS

- 9901.371 General.
- 9901.372 Creating initial pay ranges.
- 9901.373 Conversion of employees to the 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 Monitoring performance and providing feedback.
- 9901.408 Developing performance and addressing poor performance.
- 9901.409 Rating and rewarding performance.

#### **Subpart E – Staffing and Employment**

##### GENERAL

- 9901.501 Purpose.
- 9901.502 Scope of authority.
- 9901.503 Coverage.
- 9901.504 Definitions.

##### EXTERNAL RECRUITMENT AND INTERNAL PLACEMENT

- 9901.511 Appointing authorities.
- 9901.512 Probationary periods.
- 9901.513 Qualification standards.
- 9901.514 Non-citizen hiring.
- 9901.515 Competitive examining procedures.
- 9901.516 Internal placement.

## **Subpart F – Workforce Shaping**

- 9901.601 Purpose and applicability.
- 9901.602 Scope of authority.
- 9901.603 Definitions.
- 9901.604 Coverage.
- 9901.605 Competitive area.
- 9901.606 Competitive group.
- 9901.607 Retention standing.
- 9901.608 Displacement, release, and position offers.
- 9901.609 Reduction in force notices.
- 9901.610 Voluntary separation.
- 9901.611 Reduction in force appeals.

## **Subpart G – Adverse Actions**

### GENERAL

- 9901.701 Purpose.
- 9901.702 Waivers.
- 9901.703 Definitions.
- 9901.704 Coverage.

### REQUIREMENTS FOR REMOVAL, SUSPENSION, FURLOUGH OF 30 DAYS OR LESS, REDUCTION IN PAY, OR REDUCTION IN BAND (OR COMPARABLE REDUCTION)

- 9901.711 Standard for action.
- 9901.712 Mandatory removal offenses.
- 9901.713 Procedures.
- 9901.714 Proposal notice.
- 9901.715 Opportunity to reply.
- 9901.716 Decision notice.
- 9901.717 Departmental record.

### SAVINGS PROVISION

- 9901.721 Savings provision.

## **Subpart H – Appeals**

- 9901.801 Purpose.
- 9901.802 Applicable legal standards and precedents.
- 9901.803 Waivers.
- 9901.804 Definitions.
- 9901.805 Coverage.

- 9901.806 Alternative dispute resolution.
- 9901.807 Appellate procedures.
- 9901.808 Appeals of mandatory removal actions.
- 9901.809 Actions involving discrimination.
- 9901.810 Savings provision.

### **Subpart I – Labor-Management Relations**

- 9901.901 Purpose.
- 9901.902 Scope of authority.
- 9901.903 Definitions.
- 9901.904 Coverage.
- 9901.905 Impact on existing agreements.
- 9901.906 Employee rights.
- 9901.907 National Security Labor Relations Board.
- 9901.908 Powers and duties of the Board.
- 9901.909 Powers and duties of the Federal Labor Relations Authority.
- 9901.910 Management rights.
- 9901.911 Exclusive recognition of labor organizations.
- 9901.912 Determination of appropriate units for labor organization representation.
- 9901.913 National consultation.
- 9901.914 Representation rights and duties.
- 9901.915 Allotments to representatives.
- 9901.916 Unfair labor practices.
- 9901.917 Duty to bargain and consult.
- 9901.918 Multi-unit bargaining.
- 9901.919 Collective bargaining above the level of recognition.
- 9901.920 Negotiation impasses.
- 9901.921 Standards of conduct for labor organizations.
- 9901.922 Grievance procedures.
- 9901.923 Exceptions to arbitration awards.
- 9901.924 Official time.
- 9901.925 Compilation and publication of data.
- 9901.926 Regulations of the Board.
- 9901.927 Continuation of existing laws, recognitions, agreements, and procedures.
- 9901.928 Savings provisions.

**Authority:** 5 U.S.C. 9902

### **Subpart A – General Provisions**

#### **§ 9901.101 Purpose.**

(a) This part contains regulations governing the establishment of a new human resources management system and a new labor relations system within the Department of

Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, 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).

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system and a new labor relations system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law, including 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 and the labor relations system, 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 and the labor relations system 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, all civilian employees of DoD are eligible for coverage under one or more of subparts B through I of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(b)—

(1) Establish or change the effective date for applying subpart I of this part to all eligible employees in accordance with 5 U.S.C. 9902(m); and

(2) With respect to subparts B through H of this part, apply these subparts 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. However, no category of employees may be covered by subparts B, C, E, F, G, or H of this part unless that category is also covered by subpart D of this part.

(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, or 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, or 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 rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing issuances for converting that category of employees to coverage under applicable title 5 or other applicable provisions. 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 the following conditions, the Secretary may, at his or her sole and exclusive discretion, apply one or more subparts of this part as of an effective date specified 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, 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.

(2) 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 Secretary may establish conversion rules for these employees similar to the conversion rules established under § 9901.373.

**§ 9901.103 Definitions.**

In this part:

Band means pay band.

Basic pay means an employee's rate of 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 § 9901.332(c) only, basic pay includes any local market supplement.

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

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.

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.

Department or DoD means the Department of Defense.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

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.

Implementing issuance(s) means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to 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 at his or her sole and exclusive discretion. These issuances do not include internal operating guidance, handbooks, or manuals that do not change conditions of employment, as defined in § 9901.903.

Initial probationary period means the period of time, as designated by the Secretary, immediately following an employee's appointment, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

In-service probationary period, such as a supervisory probationary period, means the period of time, as designated by the Secretary, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

Labor organization means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Mandatory removal offense (MRO) means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's national security mission.

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

MSPB means the Merit Systems Protection Board.

National Security Personnel System (NSPS) means the human resources management system established under 5 U.S.C. 9902(a). It does not include the labor relations system established under 5 U.S.C. 9902(m).

Occupational series means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (for example: 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 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.

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 under implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a higher level of work in NSPS.

Rating of record means a performance appraisal prepared—

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

(2) As needed to reflect a substantial and sustained change in the employee's performance since the last rating of record as provided in implementing issuances.

Reassignment means the movement of an employee within DoD from his or her position of record to a different position or set of duties in the same or a comparable pay band under implementing issuances on a permanent or temporary/time-limited basis. This includes the movement of an employee between positions at a comparable level of work in NSPS and a non-NSPS Federal personnel system.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band under implementing issuances. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to a position determined to be at a lower level of work in NSPS.

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) Chapters 31, 33, and 35, dealing with staffing, employment, and workforce shaping (as authorized by 5 U.S.C. 9902(k));
- (b) Chapter 43, dealing with performance appraisal systems;
- (c) Chapter 51, dealing with General Schedule job classification;
- (d) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;
- (e) Chapter 55, subchapter V, dealing with premium pay, except section 5545b;
- (f) Chapter 71, dealing with labor relations (as authorized by 5 U.S.C. 9902(m));
- (g) Chapter 75, dealing with adverse actions and certain other actions; and
- (h) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

**§ 9901.105 Coordination with OPM.**

(a) As specified in paragraphs (b) through (e) of this section, the Secretary will advise and/or coordinate with 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. Such pre-decisional coordination is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of the Department of Defense 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.

(b) DoD will advise OPM in advance regarding the extension of specific subparts of this part to specific categories of DoD employees under § 9901.102(b).

(c) Subpart B of this part authorizes the Secretary to establish and administer a position classification system and classify positions covered by the NSPS; in so doing, 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 occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

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

(4) Establishing the process by which DoD employees may request reconsideration of classification decisions by the Secretary under § 9901.222, to ensure compatibility between DoD and OPM procedures.

(d) Subpart C of this part authorizes the Secretary to establish and administer a compensation system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing maximum rates of basic pay and aggregate pay under § 9901.312 that exceed those established under 5 U.S.C. chapter 53;

(2) Establishing and adjusting pay ranges for occupational pay schedules and pay bands under §§ 9901.321(a), 9901.322(a) and (b), and 9901.372;

(3) Establishing and adjusting local market supplements under §§ 9901.332(a) and 9901.333;

(4) Establishing alternative or additional local market areas under § 9901.332(b) that differ from those established for General Schedule employees under 5 CFR 531.603;

(5) Establishing policies regarding starting rates of pay for newly appointed or transferred employees under §§ 9901.351 through 9901.354 and pay retention under § 9901.355;

(6) Establishing policies regarding premium pay under § 9901.361 that differ from those that exist in Governmentwide regulations; and

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

(e) Subpart E of this part authorizes the Secretary to establish and administer authorities for the examination and appointment of employees to certain organizational elements of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to—

(1) Establishing alternative or additional examining procedures under § 9901.515 that differ from those applicable to the examination of applicants for appointment to the competitive and excepted service under 5 U.S.C. chapters 31 and 33, except as otherwise provided by subpart E of this part;

(2) Establishing policies and procedures for time-limited appointments under § 9901.511(d) regarding appointment duration, advertising requirements, examining procedures, the appropriate uses of time-limited employees, and the procedures under which a time-limited employee in a competitive service position maybe be converted without further competition to the career service; and

(3) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) or 9901.513 that significantly differ from Governmentwide standards.

(f) Subpart F of this part authorizes the Secretary to establish and administer a workforce shaping system for employees of the Department covered by the NSPS; in so doing, DoD will coordinate with OPM prior to modifying coverage, retention procedures, or appeal rights under subpart F of this part.

(g) Section 9902(l) of title 5, U.S. Code, requires the Secretary to make a determination that the Department has in place a performance management system that meets the criteria in 5 U.S.C. 9902(b) before the Secretary may apply the human resources management system established under 5 U.S.C. 9902(a) to an organization or functional unit that exceeds 300,000 civilian employees. In making this determination, the Secretary will coordinate with the Director.

(h) 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(s) as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(i) 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 and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

**§ 9901.106 Continuing collaboration.**

(a) Continuing collaboration with employee representatives. (1) Consistent with 5 U.S.C. 9902, this section provides employee representatives with an opportunity to participate in the development of implementing issuances that carry out the provisions of this part. This process is the exclusive procedure for the participation of employee representatives in the planning, development, or implementation of the implementing issuances that carry out the provisions of this part. Therefore, this process is not subject to the requirements of 5 U.S.C. chapter 71, including but not limited to the exercise of management rights, enforcement of the duty to consult or negotiate, the duty to bargain and consult, or impasse procedures, or the requirements established by subpart I of this part, including but not limited to §§ 9901.910 (regarding the exercise of management rights), 9901.916(a)(5) (regarding enforcement of the duty to consult or negotiate), 9901.917 (regarding the duty to bargain and consult), and 9901.920 (regarding impasse procedures).

(2)(i) For the purpose of this section, the term “employee representatives” includes representatives of labor organizations with exclusive recognition rights for units of DoD employees, as determined pursuant to subpart I of this part.

(ii) The Secretary, at his or her sole and exclusive discretion, may determine the number of employee representatives to be engaged in the continuing collaboration

process. However, each national labor organization with one or more bargaining units accorded exclusive recognition in the Department affected by an implementing issuance will be provided the opportunity to participate in the continuing collaboration process.

(iii) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by the Secretary under paragraph (a)(2)(ii) of this section.

(3)(i) Within timeframes specified by the Secretary, employee representatives will be provided with an opportunity to submit written comments to, and to discuss their views and recommendations with, DoD officials on any proposed final draft implementing issuances. If views and recommendations are presented by employee representatives, the Secretary must consider these views and recommendations before taking final action. The Secretary will provide employee representatives a written statement of the reasons for taking the final action regarding the implementing issuance.

(ii) To the extent that the Secretary determines necessary, employee representatives will be provided with an opportunity to discuss their views with DoD officials and/or to submit written comments, at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(4) Employee representatives will be provided with access to information for their participation in the continuing collaboration process to be productive.

(5) Nothing in the continuing collaboration process will affect the right of the Secretary, Deputy Secretary, Principal Staff Assistants, or Secretaries of the Military Departments to determine the content of implementing issuances and to make them effective at any time.

(b) Continuing collaboration with other interested organizations. The Secretary may also establish procedures for continuing collaboration with appropriate organizations that represent the interests of a substantial number of nonbargaining unit employees.

