

# Rules and Regulations

Federal Register

Vol. 71, No. 131

Monday, July 10, 2006

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

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 534

RIN 3206-AL01

#### Senior Executive Service Pay

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management is issuing final regulations to provide agencies with the authority to increase the rates of basic pay of certain members of the Senior Executive Service whose pay was set before the agency's senior executive performance appraisal system was certified for the calendar year involved. The final regulations allow an agency to review the rate of basic pay of these employees and provide an additional pay increase, if warranted, up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system for the current calendar year.

**DATES:** *Effective Date:* The final regulations will become effective on July 10, 2006.

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

**SUPPLEMENTARY INFORMATION:** On March 3, 2006, the Office of Personnel Management (OPM) issued proposed regulations to provide agencies with the authority to increase the rates of basic pay of certain members of the Senior Executive Service (SES) whose pay was set before the agency's senior executive performance appraisal system was certified under 5 CFR part 430, subpart D, for the calendar year involved (71 FR 10913). We proposed that agencies be authorized to review the rates of basic

pay set for these SES members and provide an additional pay increase, if warranted, up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system for the current calendar year. The additional pay increase would not be considered a pay adjustment for the purpose of applying 5 CFR 534.404(c) ("the 12-month rule").

The 30-day public comment period ended on April 3, 2006. During the public comment period, OPM received comments from eight Federal agencies and one association of Federal executives. All of the commenters fully support OPM's proposed regulations. Therefore, we are adopting the proposed regulations as final.

#### "Certification Gap"

Under the new SES performance-based pay system, an agency must set and adjust the rate of basic pay for an SES member on the basis of the employee's performance and/or contribution to the agency's performance, as determined by the agency through the administration of its performance management system(s) for senior executives. Under 5 U.S.C. 5382(b), the maximum rate of the SES rate range may not exceed the rate for level III of the Executive Schedule unless the agency's senior executive performance appraisal system is certified under 5 U.S.C. 5307(d). By law, such certification must be made on a calendar year basis. (See 5 U.S.C. 5307(d) and 5 CFR part 430, subpart D.) Therefore, an agency may not set or adjust pay for an SES member at a rate above the rate for level III until its senior executive performance appraisal system is certified for the calendar year involved. Since many agencies' senior executive performance appraisal systems are not certified at the beginning of a calendar year, there is a gap from the time an agency may set or adjust pay above level III (in the previous calendar year) to the time an agency may set or adjust pay above level III upon certification of its senior executive performance appraisal system (in the next calendar year).

The regulations at 5 CFR 534.404(e)(2) allow agencies that eventually receive certification of their senior executive performance appraisal system(s) to provide an additional pay increase to

certain SES members, such as a new appointee with superior leadership skills, an SES member accepting a position with substantially greater responsibility, or an SES member who is critical to the mission of the agency and who is likely to leave the agency. This is accomplished by providing for an additional exception to the "12-month rule."

The requirement in 5 U.S.C. 5307(d) that senior executive performance appraisal systems be certified on a calendar year basis may be changed only through legislation. Although the commenters fully support OPM's efforts to close the "certification gap," several recognized the need for a long-term solution and recommended a legislative change to allow senior executive performance appraisal systems to be certified on an annual basis (i.e., once every 12 months), rather than on a calendar year basis, as required by current law.

#### Effective Date

Under 5 CFR 534.404(e)(2), the decision to provide an additional pay increase to an SES member may not be made effective before the date the agency's senior executive performance appraisal system is certified under 5 CFR part 430, subpart D, or after December 31st of the calendar year for which the agency's system is certified. An agency asked whether the effective date for providing an additional pay increase would be the effective date of the final regulations or the date the agency's senior executive performance appraisal system is certified. If an agency's senior executive performance appraisal system is certified for calendar year 2006 before the final regulations become effective, the earliest date an agency may provide an additional pay increase would be the effective date of the final regulations. The agency has no authority to provide an additional pay increase until the final regulations become effective. However, if an agency's senior executive performance appraisal system is certified for calendar year 2006 after the final regulations become effective, the earliest date an agency may provide an additional pay increase would be the date the agency's senior executive performance appraisal system is certified.