**§ 9901.107 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. The interpretation of the regulations in this part by DoD and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 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. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (i.e., chapters 31, 33, 35, 43, 51, 53, 55 (subchapter V only), 71, 75, and 77 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 I 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;

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

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

(2) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart H of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9901.807(f)(6).

(3) In applying the back pay law in 5 U.S.C. 5596 to DoD employees covered by subpart I of this part (dealing with labor relations), the references in section 5596 to provisions in chapter 71 are considered to be references to those particular provisions as modified by subpart I of this part.

(c) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Public Law 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.

(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).

**§ 9901.108 Program evaluation.**

(a) The Secretary will evaluate the regulations in this part and their implementation. The Secretary will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives in the evaluation process does not waive the rights of any party under applicable law or regulations.

**Subpart B – Classification**

GENERAL

**§ 9901.201 Purpose.**

(a) This subpart contains regulations establishing 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 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, 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.

(b) 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)(2).

(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 and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

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

(4) 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

(5) 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 and 5 U.S.C. 5346 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.107, and 9901.222(d) (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).

(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 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) and 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions).

**§ 9901.204 Definitions.**

In this subpart:

Band means pay band.

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, 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.

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 whom the Secretary approves for coverage under § 9901.202(a).

**§ 9901.205 Bar on collective bargaining.**

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any classification system established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including, but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

**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 designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band, as provided in § 9901.513.

## 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 and 5346, 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 it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date an authorized official approves the classification. A classification decision is implemented by a personnel action. The personnel action implementing a classification decision must occur within four pay periods after the date of the decision. Except as provided for in § 9901.222(b), such decisions will be applied prospectively and do not convey any retroactive entitlements.

**§ 9901.222 Reconsideration of classification decisions.**

(a) An individual employee may request that DoD or OPM reconsider 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) The Secretary will establish implementing issuances for reviewing requests for reconsideration. Such issuances will include a provision stating that a retroactive effective date may be required only if the employee is wrongfully reduced in band.

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

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

(e) Any determination made under this section will be based on criteria issued by the Secretary or, where the Secretary has adopted an OPM classification standard, criteria issued by OPM.

**TRANSITIONAL PROVISIONS**

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

(a) This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate 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 section, 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)(2) and exclude employees who move from a noncovered position to a position already covered by NSPS.

(b) 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. Such procedures will include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. The Secretary will convert an employee’s rate of pay as provided in § 9901.373.

### **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. 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)(2).

(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 and positions who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

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

(4) 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

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

(c) This section does not apply in determining coverage under § 9901.361 (dealing with premium pay).

**§ 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 § 9901.107 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except section 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 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) 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 pay system established under this subpart 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 is deemed to include a classification system established under subpart B of this part; and

(3) Section 5377, dealing with the critical pay authority.

(c) Section 5379 is modified. The Secretary may establish and administer a student loan repayment program for DoD employees, except that the Secretary may not make loan payments for any noncareer appointee in the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9901.302(a), any DoD employee otherwise covered by section 5379 is eligible for coverage under the provisions

established under this paragraph, subject to a determination by the Secretary under § 9901.102(b)(2).

**§ 9901.304 Definitions.**

In this part:

Band means *pay band*.

Band rate range means the range of rates of basic pay (excluding any local market supplements) applicable to employees in a particular pay band, as described in § 9901.321. Each band rate range is defined by a minimum and maximum rate.

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.

Career group 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.

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.

Extraordinary pay increase or EPI means a discretionary basic pay increase or bonus to reward an employee at the highest performance level who has been assigned the maximum number of shares available under the rating and contribution scheme when the

payout formula does not adequately compensate them for the employee's extraordinary performance and contribution, as described in § 9901.344(b).

Local market supplement means a geographic- and occupation-based supplement to basic pay, as described in § 9901.332.

Modal rating means, for the purpose of pay administration, the most frequent rating of record assigned to employees in the same pay band within a particular pay pool for a particular rating cycle.

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

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 means the amount designated for performance payouts to employees covered by a pay pool.

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 share means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples commensurate with the employee's performance and contribution rating level.

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 or fixed dollar amount.

Promotion has the meaning given that term in § 9901.103.

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.

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.

Targeted local market supplement means a local market supplement established to address recruitment or retention difficulties or other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of the standard local market supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9901.103.

#### **§ 9901.305 Bar on collective bargaining.**

Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

#### OVERVIEW OF PAY SYSTEM

#### **§ 9901.311 Major features.**

Through the issuance of implementing issuances, the Secretary will establish a pay system that governs the setting and adjusting of covered employees' rates of pay 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 to basic pay based on local labor market conditions and other factors, as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and 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 basic pay 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.

**§ 9901.312 Maximum rates.**

The Secretary will establish limitations on maximum rates of basic pay and aggregate pay for covered employees.

**§ 9901.313 National security compensation comparability.**

(a) To the maximum extent practicable, for fiscal years 2004 through 2008, 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 2008 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 basic pay, 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 similar payment under other legal authority.

## SETTING AND ADJUSTING RATE RANGES

### **§ 9901.321 Structure.**

(a) The Secretary will establish ranges of basic pay 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.

### **§ 9901.322 Setting and adjusting rate ranges.**

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(2), set and adjust the rate ranges 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.

**§ 9901.323 Eligibility for pay increase associated with a rate range adjustment.**

(a) Employees with a current rating of record above “unacceptable” and employees who do not have a current rating of record for the most recently completed appraisal period will receive a percentage increase in basic pay equal to the percentage by which the minimum of their rate range is increased. This section does not apply to employees receiving a retained rate under § 9901.355.

(b) Employees with a current rating of record of “unacceptable” will not receive a pay increase under this section.

**LOCAL MARKET SUPPLEMENTS**

**§ 9901.331 General.**

The basic pay ranges established under §§ 9901.321 through 9901.323 may be supplemented in appropriate circumstances by local market supplements, as described in §§ 9901.332, 9901.333, and 9901.334. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9901.333.

**§ 9901.332 Local market supplements.**

(a) The Secretary may establish local market supplements that apply in specified local market areas whose boundaries are set at the Secretary’s sole and exclusive discretion, subject to paragraph (b) of this section and § 9901.105(d)(4). Local market supplements apply to employees whose official duty station is located in the given local market area. The Secretary may establish standard or targeted local market supplements.

(b)(1) The establishment or modification of geographic area boundaries for standard local market supplements by the Secretary will be effected by regulations which, notwithstanding 5 U.S.C. 553(a)(2), will be promulgated in accordance with the notice

and comment requirements of 5 U.S.C. 553. As provided by the non-waived provisions of 5 U.S.C. 5304(f)(2) (modified here to apply to DoD regulations issued under the authority of this paragraph), judicial review of any such regulation is limited to whether or not it was promulgated in accordance with such requirements.

(2) Notwithstanding paragraph (b)(1) of this section, the Secretary's establishment of a standard local market area boundary or boundaries identical to those used for locality pay areas established under 5 U.S.C. 5304 does not require separate DoD regulations.

(c) Local market supplements are considered basic pay for only 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 the rate of basic pay upon conversion to the NSPS pay system as provided in § 9901.373(b);

(10) Other payments and adjustments authorized under this subpart as specified by implementing issuances;

(11) 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

(12) Any provisions for which DoD local market supplements are treated as basic pay by law.

**§ 9901.333 Setting and adjusting local market supplements.**

(a) Within his or her sole and exclusive discretion, the Secretary may, subject to § 9901.105(d)(3), set and adjust local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted 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 a current rating of record above “unacceptable,” and employees who do not have a current rating of record for the most recently completed appraisal period, will receive any pay increase resulting from that adjustment.

(b) Employees with a current rating of record of “unacceptable” will not receive a pay increase under this section.

**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 are designed to provide the Secretary with the flexibility to allocate available funds 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 pay-for-performance system and, when implemented, 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 pay increase is the one assigned for the most recently completed appraisal period, except that if an appropriate rating official determines that an employee's current performance is inconsistent with that rating, that rating official may prepare a more current rating of record, consistent with § 9901.409(b). Unless otherwise provided in implementing issuances, 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 (f) and (g) of this section, such employee will not be eligible for a performance payout under this part.

(3) Pay pools will be managed by a pay pool manager and/or pay pool panel. The Secretary will define in implementing issuances the responsibilities of pay pool managers and pay pool panels to include the review of proposed rating and share assignments to ensure that employees are treated fairly and consistently and in accordance with the merit system principles.

(b) *Performance pay pools.* (1) The Secretary will issue implementing issuances for the establishment and management of pay pools for performance payouts.

(2) 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.

(c) *Performance shares.* (1) The Secretary will issue implementing issuances regarding the assignment of a number or range of shares for each rating of record level,

subject to paragraphs (c)(2) and (c)(3) of this section. Performance shares will be used to determine performance pay increases and/or bonuses.

(2) Employees with unacceptable ratings of record will be assigned zero shares.

(3) Where the Secretary establishes a range of shares for a rating of record level, he or she will provide guidance in implementing issuances on the use of share ranges.

DoD organizations will notify employees at least 90 days prior to the end of the appraisal period of the factors that may be considered in making specific share assignments. Pay pool managers and/or pay pool panels will review proposed share assignments to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(d) *Performance payout.* (1) The Secretary will establish a methodology that authorized officials will use to determine the value of a performance share. A performance share may be expressed as a percentage of an employee's rate of basic pay (exclusive of local market supplements under § 9901.332) or as a fixed dollar amount, or both.

(2) To determine an individual employee's performance payout, the share value determined under paragraph (d)(1) of this section will be multiplied by the number of performance shares assigned to the employee.

(3) The Secretary may provide for the establishment of control points within a band that limit increases in the rate of basic pay. The Secretary may require that certain criteria be met for increases above a control point.

(4) A performance payout may be an increase in basic pay, a bonus, or a combination of the two. However, an increase in basic pay may not cause the

employee's rate of basic pay to exceed the maximum rate or applicable control point of the employee's band rate range. Implementing issuances will provide guidance for determining the payout amount and the appropriate distribution between basic pay and bonus.

(5) The Secretary will determine the effective date(s) of increases in basic pay made under this section.

(6) Notwithstanding any other provision of this section, the Secretary will issue implementing issuances to address the circumstances under which an employee receiving a retained rate under § 9901.355 may receive a lump-sum performance payout. Any performance payout in the form of a bonus for a retained rate employee may not exceed the amount that would be received by an employee in the same pay pool with the same rating of record whose rate of pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding the proration of performance payouts for employees who, during the period between performance payouts, are—

(1) Hired, transferred, reassigned, or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where prorating is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who leaves a DoD position to perform service in the uniformed services (in accordance with 38 U.S.C. 4303 and 5 CFR

353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316). The Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for these adjustments, the Secretary will base such adjustments on the average basic pay increases granted to other employees in the same pay pool and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* The Secretary will issue implementing issuances regarding how to set the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). For the intervening period, the Secretary will credit the employee with increases under § 9901.323 and increases to basic pay under this section based on the employee's DoD rating of record for the appraisal period upon which these adjustments are based. If an employee does not have a rating of record for the appraisal period serving as a basis for these adjustments, such adjustments will be based on the average basic pay increases granted to other employees in the same pay pool

and pay band who received the same rating as the employee's last DoD rating of record or the modal rating, whichever is most advantageous to the employee. In unusual cases where insufficient statistical information exists to determine the modal rating or when previous ratings do not convert to the NSPS rating scale, the Secretary may establish alternative procedures for determining a basic pay increase under this section.

**§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.**

An employee's rate of basic pay may be reduced based on a determination of unacceptable performance, conduct, or both. Such reduction may not exceed 10 percent unless the employee has been changed to a lower pay band and a greater reduction is needed to set the employee's pay at the maximum rate of the pay band. (See also §§ 9901.352 and 9901.354.) An employee's rate of basic pay 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) In accordance with implementing issuances authorized officials may make other payments to—

- (1) Recognize organizational or team achievement;
- (2) Reward extraordinary individual performance through an extraordinary pay increase (EPI), as described in paragraph (b) of this section; and
- (3) Provide for other special circumstances.

(b) An EPI is paid in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. The future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

**§ 9901.345 Treatment of developmental positions.**

The Secretary may issue implementing issuances regarding pay increases for developmental positions. These issuances may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. The Secretary may provide adjustments under this section in lieu of or in addition to adjustments under § 9901.342.

**PAY ADMINISTRATION**

**§ 9901.351 Setting an employee's starting pay.**

Subject to implementing issuances, the Secretary may set the starting rate of pay for individuals who are newly appointed or reappointed to the Federal service anywhere within the assigned pay band.

**§ 9901.352 Setting pay upon reassignment.**

(a) Subject to paragraphs (b) and (c) of this section and subject to implementing issuances, the Secretary may set pay anywhere within the assigned pay band when an employee is reassigned, either voluntarily or involuntarily, to a position in the same or comparable pay band.

(b) Subject to the adverse action procedures set forth in subpart G of this part and implementing issuances (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may reduce an employee's rate of basic pay within a pay band for unacceptable performance and/or conduct. A reduction in pay under this paragraph may not be more than 10 percent or cause an employee's rate of basic pay to

fall below the minimum rate of the employee's pay band. Such a reduction may be made effective at any time.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee whose pay is reduced involuntarily, but not through adverse action procedures. In the case of completion of a temporary reassignment or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary reassignment or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

**§ 9901.353 Setting pay upon promotion.**

Except as otherwise provided in implementing issuances, upon an employee's promotion, the employee will receive an increase in his or her rate of basic pay equal to at least 6 percent, unless this minimum increase results in a rate of basic pay higher than the maximum rate of the applicable pay band. An employee's rate of basic pay upon promotion may not be less than the minimum of the rate range.

**§ 9901.354 Setting pay upon reduction in band.**

(a) Subject to paragraphs (b) and (c) of this section, pay may be set anywhere within the assigned pay band when an employee is reduced in band, either voluntarily or involuntarily. As applicable, pay retention provisions established under § 9901.355 will apply.

(b) Subject to the adverse action procedures set forth in subpart G of this part (or other appropriate adverse action procedures for employees not covered by subpart G of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), the Secretary may assign an employee involuntarily to a position in a lower pay band for unacceptable performance and/or conduct, and may simultaneously reduce the employee's rate of basic pay. A reduction in basic pay under this paragraph may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's new pay band, or be more than 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

(c) The Secretary will prescribe policies in implementing issuances regarding setting pay for an employee who is reduced in band involuntarily, but not through adverse action procedures. In the case of termination of a temporary promotion or failure to successfully complete an in-service probationary period, the employee's rate of basic pay will be set at the same rate the employee received prior to the temporary promotion or placement in the position requiring the probationary period, with appropriate adjustment of the employee's rate of basic pay based on rate range increases or performance payouts that occurred during the time the employee was assigned to the new position. Any resulting reduction in basic pay is not considered an adverse action under subpart G of this part (or similar authority).

**§ 9901.355 Pay retention.**

(a) Subject to the requirements of this section, the Secretary will issue implementing issuances regarding pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay 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 basic pay in applying pay retention.

(b) Pay retention will be based on the employee's rate of basic pay 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 basic pay applicable to the employee's position.

(c) Subject to any employee eligibility requirements the Secretary may prescribe, pay retention will apply when an employee is reduced in band through reduction in force (RIF), reclassification, or other appropriate circumstances, as specified in implementing issuances. Pay retention will be granted for a period of 2 years (that is, 104 weeks).

(d) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than salary adjustments, as provided in § 9901.342(d)(6).

(e) Employees entitled to a retained rate will not receive minimum rate range adjustments under § 9901.323(a), but are entitled to receive any applicable local market supplement adjustments under § 9901.334(a).

**§ 9901.356 Miscellaneous.**

(a) 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 rate of basic pay may not be less than the minimum rate of the employee's pay band.

(b) Except as provided in § 9901.355, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) The Secretary will follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay will be converted to hourly rates of pay in computing payments received by covered employees.

(d) The Secretary may promulgate implementing issuances that provide for a special increase prior to an employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system, if a DoD employee moves from the pay system established under this subpart to a GS position having a higher level of duties and responsibilities.

#### PREMIUM PAY

##### **§ 9901.361 General.**

(a) This section applies to eligible DoD employees and positions which would otherwise be covered by 5 U.S.C. chapter 55, subchapter V, subject to a determination by the Secretary under § 9901.102(b)(2). As provided in § 9901.303(a)(2), for employees covered by such a determination, the provisions of 5 U.S.C. chapter 55, subchapter V (except section 5545b), are waived or modified to the extent that the Secretary establishes alternative premium pay provisions for such employees in lieu of the provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The Secretary may establish alternative or additional forms of premium pay, or make modifications in premium payments under 5 U.S.C. chapter 55, subchapter V (except section 5545b), for specified categories of employees through implementing issuances. The types of premium payments the Secretary may establish or modify include, but are not limited to—

- (1) Overtime pay (excluding overtime pay under the Fair Labor Standards Act);
  - (2) Compensatory time off;
  - (3) Sunday, holiday, and night pay;
  - (4) Annual premium pay for standby duty and administratively uncontrollable overtime work;
  - (5) Availability pay for criminal investigators; and
  - (6) Hazardous duty differentials.
- (c) The Secretary will determine the conditions of eligibility for the amounts of and the limitations on payments made under the authority of this section.

## CONVERSION PROVISIONS

### **§ 9901.371 General.**

(a) This section and §§ 9901.372 and 9901.373 describe the provisions that apply when DoD employees are converted to the NSPS pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate 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 section and §§ 9901.372 and 9901.373, the terms “convert,” “converted,” “converting,” and “conversion” refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)(2)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these transitional provisions.

**§ 9901.372 Creating initial pay ranges.**

DoD will set the initial band rate ranges for the NSPS pay system established under this subpart. The initial ranges may link to the ranges that apply to converted employees in their previously applicable pay system (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 similar payment under other legal authority).

**§ 9901.373 Conversion of employees to the NSPS pay system.**

(a) When the NSPS pay system is established under this subpart and applied to a category of employees, employees will be converted to the system without a reduction in their rate of pay (including basic pay and 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 similar payment under other legal authority).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the NSPS pay system that consists of a basic rate and a local market supplement, the conversion is not a reduction in pay for the purpose of applying subpart G of this part (or similar authority).

(c) 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.

(d) 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. 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.

(e) The Secretary has discretion to make one-time pay adjustments for employees when they are converted to the NSPS pay system. The Secretary will issue implementing issuances governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

### **Subpart D – Performance Management**

#### **§ 9901.401 Purpose.**

(a) This subpart provides for the establishment in DoD of 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 by incorporating 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 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)(2), except as provided in paragraph (c) of this section.

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

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions who were 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) 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 defined in § 9901.404) during a single 12-month period.

**§ 9901.403 Waivers.**

When a specified category or group of employees is covered by the performance management system(s) 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* means the period of time established under a performance management system for reviewing employee performance.

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

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

*Minimum period* means the period of time established by the Secretary during which an employee will perform under applicable performance expectations 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 appraising and compensating employees.

*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(d).

*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 the elements set forth in § 9901.401(b).

*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 will issue implementing issuances that establish a performance management system for DoD employees, subject to the requirements set forth in this subpart.

(b) The NSPS performance management system will—

(1) Specify the employees covered by the system(s);

(2) Provide for the appraisal of the performance of each employee at least annually;

(3) Specify the minimum period during which an employee will perform before being eligible to receive a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Specify procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance and contribution;

(3) Fostering and rewarding excellent performance;

(4) Addressing poor performance; and

(5) Assuring that employees are assigned a rating of record when required by implementing issuances.

**§ 9901.406 Setting and communicating performance expectations.**

(a) Performance expectations will support and align with the DoD mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated in writing, including those that may affect an employee's retention in the job. Performance expectations will be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating professionalism and standards of appropriate conduct and behavior, such as civility and respect for others.

(c) Performance expectations for supervisors and managers will include assessment and measurements of how well supervisors and managers plan, monitor, develop, correct, and assess subordinate employees' performance.

(d) Performance expectations may 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.

(e) 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.

(f) 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.

**§ 9901.407 Monitoring performance and providing feedback.**

In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(a) Monitor the performance of their employees and their contribution to the organization; and

(b) 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.

**§ 9901.408 Developing performance and addressing poor performance.**

(a) Implementing issuances will prescribe procedures that supervisors will use to develop employee performance and to address poor performance.

(b) If at any time during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor will—

(1) Consider the range of options available to address the performance deficiency, which include, but are not limited to, remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, or

adverse action as defined in subpart G of this part, including a reduction in rate of basic pay or pay band; and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart H of this part (or other appropriate appeal procedures, if not covered by subpart H of this part, such as procedures for National Guard Technicians under 32 U.S.C. 709(f)), employees may appeal adverse actions (e.g., suspensions of more than 14 days, reductions in pay and pay band, and removal) based on unacceptable performance and/or conduct.

**§ 9901.409 Rating and rewarding performance.**

(a) The NSPS performance management system will establish a multi-level rating system as described in the implementing issuances.

(b) An appropriate rating official will prepare and issue a rating of record after the completion of the appraisal period. In accordance with implementing issuances, an additional rating of record may be issued to reflect a substantial and sustained change in the employee's performance since the last rating of record. A rating of record will be used as a basis for—

(1) A pay determination under any applicable pay rules;

(2) Determining reduction in force retention standing; and

(3) Such other action that the Secretary considers appropriate, as specified in implementing issuances.

(c) 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 and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) An appropriate rating official will communicate the rating of record and number of shares to the employee prior to payout.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required. Ratings of record will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances.

(f) The Secretary may not lower the rating of record of an employee based on an approved absence from work, including the absence of a disabled veteran to seek medical treatment as provided in Executive Order 5396.

(g) A rating of record may be challenged by a nonbargaining unit employee only through a reconsideration process as provided in implementing issuances. This process will be the sole and exclusive method for all nonbargaining unit employees to challenge a rating of record. A payout determination will not be subject to the reconsideration process.

(h) A bargaining unit employee may choose a negotiated grievance procedure or the administrative reconsideration process established under paragraph (g) of this section, but not both, to challenge his or her rating of record. An employee who chooses the administrative reconsideration process may not revert to a negotiated grievance

procedure. A payout determination will not be subject to the negotiated grievance procedure. Any individual or panel reviewing a rating of record under a negotiated grievance procedure may not conduct an independent evaluation of the employee's performance, determine the appropriate share payout, or otherwise substitute his or her judgment for that of the rating official.

(i) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(j) Implementing issuances will establish policies and procedures for crediting performance in a reduction in force in accordance with subpart F of this part (or other appropriate workforce shaping procedures for those not covered by subpart F of this part, such as National Guard Technicians under 32 U.S.C. 709).

## **Subpart E – Staffing and Employment**

### **GENERAL**

#### **§ 9901.501 Purpose.**

(a) This subpart sets forth policies and procedures for the establishment of qualification requirements; recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (k).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(a) and (k).

**§ 9901.502 Scope of authority.**

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321, 3324, 3325, 3327, 3330, 3341, and 5112(a) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

**§ 9901.503 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).

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

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapters 31 and 33 (excluding members of the Senior Executive Service); and

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

**§ 9901.504 Definitions.**

In this subpart—

Career employee means an individual appointed without time limit to a competitive or excepted service position in the Federal career service.

Initial probationary period has the meaning given that term in § 9901.103.

In-service probationary period has the meaning given that term in § 9901.103.

Promotion 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.

Temporary employee means an individual not on a career appointment who is employed for a limited period of time not to exceed 1 year. The appointment may be extended, up to a maximum established by implementing issuances, to perform the work of a position that does not require an additional permanent employee.

Term employee means an individual not on a career appointment who is employed for a period of more than 1 year up to a maximum established by implementing issuances, when the need for an employee's service is not permanent.

Time-limited employee means an individual appointed to a position for a period of limited duration (e.g., term or temporary) in either the competitive or excepted service.

## EXTERNAL RECRUITMENT AND INTERNAL PLACEMENT

### **§ 9901.511 Appointing authorities.**

(a) Competitive and excepted appointing authorities. The Secretary may continue to use excepted and competitive appointing authorities and entitlements under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals will be given career or time-limited appointments, as appropriate.

(b) Additional appointing authorities. (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2)(i) DoD and OPM will jointly publish a notice in the Federal Register when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive position in the career service. DoD and OPM will issue a notice with a public comment period before establishing such authority, except as provided in paragraph (b)(2)(ii) of this section.

(ii) If the Secretary determines that a critical mission requirement exists, DoD and OPM may establish a new appointing authority as described in paragraph (b)(2)(i) of this section effective upon publication of a Federal Register notice without a preceding comment period. However, the notice will invite public comments, and DoD and OPM will issue another notice if the authority is revised based on those comments.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the Federal Register.

(c) Severe shortage/critical need hiring authority. (1) The Secretary may determine that there is a severe shortage of candidates or a critical hiring need, as defined in 5 U.S.C. 3304(a)(3) and 5 CFR part 337, subpart B, for particular occupations, pay

bands, career groups, and/or geographic locations, and establish a specific authority to make appointments without regard to § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary will terminate or modify a specific authority to make appointments under this section when it determines that the severe shortage or critical need upon which the authority was based no longer exists.

(4) The Secretary will prescribe appropriate implementing issuances to administer this authority and will notify OPM of determinations made under this section.

(d) *Time-limited appointing authorities.* (1) The Secretary may prescribe the procedures for appointing employees, the duration of such appointments, and the appropriate uses of time-limited employees. These procedures will preclude the use of employees on term appointments in positions that should be filled on a permanent basis. Term appointments may be used to accomplish permanent work in circumstances where the position cannot be filled permanently, e.g., the incumbent will be out of the position for a significant period of time, but is expected to return.

(2) The Secretary will prescribe implementing issuances establishing the procedures under which a time-limited employee serving in a competitive service position may be converted without further competition to the career service if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a competitive position in the career service at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c); and

(iii) The employee completed at least 2 years of continuous service at the fully successful level of performance or better.

**§ 9901.512 Probationary periods.**

(a) The Secretary may establish initial probationary periods of at least 1 year, but not to exceed 3 years, as deemed appropriate for employees appointed to positions in the competitive and excepted service covered by NSPS. The Secretary will prescribe the conditions for such periods, such as creditable service, in implementing issuances. Initial probationary periods established for more than 1 year will be applied to categories of positions or types of work that require a longer time period to evaluate the employee's ability to perform the work. A preference eligible who has completed 1 year of an initial probationary period is covered by subparts G and H of this part.

(b) The Secretary may establish in-service probationary periods. The Secretary will prescribe the conditions for such periods, such as creditable service and groups of positions or occupations to be covered, in implementing issuances. An employee who does not satisfactorily complete an in-service probationary period will be returned to a grade or band no lower than that held before the in-service probationary period and will have his or her rate of basic pay set in accordance with § 9901.352(c) or 9901.354(c), as

applicable. Nothing in this section prohibits an action against an individual serving an in-service probationary period for cause unrelated to performance.

**§ 9901.513 Qualification standards.**

The Secretary may continue to use qualification standards established or approved by OPM. The Secretary also may establish qualification standards for positions covered by NSPS.

**§ 9901.514 Non-citizen hiring.**

The Secretary may establish procedures for appointing non-citizens to positions within NSPS under the following conditions:

- (a) In the absence of a qualified U.S. citizen, the Secretary may appoint a qualified non-citizen in the excepted service; and
- (b) Immigration and security requirements will apply to these appointments.

**§ 9901.515 Competitive examining procedures.**

(a) In recruiting applicants from outside of the civil service for competitive appointments to competitive service positions in NSPS, the Secretary will provide public notice for all vacancies in the career service in accordance with 5 CFR part 330 and—

- (1) Will accept applications for the vacant position from all U.S. citizens;
- (2) Will, at a minimum, consider applicants from the local commuting area;
- (3) May concurrently consider applicants from other targeted recruitment areas, as specified in the vacancy announcement, in addition to those applicants from the minimum area of consideration; and
- (4) May consider applicants from outside that minimum area(s) of consideration as necessary to provide sufficient qualified candidates.

(b) The Secretary may establish procedures for the examination of applicants for entry into competitive and excepted service positions in the National Security Personnel System. Such procedures will adhere to the merit system principles in 5 U.S.C. 2301 and veterans' preference requirements as set forth in 5 U.S.C. 1302(b) and (c) and 3309 through 3320, as applicable, and will be available in writing for applicant review. These procedures will also include provisions for employees entitled to priority consideration referred to in 5 U.S.C. 8151.

(c) In establishing examining procedures for appointing employees in the competitive service under paragraph (b) of this section, the Secretary may use traditional numerical rating and ranking or alternative ranking and selection procedures (category rating) in accordance with 5 U.S.C. 3319(b) and (c).

(d) The Secretary will apply the requirements of paragraphs (a) through (c) of this section to the recruitment of applicants for time-limited positions in the competitive service in order to qualify an appointee for noncompetitive conversion to a competitive position in the career service, in accordance with § 9901.511.

**§ 9901.516 Internal placement.**

The Secretary may prescribe implementing issuances regarding the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS. Such implementing issuances will be made available to applicants and employees. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures. Those exceptions to competitive procedures set forth in 5 CFR part 335 apply to NSPS.

## **Subpart F – Workforce Shaping**

### **§ 9901.601 Purpose and applicability.**

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9902(k) concerning the Department's system for realigning, reorganizing, and reshaping its workforce. This subpart applies to categories of positions and employees affected by such actions resulting from the planned elimination, addition, or redistribution of functions, duties, or skills within or among organizational units, including realigning, reshaping, delayering, and similar organizational-based restructuring actions. This subpart does not apply to actions involving the conduct and/or performance of individual employees, which are covered by subpart G of this part.

### **§ 9901.602 Scope of authority.**

When a specified category of employees is covered by the system established under this subpart, the provisions of 5 U.S.C. 3501 through 3503 (except with respect to veterans' preference) are modified and replaced with respect to that category, except as otherwise specified in this subpart. In accordance with § 9901.105, the Secretary will prescribe implementing issuances to carry out the provisions of this subpart.

### **§ 9901.603 Definitions.**

In this subpart:

*Competing employee* means a career employee (including an employee serving an initial probationary period), an employee serving on a term appointment, and other employees as identified in implementing issuances.

*Competitive area* means the boundaries within which employees compete for retention under this subpart, based on factors described in § 9901.605(a).

Competitive group means employees within a competitive area who are on a common retention list for the purpose of exercising displacement rights.

Displacement right means the right of an employee who is displaced from his or her present position because of position abolishment, or because of displacement resulting from the abolishment of a higher-standing employee on the retention list, to displace a lower-standing employee on the list on the basis of the retention factors.

Modal rating means, for the purpose of reduction in force, the rating of record that occurs most frequently in a particular competitive group.

Notice means a written communication to an individual employee stating that the employee will be displaced from his or her position as a result of a reduction in force action under this subpart.

Rating of record has the meaning given that term in § 9901.103.

Retention factors means tenure, veterans' preference, performance, length of service, and such other factors as the Secretary considers necessary and appropriate to rank employees within a particular retention list.

Retention list means a list of all competing employees occupying positions in the competitive area, who are grouped in the same competitive group on the basis of retention factors. While all positions in the competitive group are listed, only competing employees have retention standing.

Tenure group means a group of employees with a given appointment type. In a reduction in force, employees are first placed in a tenure group and then ranked within that group according to other retention factors.

Undue interruption means a degree of interruption that would prevent the completion of required work by an employee within 90 days after the employee has been placed in a different position.

**§ 9901.604 Coverage.**

(a) Employees covered. The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 35 (excluding members of the Senior Executive Service and employees who are excluded from coverage by other statutory authority); and

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

(b) Actions covered. (1) Reduction in force. This subpart will apply when a displacement action occurs within a retention list or when releasing a competing employee from a retention list by separation, reduction in band, or assignment involving displacement, and the release results from an action described in § 9901.601.

(2) Transfer of function. The Secretary will issue implementing issuances consistent with 5 U.S.C. 3503 prescribing procedures to be used when a function transfers from one competitive area to a different competitive area.

(3) Furlough. The provisions in 5 CFR 351.604 will apply when furloughing a competing employee for more than 30 consecutive calendar days, or more than 22 workdays in 1 calendar year if done on a discontinuous basis, except as otherwise provided in this subpart.

(c) Actions excluded. This subpart does not apply to—

(1) The termination of a temporary promotion or temporary reassignment and the subsequent return of an employee to the position held before the temporary promotion or temporary reassignment (or to a position with comparable pay band, pay, status, and tenure);

(2) A reduction in band based on the reclassification of an employee's position due to the application of new classification standards or the correction of a classification error or classification actions covered under § 9901.222;

(3) Placement of an employee serving on a seasonal basis in a nonpay, nonduty status in accordance with conditions established at time of appointment;

(4) A change in an employee's work schedule from other-than-full-time to full-time;

(5) A change in an employee's mixed tour work schedule in accordance with conditions established at time of appointment;

(6) A change in the scheduled tour of duty of an other-than-full-time schedule;

(7) A reduction in band based on the reclassification of an employee's position due to erosion of duties, except that this exclusion does not apply to such reclassification actions that will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days; or

(8) Any other personnel action not covered by paragraph (b) of this section.

**§ 9901.605 Competitive area.**

(a) *Basis for competitive area.* The Secretary may establish a competitive area on the basis of one or more of the following considerations:

- (1) Geographical location(s);
- (2) Line(s) of business;
- (3) Product line(s);
- (4) Organizational unit(s); and
- (5) Funding line(s).

(b) Employees included in competitive area. A competitive area will include all competing employees holding official positions of record in the defined competitive area.

(c) Review of competitive area determinations. The Secretary will make all competitive area definitions available for review.

(d) Change of competitive area. Competitive areas will be established for a minimum of 90 days before the effective date of a reduction in force. In implementing issuances, the Secretary will establish approval procedure requirements for any competitive area identified less than 90 days before the effective date of a reduction in force.

(e) Limitations. The Secretary will establish a competitive area only on the basis of legitimate organizational reasons, and competitive areas will not be used for the purpose of targeting an individual employee for reduction in forces on the basis of nonmerit factors.

(f) Bar on collective bargaining. Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive area under the authority of this subpart is not subject to collective bargaining.

#### **§ 9901.606 Competitive group.**

- (a) The Secretary will establish separate competitive groups for employees—

- (1) In the excepted and competitive service;
- (2) Under different excepted service appointment authorities; and
- (3) With different work schedules (e.g., full-time, part-time, seasonal, intermittent).

(b) The Secretary may further define competitive groups on the basis of one or more of the following considerations:

- (1) Career group;
- (2) Pay schedule;
- (3) Occupational series or specialty;
- (4) Pay band; or
- (5) Trainee status.

(c) An employee is placed into a competitive group based on the employee's official position of record. An employee's official position description may be supplemented with other applicable records that document the employee's actual duties and responsibilities.

(d) The competitive group includes the official positions of employees on a detail or other nonpermanent assignment to a different position from the competitive group.

(e) Pursuant to 5 U.S.C. 9902(f)(4) and (m)(7), the establishment of a competitive group under the authority of this subpart is not subject to collective bargaining.

**§ 9901.607 Retention standing.**

(a) *Retention list.* Within each competitive group, the Secretary will establish a retention list of competing employees in descending order based on the following:

(1) Tenure, with career employees listed first, followed by employees serving an initial probationary period, and then followed by employees on term appointments and other employees as identified in implementing issuances;

(2) Veterans' preference, in accordance with the preference requirements in 5 CFR 351.501(c) and (d), including the preference restrictions found in 5 U.S.C. 3501(a);

(3) The ratings of record, as determined in accordance with implementing issuances;

(4) Creditable civilian and/or uniformed service in accordance with 5 U.S.C. 3502(a)(A) and (B) and 5 CFR 351.503, but without regard to provisions covering additional service credit for performance in 5 CFR 351.503(c)(3) and (e); and

(5) The Secretary may establish tie-breaking procedures when two or more employees have the same retention standing.

(b) Active uniformed service member not on list. The retention list does not include the name of an employee who, on the effective date of the reduction in force, is on active duty in the uniformed services with a restoration right under 5 CFR part 353.

(c) Access to retention list. An employee who received a specific reduction in force notice and the employee's representative have access to the applicable retention list in accordance with 5 CFR 351.505. Where 5 CFR 351.505 uses the terms "competitive level" or "retention register," the term retention list (as defined in this subpart) is substituted.

**§ 9901.608 Displacement, release, and position offers.**

(a) Displacement to other positions on the retention list. (1) An employee who is displaced because of position abolishment, or because of displacement resulting from the abolishment of the position of a higher-standing employee on the retention list, may displace a lower-standing employee on the list if—

(i) The higher-standing employee is qualified for the position consistent, as applicable, with 5 CFR 351.702, or the Department’s own qualifications applied consistent with other requirements in 5 CFR 351.702;

(ii) No undue interruption would result from the displacement; and

(iii) The position of the lower-standing employee is in the same pay band, or in a lower pay band, as the position of the higher-standing employee.

(2) A displacing employee retains his or her status and tenure.

(b) Release from the retention list. (1) Employees are selected for release from the list on the basis of the ascending order of retention standing set forth in § 9901.607(a).

(2) A competing employee may not be released from a retention list that contains a position held by a temporary employee when the competing employee is qualified to perform in that position under § 9901.608(a)(1)(i).

(3) The release of an employee from the retention list may be temporarily postponed when appropriate under 5 CFR 351.506, 351.606, 351.607, and 351.608.

Where part 351 uses the term “competitive level” in these four sections, the term retention list (as defined in this subpart) is substituted.

(c) *Placement in vacant positions.* At the Secretary's option, an employee affected by § 9901.608(a)(1) may be offered a vacant position within the competitive area in lieu of reduction in force, based on relative retention standing as specified in § 9901.607(a).

(d) *Actions for employees with no offer.* If a released employee does not receive an offer of another position under paragraph (c) of this section to a position on a different retention list, the Secretary may—

- (1) Separate the employee by reduction in force; or
- (2) Furlough the employee under § 9901.604(b)(3).

**§ 9901.609 Reduction in force notices.**

The Secretary will provide a specific written notice to each employee reached for an action in reduction in force competition at least 60 days before the reduction in force becomes effective. When a reduction in force is caused by circumstances not reasonably foreseeable, the Secretary, at the request of a Component head or designee, may approve a notice period of less than 60 days. The shortened notice period must cover at least 30 full days before the effective date of release. The content of the notice will be prescribed in implementing issuances.

**§ 9901.610 Voluntary separation.**

(a) The Secretary may—

- (1) Separate from the service any employee who volunteers to be separated even though the employee is not otherwise subject to separation due to a reduction in force;
- and

(2) For each employee voluntarily separated under paragraph (a)(1) of this section, retain an employee in a similar position who would otherwise be separated due to a reduction in force.

(b) The separation of an employee under paragraph (a) of this section will be treated as an involuntary separation due to a reduction in force.

**§ 9901.611 Reduction in force appeals.**

(a) An employee who believes the provisions of this subpart were not properly applied may appeal the reduction in force action to the Merit Systems Protection Board as provided for in 5 CFR 351.901 if the employee was—

- (1) Separated by reduction in force;
- (2) Reduced in band by reduction in force; or
- (3) Furloughed by reduction in force under § 9901.604(b)(3).

(b) Paragraph (a) of this section does not apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

**Subpart G – Adverse Actions**

**GENERAL**

**§ 9901.701 Purpose.**

This subpart contains regulations prescribing the requirements for employees who are removed, suspended, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction). The Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

**§ 9901.702 Waivers.**

With respect to any category of employees covered by this subpart, subchapters I and II of 5 U.S.C. chapter 75, in addition to those provisions of 5 U.S.C. chapter 43 specified in subpart D of this part, are waived and replaced by this subpart.

**§ 9901.703 Definitions.**

In this subpart:

Adverse action means a removal, suspension, furlough for 30 days or less, reduction in pay, or reduction in pay band (or comparable reduction).

Band has the meaning given that term in § 9901.103.

Day has the meaning given that term in § 9901.103.

Furlough has the meaning given that term in § 9901.103.

Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or other administrative action. An indefinite suspension continues for an indeterminate period of time and ends with the occurrence of pending conditions set forth in the notice of actions which may include the completion of any subsequent administrative action.

Initial probationary period has the meaning given that term in § 9901.103.

In-service probationary period has the meaning given that term in § 9901.103.

Mandatory removal offense (MRO) has the meaning given that term in § 9901.103.

Reduction in pay means a decrease in an employee's rate of basic pay fixed by law or administrative action for the position held by the employee before any deductions and exclusive of additional pay of any kind. Basic pay does not include local market

supplements under subpart C of this part or similar payments. Nonreceipt of a pay increase is not a reduction in pay.

*Removal* means the involuntary separation of an employee from the Federal service.

*Suspension* means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

**§ 9901.704 Coverage.**

(a) *Actions covered*. This subpart covers removals, suspensions, furloughs of 30 days or less, reductions in pay, or reductions in band (or comparable reductions).

(b) *Actions excluded*. This subpart does not cover—

(1) An action taken against an employee during an initial probationary period established under § 9901.512(a), except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A reduction in pay or pay band of an employee who does not satisfactorily complete an in-service probationary period under § 9901.512(b) if the employee is returned to a grade or band and rate of basic pay no lower than that held before the in-service probationary period.

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position in a comparable pay band, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction in force action under subpart F of this part;

(5) An action imposed by the Merit Systems Protection Board under 5 U.S.C. 1215;

(6) A voluntary action by an employee;

(7) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(8)(i) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(ii) Termination of appointment before the expiration date specified as a basic condition of employment at the time the appointment was made, except when the termination is taken against—

(A) A preference eligible employee who has completed 1 year under a time-limited appointment; or

(B) An employee who has completed a probationary period under a term appointment;

(9) Cancellation of a promotion to a position not classified prior to the promotion;

(10) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(11) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(12) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(13) A classification determination, including a classification determination under subpart B of this part;

(14) Suspension or removal under 5 U.S.C. 7532; and

(15) An action to terminate grade retention upon conversion to the NSPS pay system established under subpart C of this part.

(c) Employees covered. Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to DoD employees, except as excluded by paragraph (d) of this section.

(d) Employees excluded. This subpart does not apply to—

(1) An employee who is serving a probationary period, except when the employee is a preference eligible who has completed 1 year of that probationary period;

(2) A member of the Senior Executive Service;

(3) An employee who is terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(4) An employee whose appointment is made by and with the advice and consent of the Senate;

(5) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

- (6) An employee whose appointment is made by the President;
- (7) A reemployed annuitant who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund;
- (8) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);
- (9) A member of the National Security Labor Relations Board;
- (10) A non-appropriated fund employee;
- (11) A National Guard technician who is employed under 32 U.S.C. 709; and
- (12) An employee against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart.

REQUIREMENTS FOR REMOVAL, SUSPENSION, FURLOUGH OF 30 DAYS OR LESS, REDUCTION IN PAY, OR REDUCTION IN BAND (OR COMPARABLE REDUCTION)

**§ 9901.711 Standard for action.**

The Secretary may take an adverse action under this subpart only for such cause as will promote the efficiency of the service.

**§ 9901.712 Mandatory removal offenses.**

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's national security mission. Such offenses will be identified in advance in implementing issuances, publicized upon establishment via notice in the *Federal Register*, and made known to all employees on a periodic basis, as appropriate, through means determined by the Secretary.

(b) The procedures in §§ 9901.713 through 9901.716 apply to actions taken under this section. However, a proposed notice required by § 9901.714 may be issued to the employee in question only after the Secretary's review and approval.

(c) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty on his or her own initiative or at the request of the employee in question.

(d) Nothing in this section limits the discretion of the Secretary to remove employees for offenses other than those identified by the Secretary as an MRO.

**§ 9901.713 Procedures.**

An employee against whom an adverse action is proposed is entitled to the following:

- (a) A proposal notice under § 9901.714;
- (b) An opportunity to reply under § 9901.715; and
- (c) A decision notice under § 9901.716.

**§ 9901.714 Proposal notice.**

(a) *Notice period.* An employee will receive a minimum of 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the notice period may be shortened to a minimum of 5 days. No notice of proposed action is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) Contents of notice. (1) The proposal notice will inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the evidence supporting the proposed action. Evidence may not be used that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given category and/or organizational unit are being furloughed, the proposal notice will state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough.

(c) Duty status during notice period. An employee will remain in a duty status in his or her regular position during the notice period. However, if it is determined that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, adversely impact the Department's mission, or otherwise jeopardize legitimate Government interests, one or a combination of the following alternatives may be taken:

(1) Assign the employee to duties where it is determined that the employee is no longer a threat to the employee or others, the Department's mission, or Government property or interests;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

**§ 9901.715 Opportunity to reply.**

(a) An employee will be provided a minimum of 10 days, which will run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the reply period may be reduced to a minimum 5 days, which will run concurrently with the notice period. No opportunity to reply is necessary for furlough without pay due to unforeseen circumstances, such as sudden breakdown in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply period, the employee will be provided a reasonable amount of official time to review the evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) An official will be designated to receive the employee's written and/or oral response. The official will have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or non-Federal employee representative, at the employee's expense, or other representative of the employee's choice, subject to paragraph (f) of this section. The employee will provide a written designation of his or her representative.

(f) An employee's representative may be disallowed if the representative is—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes consideration of any medical condition that may be relevant to the proposed adverse action will provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) A medical examination may be required or offered pursuant to 5 CFR part 339, subpart C, when an employee's medical documentation is under consideration

(3) Withdrawal or delay of a proposed adverse action is not required when an employee's medical condition is under consideration. However,—

(i) The employee will be allowed to provide medical documentation during the opportunity to reply;

(ii) Compliance with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules will occur; and

(iii) Compliance with 5 CFR 831.1205 or 844.202, as applicable, will occur in the issuance of a decision to remove.

**§ 9901.716 Decision notice.**

(a) Any reasons for the action other than those specified in the proposal notice may not be considered in a decision on a proposed adverse action.

(b) Any response from the employee and the employee's representative, if the response is provided to the official designated under § 9901.715(d) during the opportunity to reply period, and any medical documentation furnished under § 9901.715(g) will be considered.

(c) The decision notice will specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts H or I of this part.

(d) To the extent practicable, the notice to the employee will be delivered on or before the effective date of the action. If delivery cannot be made to the employee in person, the notice may be delivered to the employee's last known address of record on or before the effective date of the action.

**§ 9901.717 Departmental record.**

(a) *Document retention.* The Department will keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record will include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department will make the record available for review by the employee and furnish a copy of the record upon the employee's request or

the request of the Merit Systems Protection Board (MSPB), but not less than 15 days after such a request.

## SAVINGS PROVISION

### **§ 9901.721 Savings provision.**

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

## **Subpart H – Appeals**

### **§ 9901.801 Purpose.**

This subpart implements the provisions of 5 U.S.C. 9902(h), which establishes the process for Department employees to appeal certain adverse actions covered under subpart G of this part.

### **§ 9901.802 Applicable legal standards and precedents.**

In accordance with 5 U.S.C. 9902(h)(3), in applying existing legal standards and precedents, MSPB and arbitrators, in applicable cases, are bound by the legal standard set forth in § 9901.107(a)(2).

### **§ 9901.803 Waivers.**

When a specified category of employees is covered by an appeals process established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9901.809. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB will follow the provisions in this subpart until it issues conforming regulations, which may not conflict with this part.

**§ 9901.804 Definitions.**

In this subpart:

Administrative judge or AJ means the official, including an administrative law judge, authorized by MSPB to hold a hearing in a matter covered by this subpart and subpart G of this part, or to decide such a matter without a hearing.

Class appeal means an appeal brought by a representative(s) of a group of similarly situated employees consistent with the provisions of Rule 23 of the Federal Rules of Civil Procedure.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) has the meaning given that term in § 9901.103.

MSPB means the Merit Systems Protection Board.

Petition for Review (PFR) means a request for full MSPB review of a final Department decision.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Request for Review (RFR) means a preliminary request for review of an initial decision of an MSPB administrative judge before that decision has become a final Department decision.

**§ 9901.805 Coverage.**

(a) Subject to a determination by the Secretary under § 9901.102(b)(2), this subpart applies to employees in DoD organizational and functional units that are included under NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of this subpart, provided such employees are covered by § 9901.704.

(b) This subpart does not apply to a reduction in force action taken under subpart F of this part, nor does it apply to actions taken under internal DoD placement programs, including the DoD Priority Placement Program.

(c) Appeals of suspensions of 14 days or less and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(d) The appeal rights in 5 CFR 315.806 apply to the termination of an employee in the competitive service while serving a probationary period.

(e) Actions taken under 5 U.S.C. 7532 are not appealable to MSPB.

(f) Except as expressly provided in subpart C of this part, actions taken under that subpart are not appealable to MSPB.

**§ 9901.806 Alternative dispute resolution.**

The Secretary recognizes the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based problem-solving to address employee-employer disputes arising in the workplace, including those which may involve disciplinary or adverse actions. Such methods can result in more efficient and more

effective outcomes than traditional, adversarial methods of dispute resolution. The use of alternative dispute resolution is encouraged. Such methods will be subject to collective bargaining to the extent permitted by subpart I of this part.

**§ 9901.807 Appellate procedures.**

(a) *General.* (1) A covered Department employee may appeal to MSPB an adverse action listed in § 9901.805(a). Such an employee has a right to be represented by an attorney or other representative of his or her own choosing. The procedures in this subpart do not apply when the action is taken under the special national security provisions established by 5 U.S.C. 7532.

(2)(i) This section modifies MSPB's appellate procedures with respect to appeals under this subpart, as applicable.

(ii) MSPB will refer appeals to an AJ for adjudication. The AJ must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(3) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(4) If the AJ is of the opinion that an appeal could be processed more expeditiously without adversely affecting any party, the AJ may—

- (i) Consolidate appeals filed by two or more appellants; or
- (ii) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(5) If an employee has been removed under subpart G of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(6) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of a decision under subpart G of this part, whichever is later.

(7) Either party may file a motion to disqualify a party's representative at any time during the proceedings.

(b) *Case suspension.* Requests for case suspensions must be submitted jointly by the parties.

(c) *Settlement.* (1) An MSPB AJ may not require any party to engage in settlement discussions in connection with any action appealed under this section. Where the parties voluntarily agree to enter into settlement discussions under paragraph (c)(2) of this section, if either party decides that such discussions are not appropriate, the matter will proceed to adjudication.

(2) Where the parties agree to engage in formal settlement discussions, these discussions will be conducted by an official other than the AJ assigned to adjudicate the case. Nothing prohibits the parties from engaging in settlement discussions on their own.

(d) *Discovery.* The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably

cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(1) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(2) Neither party may submit more than one set of interrogatories, one set of requests for production, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(3) The AJ may grant a party's motion for additional discovery only upon a showing of necessity and good cause.

(e) *Hearing*. (1) *Burden of proof*. An adverse action taken against an employee will be sustained by the MSPB AJ if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) That there was harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(2) *Decisions without a hearing*. If the AJ determines upon his or her own initiative or upon request by either party that some or all material facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing, including filing evidence and/or arguments, within 15

calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(f) Initial decision. (1) Time limit. An initial decision must be made by an AJ no later than 90 days after the date on which the appeal is filed.

(2) Mitigation. (i) An AJ will give great deference to the determination regarding the penalty imposed.

(ii) An AJ may not modify the penalty imposed unless such penalty is totally unwarranted in light of all pertinent circumstances. In evaluating the appropriateness of the penalty, the AJ will give primary consideration to the impact of the sustained misconduct or poor performance on the Department's national security mission in accordance with § 9901.107(a)(2).

(iii) In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s).

(iv) When a penalty is mitigated, the maximum justifiable penalty must be applied. The maximum justifiable penalty is the severest penalty that is not so disproportionate to the basis for the action as to be totally unwarranted in light of all pertinent circumstances.

(v) If the adverse action is based on an MRO, the penalty may only be mitigated as prescribed in § 9901.808.

(3) Reviewing charges. Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way in which the charge is labeled or the conduct characterized, provided the employee has sufficient notice to respond to the charge.

(4) Performance expectations. Neither the MSPB AJ, nor the full MSPB, may reverse an action based on the way a performance expectation is expressed, provided that the expectation would be clear to a reasonable person.

(5) Interim relief. Pursuant to 5 U.S.C. 9902(h)(4), employees will not be granted interim relief, nor will an action taken against an employee be stayed, unless specifically ordered by the full MSPB following final decision by the Department.

(i) If the interim relief ordered by the full MSPB provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, that the employee's return to the workplace is impracticable or the presence of the employee is unduly disruptive to the work environment, the employee may be placed in an alternative position, or may be placed on excused absence pending final disposition of the employee's appeal.

(ii) Nothing in paragraph (f)(5) of this section may be construed to require that any award of back pay or attorney fees be paid before an MSPB decision becomes final.

(6) Attorney fees. (i) Except as provided in paragraph (f)(6)(ii) of this section or as otherwise provided by law, the AJ may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the AJ determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable

attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(g) Department's final decision. (1) Request for Review. The initial AJ decision will become the Department's final decision 30 days after its issuance, unless either party files an RFR with MSPB and the Department concurrently (with service on the other party) within that 30-day period in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. If a party does not submit an RFR within the above time limit, the RFR will be dismissed as untimely filed unless a good reason for the delay is shown.

(2) Department review process. (i) Thirty days after the timely filing of an RFR, the initial AJ decision will become the Department's final, nonprecedential decision, unless notice is served on the parties and MSPB within that 30-day period that the Department will act on the RFR. When no such notice is served, MSPB will docket and process a party's RFR as a petition for full MSPB review in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart. Timeframes will be established in implementing issuances for those instances where action is taken on an RFR.

(ii) If a decision is made to act on the RFR, the other party to the case will be provided 15 days to respond to the RFR. An extension to the filing period may be granted for good cause. After receipt of a timely response to the RFR,—

(A) If a determination is made that there has been a material error of fact, or that there is new and material evidence available that, despite due diligence, was not available when the record closed, the matter will be remanded to the assigned AJ for further adjudication or a final DoD decision will be issued modifying or reversing that initial

decision or decision after remand. Any remand will be served on all parties with an opportunity for those parties to comment to the AJ. An AJ decision after remand must be made no later than 30 days after the date of receipt of the remand. However, if the Department's remand order includes instructions to hold a hearing, the AJ decision will be made not later than 45 days after receipt of the remand order. Decisions on remand will be treated as initial decisions for purpose of further review.

(B) Where it is determined that the initial AJ decision has a direct and substantial adverse impact on the Department's national security mission, or is based on an erroneous interpretation of law, Governmentwide rule or regulation, or this part, a final DoD decision will be issued modifying or reversing that initial decision; or

(C) Where it is determined that the initial AJ decision should serve as precedent, a final DoD decision will be issued affirming that initial decision for such purposes.

(3) *Precedential effect.* Any decision issued by the Department after reviewing an initial AJ decision is precedential unless—

- (i) The Secretary determines that the DoD decision is not precedential; or
- (ii) The final DoD decision is reversed or modified by the full MSPB.

(4) *Publication of decisions.* Precedential DoD decisions will be published.

Further details regarding the publication of DoD precedential decisions will be provided in implementing issuances.

(h) *Appeal of Department's final decision.* (1) *OPM Petition for Review.* Any decision under paragraph (a)(2) of this section is final unless a party to the appeal or the Director of OPM petitions the full MSPB for review within 30 days. The Director, after consultation with the Secretary, may petition the full MSPB for review if the Director

believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(2) *Petition for Review*. (i) Upon receipt of a final DoD decision issued under paragraph (g)(2)(ii) of this section, an employee or OPM may file a PFR with the full MSPB within 30 days in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(ii) The Board may dismiss any petition that, in the view of the Board, does not raise substantial questions of fact or law.

(iii) The full MSPB may order corrective action only if the Board determines that the decision was—

(A) Arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) Obtained without procedures required by law, rule, or regulation having been followed; or

(C) Unsupported by substantial evidence.

(iv) Upon receipt of a petition for full MSPB review or an RFR that becomes a PFR as a result of the expiration of the Department's review period in accordance with paragraph (g)(2)(i) of this section, the other party to the case and/or OPM, as applicable, will have 30 days to file a response to the petition. The full MSPB will act on a PFR within 90 days after receipt of a timely response, or the expiration of the response period, as applicable, in accordance with 5 U.S.C. 9902(h), MSPB's regulations, and this subpart.

(3) Request for reconsideration of final MSPB decision. The Director of OPM, after consultation with the Secretary, may seek reconsideration by MSPB of a final MSPB decision in accordance with 5 U.S.C. 7703(d), which is modified for this purpose. The Director of OPM must seek reconsideration within 35 days after the date of service of the Board's final order. If the Director seeks such reconsideration, the full MSPB must render its decision no later than 60 days after receipt of a response to OPM's petition in support of such reconsideration. The full MSPB must state the reasons for its decision.

(4) Failure of MSPB to meet deadlines. Failure of MSPB to meet the deadlines imposed by paragraphs (f)(1), (h)(2)(iv), and (h)(3) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party. If the AJ or full MSPB fails to meet the above time limits, the full MSPB will inform the Secretary in writing of the cause of the delay and will recommend future actions to remedy the problem.

(i) Judicial review. The Secretary or an employee adversely affected by a final order or decision of MSPB may seek judicial review under 5 U.S.C. 9902(h)(6).

#### **§ 9901.808 Appeals of mandatory removal actions.**

(a) Procedures for appeals of adverse actions to MSPB based on MROs will be the same as for other offenses except as otherwise provided by this section.

(b) If one or more MROs are sustained, the MSPB AJ may not mitigate the penalty.

(c) Only the Secretary may mitigate the penalty within the Department.

(d) If the MSPB AJ or the full MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, a subsequent proposed adverse action (other than an MRO) based in whole or in part on the same or similar evidence is not precluded.

**§ 9901.809 Actions involving discrimination.**

(a) In considering any appeal of an action filed under 5 U.S.C. 7702, the Board will apply the provisions of 5 U.S.C. 9902 and this part.

(b) In any appeal of an action filed under 5 U.S.C. 7702 that results in a final Department decision, if no petition for review of the Department's decision is filed with the full Board, and if requested by the appellant, the Department will refer only the discrimination issue to the full Board for adjudication.

(c) All references in 5 U.S.C. 7702 to 5 U.S.C. 7701 are modified to read 5 CFR part 9901, subpart H.

**§ 9901.810 Savings provision.**

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

**Subpart I – Labor-Management Relations**

**§ 9901.901 Purpose.**

This subpart contains the regulations which implement the provisions of 5 U.S.C. 9902(m) relating to the Department's labor-management relations system. This labor management relations system addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission and promotes a collaborative issue-based approach to labor management relations. These regulations

recognize the rights of DoD employees to organize and bargain collectively, as provided for in 5 U.S.C. 9902 and this part and subject to any exclusion from coverage or limitation on the scope of bargaining pursuant to law, including this part, issuances, and implementing issuances, applicable Presidential issuances (e.g., Executive orders), and any other applicable legal authority.

**§ 9901.902 Scope of authority.**

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are modified and replaced by the provisions in this subpart with respect to that category, except as otherwise specified in this subpart. Implementing issuances may be prescribed to carry out the provisions of this subpart.

**§ 9901.903 Definitions.**

In this subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Board means the National Security Labor Relations Board established by this subpart.

Collective bargaining means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to bargain in a good faith effort to reach agreement, pursuant to 5 U.S.C. 9902 and this subpart, with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective

bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of 5 U.S.C. 9902 and this subpart.

Component means an organizational unit so prescribed and designated by the Secretary in his or her sole and exclusive discretion, such as, for example, the Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

Conditions of employment means personnel policies, practices, and matters affecting working conditions—whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

- (1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;
- (2) The classification of any position, including any classification determinations under subpart B of this part;
- (3) The pay of any employee or for any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or
- (4) Any matters specifically provided for by Federal statute.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

Consult means to consider the interests, opinions, and recommendations of a recognized labor organization in rendering decisions. This can be accomplished in face-

to-face meetings or through other means, e.g., teleconferencing, e-mail, and written communications.

Dues means dues, fees, and assessments.

Exclusive representative means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9901.911.

FMCS means Federal Mediation and Conciliation Service.

Grade means a level of work under a position classification or job grading system.

Grievance means any complaint—

- (1) By any employee concerning any matter relating to the conditions of employment of the employee;
- (2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or
- (3) By any employee, labor organization, or the Department concerning—
  - (i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
  - (ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, regulation, or issuance issued for the purpose of affecting conditions of employment.

Implementing issuance or issuances has the meaning given that term in § 9901.103.

Issuance or issuances means a document issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries of the Military Departments to carry out a policy or procedure of the Department other than those issuances implementing this part.

Labor organization has the meaning given that term in § 9901.103.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department.

Person has the meaning given that term in 5 U.S.C. 7103(a)(1).

Professional employee has the meaning given that term in 5 U.S.C. 7103(a)(15).

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; to adjust their grievances; or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority. It also means an individual employed by the Department who exercises supervisory authority over military members of the armed services, such as directing or assigning work or evaluating or recommending evaluations.

**§ 9901.904 Coverage.**

(a) Employees covered. This subpart applies to eligible DoD employees, subject to a determination by the Secretary under § 9901.102(b)(1), except as provided in

paragraph (b) of this section. DoD employees who would otherwise be eligible for bargaining unit membership under 5 U.S.C. chapter 71, as modified by § 9901.912, are eligible for bargaining unit membership under this subpart. In addition, this subpart applies to an employee whose employment in the Department has ceased because of any unfair labor practice under § 9901.916 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

- (1) An alien or noncitizen of the United States who occupies a position outside the United States;
- (2) A military member of the armed services;
- (3) A supervisor or a management official;
- (4) Any person who participates in a strike in violation of 5 U.S.C. 7311; or
- (5) Any employee excluded pursuant to § 9901.912 or any other legal authority.

**§ 9901.905 Impact on existing agreements.**

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or implementing issuances is unenforceable on the effective date of the applicable subpart(s) or such issuances. The exclusive representative may appeal a determination that a provision is unenforceable to the National Security Labor Relations Board in accordance with the procedures and time limits pursuant to § 9901.908 and the Board's regulations. However, the Secretary, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continuation at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing issuance to bring into conformance those remaining negotiable collective bargaining agreement provisions directly affected by the collective bargaining agreement provisions rendered unenforceable by the applicable subpart and/or implementing issuance. During that period, the parties may utilize the negotiation impasse provisions of § 9901.920 to assist in resolving any impasses.

(c) Any provision of a collective bargaining agreement that is inconsistent with an issuance remains in effect until the expiration, renewal, or extension of the term of the agreement, whichever occurs first.

**§ 9901.906 Employee rights.**

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee will be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

**§ 9901.907 National Security Labor Relations Board.**

(a) The Secretary has sole, exclusive, and unreviewable authority to determine the effective date for the establishment of the National Security Labor Relations Board.

(b)(1) The National Security Labor Relations Board is composed of at least three members who are appointed by the Secretary for terms of 3 years, except that the appointments of the initial Board members will be for terms of 1, 2, and 3 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for up to two additional 1-year terms. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the Board; in so doing, he or she will make such appointments to ensure that the Board consists of an odd number of members.

(2) Members of the Board will be independent, distinguished citizens of the United States who are well known for their integrity, impartiality, and expertise in labor relations, and/or the DoD mission and/or other related national security matters, and will be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary only for inefficiency, neglect of duty, or malfeasance in office.

(3) An individual chosen to fill a vacancy on the Board will be appointed for the unexpired term of the member who is replaced and, at the Secretary's option, an additional term or terms.

(c) Appointment of the Chair. The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the NSLRB.

(d) Appointment procedures for non-Chair NSLRB members. (1) The appointments of the two non-Chair NSLRB members will be made by the Secretary, at

his or her sole and exclusive discretion, after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint NSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requires established by the Secretary.

(e) Appointment of additional non-Chair NSLRB members. If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph (b)(2) of this section, appoint the additional members according to the procedures established by paragraph (d) of this section.

(f) A Board vacancy will be filled according to the procedure used to appoint the member whose position was vacated.

(g)(1) The Board will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, including standards for asserting or declining jurisdiction.

(2) To the extent practicable, the Board will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The Board may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution methods to resolve all such disputes at the earliest practicable time and with a minimum administrative burden.

(3) A vote of the majority of the Board (or a three-person panel of the Board) will be final. A vacancy on the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The vote of the Chair will be dispositive in the event of a tie.

(h) Decisions of the Board are final and binding.

**§ 9901.908 Powers and duties of the Board.**

(a) Section 9902(m)(6) of title 5, U.S. Code, requires that the labor relations system established under this subpart provide for an independent third party review of labor relations issues set out in § 9901.908(b), including defining the third party to provide the review. Notwithstanding § 9901.907 and pending establishment of the Board, the Secretary, in consultation with the Director, may designate a third party to exercise the authority of the Board in accordance with this subpart.

(b) The Board may to the extent provided in this subpart and in accordance with regulations prescribed by the Board—

(1) Conduct investigations and hearings, and resolve allegations of unfair labor practices, including allegations concerning strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9901.917;

(3) Resolve exceptions to arbitration awards. In doing so, the Board will conduct any review of an arbitral award in accordance with 5 U.S.C. 7122(a) as modified in § 9901.923;

(4) Resolve negotiation impasses in accordance with § 9901.920;

(5) Conduct *de novo* review involving all matters within the Board's jurisdiction;  
and

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue, but in no case may the Board issue status quo ante remedies, where such remedies are not intended to cure egregious violations of this subpart or where such an award would impose an economic hardship or interfere with the efficiency or effectiveness of the Department's mission or impact national security.

(c) In any case in which the Board or its authorized agent, in the Board's or the agent's unreviewable discretion, declines to adjudicate any unfair labor practice allegation(s) because the allegation(s) was not timely filed, fails to state an unfair labor practice, or for other appropriate reasons, the Board or the agent, as applicable, will provide the person making the allegation(s) a written statement of the reasons for such determination.

(d) Upon the request of a DoD Component or a labor organization concerned, the Board may issue guidance for matters within its jurisdiction.

(e) The Board's decisions will be written and published.

**§ 9901.909 Powers and duties of the Federal Labor Relations Authority.**

(a) To the extent provided in this subpart (pursuant to the authority in 5 U.S.C. 9902), the Federal Labor Relations Authority, in accordance with conforming regulations prescribed by the Authority, may—

(1) Determine the appropriateness of bargaining units pursuant to the provisions of § 9901.912;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer 5 U.S.C. 7111 (relating to the according of exclusive recognition to labor organizations), which is not waived for the purpose of this subpart;

(3) Resolve disputes regarding the granting of national consultation rights; and

(4) Upon request of a party, review only those Board decisions on—

(i) Unfair labor practices, except those issued under § 9901.908(c);

(ii) Arbitral awards under § 9901.908; and

(iii) Negotiability disputes.

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party will timely raise the issue with the Authority and simultaneously file a copy of its response with the Board in accordance with regulations established by the Authority. The Authority will promptly transfer the case to the Board, which will determine whether the matter is within the Board's jurisdiction. If the Board determines that the matter is not within its jurisdiction, the Board will return the matter to the Authority for a decision on the merits of the case. The Board's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority. The Authority will promptly decide those cases that the Board has determined are within the jurisdiction of the Authority.

(c)(1) To obtain review by the Authority of a Board decision, a party will request a review of the record of a Board decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. A copy of the request will be served on all parties. Within 15 days after service of the request, any response will be filed. The Authority will establish, in conjunction with the Board, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority will accept the findings of fact and interpretations of this part made by the Board and sustain the Board's decision unless the requesting party shows that the Board's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the Board's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) The Authority will complete its review of the record and issue a final decision within 30 days after receiving the party's response to such request for review. If the Authority does not issue a final decision within this mandatory time limit, the Authority will be considered to have denied the request for review of the Board's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

(d) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123(a). The references in 5 U.S.C. 7123(a) to other provisions in 5 U.S.C. chapter 71 are considered to be references to those particular provisions as modified by this subpart.

**§ 9901.910 Management rights.**

(a) Subject to paragraphs (b) through (e) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, pay schedules, pay bands and/or grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend; remove; reduce in pay, pay band, or grade; or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section.

(c) Notwithstanding paragraph (b) of this section, the Secretary in his or her sole, exclusive, and unreviewable discretion, may authorize bargaining over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2)

of this section. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(d) Unless the Secretary elects to bargain under paragraph (c) of this section, management will consult at the request of an exclusive representative as required under § 9901.917 over the procedures that will be observed in exercising the authorities set forth in paragraphs (a)(1) and (a)(2) of this section. Consultation does not require that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for FMCS or another third party to assist in this process. Neither the Board nor the Authority may intervene in this process.

(e) If an obligation exists under § 9901.917 to bargain or consult regarding any authority under paragraph (a) of this section, management will provide notice to the exclusive representative concurrently with the exercise of that authority. However, at its sole, exclusive, and unreviewable discretion, management may provide notice to an exclusive representative of its intention to exercise an authority under paragraph (a) of this section as far in advance as practicable. Further, nothing in paragraph (e) of this section establishes an independent right to bargain or consult.

(f) When an obligation exists under § 9901.917, management will provide notice to the exclusive representative and an opportunity to present its views and recommendations regarding the exercise of an authority under paragraph (a) of this section, and the parties will bargain at the level of recognition (unless otherwise

delegated below that level, at their mutual agreement, or as provided for in §§ 9901.917 and 9901.918) over otherwise negotiable—

(1)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(ii) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraphs (a)(1) and (a)(2) of this section. Appropriate arrangements within the duty to bargain include proposals on matters such as personal hardships and safety measures.

(2) Appropriate arrangements within the duty to bargain do not include proposals on matters such as the routine assignment to specific duties, shifts, or work on a regular or overtime basis except when the Secretary in his or her sole, exclusive, and unreviewable discretion authorizes such bargaining. This authorization will be based on a determination by the Secretary, in his or her sole, exclusive, and unreviewable discretion, that bargaining is necessary to advance the Department's mission or promote organizational effectiveness. Any specific authorization remains in effect until an agreement is reached or management withdraws from negotiations, whichever occurs first.

(g) Where a proposal falls within the coverage of both paragraph (a)(1) and (a)(3) of this section or paragraph (a)(2) and (a)(3) of this section, the matter will be determined to be covered by paragraph (a)(1) or (a)(2) of this section for the purpose of collective bargaining.

(h) Any mid-term agreements, reached with respect to paragraphs (c), (f)(1)(ii), or (f)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Secretary's sole, exclusive, and unreviewable discretion.

(i) Nothing will delay or prevent the Secretary from exercising his or her authority under this subpart.

**§ 9901.911 Exclusive recognition of labor organizations.**

Exclusive recognition will be accorded to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees, in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

**§ 9901.912 Determination of appropriate units for labor organization representation.**

(a) The Authority will determine the appropriateness of any unit. The Authority will determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure and § 9901.107(a).

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision or subpart applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision or subpart applies.

(d) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Secretary or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

**§ 9901.913 National consultation.**

(a) If, in connection with the Department or Component, no labor organization has been accorded exclusive recognition on a Department or Component basis, a labor organization that is the exclusive representative of a substantial number of the employees of the Department or Component, as determined in accordance with criteria prescribed by the Authority, will be granted national consultation rights by the Department or Component. National consultation rights will terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights will be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any Department or Component under subsection (a) of this section will—

(i) Be informed of any substantive change in conditions of employment proposed by the Department or Component; and

(ii) Be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (b)(1) of this subsection to the Department or Component by any labor organization—

(i) The Department or Component will consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(ii) The Department or Component will provide the labor organization a written statement of the reasons for taking the final action.

(c) Section 9901.913(b) does not apply where the proposed change is bargained at the national level or where continuing collaboration procedures under § 9901.106 apply.

(d) Nothing in this section precludes the Department or the Component from seeking views and recommendations from labor organizations having exclusive representation within the Department or Component which do not have national consultation rights.

(e) Nothing in this section will be construed to limit the right of the agency or exclusive representative to engage in collective bargaining.

**§ 9901.914 Representation rights and duties.**

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit will be given the opportunity to be represented at—

(i) Any formal discussion between a Department management official(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between a management official(s) and bargaining unit employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance filed under the negotiated grievance procedure;

(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation; or

(iv) Any discussion between one or more Department representatives and one or more bargaining unit employees in connection with a formal complaint of discrimination

only if the employee(s), in his or her sole and exclusive discretion, requests such representation.

(3) Bargaining unit employees will be informed annually of their rights under paragraph (a)(2)(iii) of this section.

(4) Employee representatives employed by the Department are subject to the same expectations regarding conduct as any other employee, whether they are serving in their representative capacity or not.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any grievance or appeal action; or

(ii) Exercising grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Secretary or appropriate Component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate Component(s) of the Department, to furnish information to an exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained in the regular course of business, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance or unfair labor practice proceedings, or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing issuances and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a

particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosures where an authorized official has determined that disclosure would compromise the Department's mission, security, or employee safety; and

(5) Personal addresses, personal telephone numbers, personal email addresses, or any other information not related to an employee's work.

(d)(1) An agreement between the Department or appropriate Component(s) of the Department and the exclusive representative is subject to approval by the Secretary.

(2) The Secretary will approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, regulation, issuance, or implementing issuance.

(3) If the Secretary does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement will take effect and is binding on the Department or Component(s), as appropriate, and the exclusive representative, but only to the extent it is consistent with Federal law, Presidential issuance (e.g., Executive order), Governmentwide regulations, issuances and implementing issuances, or the regulations in this part.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if

none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if they are contrary to Federal law, Presidential issuance (e.g., Executive order), the regulations in this part, or implementing issuances. Provisions in existing collective bargaining agreements that are inconsistent with Governmentwide regulations or issuances (other than implementing issuances), are unenforceable upon expiration, extension, renewal, or renegotiation of the collective bargaining agreement, whichever occurs first.

**§ 9901.915 Allotments to representatives.**

(a) If the Department has received from an employee in an appropriate unit a properly executed written or electronic assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues and other financial assessments of the exclusive representative of the unit, the Department will honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment will be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department Component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership by the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority will investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department Component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

**§ 9901.916 Unfair labor practices.**

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions, as required by this subpart;

(7) To enforce any issuance (other than an implementing issuance), or Governmentwide regulation, which is in conflict with an applicable collective bargaining agreement if the agreement was in effect before the issuance or regulation was prescribed.

(8) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the Board, to negotiate in good faith or to consult with the Department as required by this subpart;

(6) To fail or refuse, as determined by the Board, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The Board will not consider any allegation of an unfair labor practice filed more than 6 months after it occurred, unless the Board determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Unfair labor practice issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation,

will not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

- (1) Constitute an unfair labor practice under any provision of this subpart; or
- (2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

**§ 9901.917 Duty to bargain and consult.**

(a) The Department or appropriate Component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, will meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate Component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the Board, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining begins, the parties may mutually agree to continue bargaining, or either party may refer the matter to the Board for resolution in accordance with procedures established by the Board. At any time prior to going to the Board, either party may refer the matter to FMCS for assistance.

(c) If the parties bargain during the term of an existing collective bargaining agreement, or in the absence of a collective bargaining agreement, over a proposed change affecting bargaining unit employees' conditions of employment, and no agreement is reached within 30 days after such bargaining begins, the parties may mutually agree to continue bargaining, or either party may refer the matter to the Board

for resolution in accordance with procedures established by the Board. Either party may refer the matter to FMCS for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, issuances and implementing issuances, or Executive orders.

(2) Except as otherwise provided in § 9901.910(d), management has no obligation to bargain or consult over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(3) Nothing in paragraphs (b) or (c) of this section prevents management from exercising the rights enumerated in § 9901.910.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Board in accordance with procedures established by the Board.

**§ 9901.918 Multi-unit bargaining.**

(a) Negotiations can occur at geographical or organizational levels within DoD or a Component with the local exclusive representatives impacted by the proposed change.

(b) Any such negotiations will—

(1) Be binding on all parties afforded the opportunity to bargain with representatives of DoD or the Component;

(2) Supersede all conflicting provisions of applicable collective bargaining agreements of the labor organization(s) affected by the negotiations; and

(3) Be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under multi-unit bargaining is not subject to review by the Board.

(c) When agreement is reached under this section, individual bargaining units cannot opt out of or veto the agreement.

(d) Any party may request the services of FMCS to assist with these negotiations.

(e) Labor organizations may request multi-unit bargaining, as appropriate. The Secretary has sole and exclusive authority to grant the labor organizations' request.

(f) The Department will prescribe implementing issuances on the procedures and constraints associated with multi-unit bargaining.

**§ 9901.919 Collective bargaining above the level of recognition.**

(a) Negotiations can occur at the DoD or Component level with labor organization(s) at an organizational level above the level of exclusive recognition. The decision to negotiate at a level above the level of recognition as well as the unions involved, is within the sole and exclusive discretion of the Secretary to determine and will not be subject to review.

(b) Any such agreement reached in these negotiations will—

(1) Be binding on all subordinate bargaining units of the labor organization(s) afforded the opportunity to bargain above the level of recognition, and on DoD and its Components, without regard to levels of recognition;

(2) Supersede all conflicting provisions of other collective bargaining agreements of the labor organization(s), including collective bargaining agreements negotiated with an exclusive representative at the level of recognition, except as otherwise determined by the Secretary;

(3) Not be subject to further negotiations with the labor organizations for any purpose, including bargaining at the level of recognition, except as the Secretary may decide, in his or her sole and exclusive discretion; and

(4) Be subject to review by the Board only to the extent provided by this subpart.

(c) When agreement is reached under this section, individual labor organizations or bargaining units cannot opt out of or veto the agreement.

(d) Negotiations will be subject to impasse resolution by the Board under procedures prescribed by the Board. In resolving impasses, the Board will ensure that agreement provisions are consistent with regard to all similarly situated employees. The determination as to which organizations are covered under national level bargaining is not subject to review by the Board;

(e) The National Guard Bureau and the Army and Air Force National Guard are excluded from coverage under this section. Where National Guard employees are impacted, negotiations at the level of recognition are authorized.

(f) The Secretary may require and a labor organization or organizations may request bargaining above the level of recognition, as appropriate. The Secretary has sole and exclusive authority to grant such requests; and

(g) The Department will prescribe implementing issuances on the procedures and constraints associated with collective bargaining above the level of recognition.

**§ 9901.920 Negotiation impasses.**

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9901.905, 9901.914, 9901.917, 9901.918, or 9901.919, either party may submit the disputed issues to the Board for resolution.

(b) The Board may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse, to include use of settlement efforts.

(c) Pursuant to §§ 9901.907 and 9901.926, the Board's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and negotiation impasses.

(d) Notice of any final action of the Board under this section will be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

**§ 9901.921 Standards of conduct for labor organizations.**

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not modified.

**§ 9901.922 Grievance procedures.**

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement will provide procedures for the settlement of grievances, including

questions of arbitrability. Except as provided in paragraphs (e), (f) and (h) of this section, the procedures will be the exclusive procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section will be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section will, to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any

disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) Any examination, certification, or appointment;

(4) A removal taken under mandatory removal authority as defined in § 9901.712;

(5) Any subject not within the definition of *grievance* in § 9901.903 (e.g., the classification or pay of any position), except for an adverse action under applicable authority, including subpart G of this part, which is not otherwise excluded by paragraph (c) of this section; or

(6) A suspension or removal taken under 5 U.S.C. 7532.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9901.102(b)(1).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance

procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(3) Selection of the negotiated grievance procedure in no manner prejudices the right of an aggrieved party to request the Merit Systems Protection Board to review the final decision pursuant to 5 U.S.C. 7702 in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(f)(1) For appealable matters, except for mandatory removal offenses under § 9901.712, an aggrieved employee may raise the matter under an applicable appellate procedure or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under 5 U.S.C. 7701 or subpart H of this part is bound by the applicable provisions of this part.

(g)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (g)(1) of this section may elect not more than one of the procedures described in paragraph (g)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected will be made as set forth under paragraph (g)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

- (i) An appeal under 5 U.S.C. 7701 or under subpart H of this part;
- (ii) A negotiated grievance under this section; and
- (iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (g)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (g)(3)(ii) of this section if such employee has timely filed a grievance in writing in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (g)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

(h)(1) An employee may challenge a rating of record issued under subpart D of this part, through either the negotiated grievance procedure or an administrative reconsideration process under § 9901.409(h), but not both, so long as the rating of record has not been raised in connection with an appeal under the provisions of 5 U.S.C. 7701 or subpart H of this part. Once an employee raises an issue on his or her rating of record issue in an appeal under 5 U.S.C. 7701 or subpart H of this part, any pending grievance, arbitration, or request for administrative reconsideration under § 9901.409(h), will be dismissed with prejudice.

(2) Final decision authority in the negotiated grievance procedure may rest with—

(i) An independent arbitrator; or

(ii) A panel consisting of an independent arbitrator, a union representative, and a management representative.

(3) An arbitrator or panel may not conduct an independent evaluation of the employee's performance, determine the appropriate share payout, or otherwise substitute his or her judgment for that of the supervisor or pay pool panel.

(i) An arbitrator or panel hearing a matter under this subpart is bound by all applicable laws, rules, regulations, including applicable provisions of this part, issuances, and implementing issuances.

**§ 9901.923 Exceptions to arbitration awards.**

(a) Either party to arbitration under this subpart may file with the Board an exception to any arbitrator's award, except an award issued in connection with an appealable matter under § 9901.922(f) or matters similar to those covered under 5 U.S.C. 4303 and 7512 arising under other personnel systems, which will be adjudicated under procedures described in § 9901.807(g) and (h). Such procedures are adopted in this subpart for these purposes.

(b) In addition to the bases contained in 5 U.S.C. 7122, exceptions may also be filed by the parties based on the arbitrator's failure to properly consider the Department's national security mission or to comply with applicable issuances and implementing issuances. The Board may take such action concerning the award as is consistent with this subpart.

(c) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party will take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(d) Nothing in this section prevents the Board from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

**§ 9901.924 Official time.**

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart will be authorized official time for such purposes, including attendance at impasse proceedings, during the time the

employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, will be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the Board, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the Board will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, will be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

(e) Official time for representational activities will not extend to the representation of employees outside the representative's bargaining unit, except for multi-unit bargaining and/or bargaining above the level of recognition, in accordance with §§ 9901.918 and 9901.919 and mutual agreement of the agency and the exclusive representatives involved.

**§ 9901.925 Compilation and publication of data.**

(a) The Board will maintain a file of its proceedings.

(b) All files maintained under paragraph (a) of this section will be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The Board will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

**§ 9901.926 Regulations of the Board.**

The Department may issue initial interim rules for the operation of the Board and will consult with labor organizations granted national consultation rights on the rules. The Board will prescribe and publish rules for its operation in the *Federal Register*.

**§ 9901.927 Continuation of existing laws, recognitions, agreements, and procedures.**

(a) Except as otherwise provided by §§ 9901.905 or 9901.912, nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law, the regulations in this part and DoD or Component issuances between the Department or a Component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9901.102(b)(1).

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, in effect on the effective date of this subpart (as determined under § 9901.102(b)(1)), will remain in full force and effect until revised or revoked by the

President, or unless superseded by specific provisions of this subpart or by implementing issuances or decisions issued pursuant to this subpart.

**§ 9901.928 Savings provisions.**

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9901.102(b)(1). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.