## Regulatory Flexibility Act

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

### E.O. 12866, Regulatory Review

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

### List of Subjects in 5 CFR Part 534

Government Employees, Hospitals, Students, and Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is amending part 534 of title 5 of the Code of Federal Regulations as follows:

## PART 534—PAY UNDER OTHER SYSTEMS

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

■ 1. The authority citation for part 534 continues to read as follows:

**Authority:** 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125 of the National Defense Authorization Act for FY 2004, Public Law 108–136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207).

■ 2. In § 534.404, redesignate paragraphs (c)(3)(v) and (vi) as (c)(3)(vi) and (vii), respectively, add new paragraph (c)(3)(v), and revise paragraph (e) to read as follows:

#### § 534.404 Setting and adjusting pay for senior executives.

\* \* \* \* \*

(c) 12-month rule. \* \* \*

(3) \* \* \*

(v) A determination to provide an additional pay increase under paragraph (e)(2) of this section when an agency's senior executive performance appraisal system is certified under 5 CFR part 430, subpart D, after the beginning of a calendar year;

\* \* \* \* \*

(e) *Adjustments in pay after certification of applicable performance appraisal system.*

(1) In the case of an agency that obtains certification of a performance appraisal system for senior executives under 5 CFR part 430, subpart D, an authorized agency official may increase a covered senior executive's rate of basic pay up to the rate for level II of the Executive Schedule, consistent with the

limitations in § 534.403(a)(3). The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and if the senior executive is otherwise eligible for such an increase (i.e., he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). An adjustment in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(2) In the case of an agency that was prevented from establishing or adjusting a rate of basic pay above the rate for level III of the Executive Schedule for an individual upon initial appointment to the SES under § 534.404(a) or for a current SES member using one of the exceptions to the 12-month rule in § 534.404(c)(4)(i), (ii), or (iii) because the agency had not yet obtained certification of its performance appraisal system for senior executives under 5 CFR part 430, subpart D, in the current calendar year, an authorized agency official may increase such a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system, consistent with the limitations in § 534.403(a)(3). The authorized agency official may review the previous determination to set or adjust the pay of a senior executive to determine whether, and to what extent, an additional pay increase may be warranted based on the same criteria used for the previous determination. The determination to provide an additional pay increase may not be made effective before the date the agency's senior executive performance appraisal system is certified under 5 CFR part 430, subpart D, or after December 31st of the calendar year for which the agency's system is certified. An adjustment in pay made under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c) and does not begin a new 12-month period for that purpose.

[FR Doc. E6–10750 Filed 7–7–06; 8:45 am]

BILLING CODE 6325–39–P

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1031

#### Commission Involvement in Voluntary Standards

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission (CPSC or Commission) is revising its regulations governing the Commission's involvement in voluntary standards activities. The revisions more accurately reflect current Commission practices and strengthen oversight of staff involvement in standards making activities. The revisions also codify existing procedures for internet disclosure and public comment regarding standards activities in which Commission staff is actively involved.<sup>1</sup>

**EFFECTIVE DATE:** July 10, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Barbara Parisi, Office of the General Counsel, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814; telephone (301) 504–7879; [bparisi@cpsc.gov](mailto:bparisi@cpsc.gov).

**SUPPLEMENTARY INFORMATION:** Since this rule relates solely to rules of agency organization, procedure and practice, pursuant to 5 U.S.C. 553(b) notice and other public procedures are not required. The rule is effective immediately upon publication in the **Federal Register**. Further, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612, and, thus, is exempt from the provisions of the Act.

#### Background

Congress enacted the Consumer Product Safety Act (CPSA) in 1972, codified at 15 U.S.C. 2051, *et seq.*, to protect consumers against unreasonable risks of injury associated with consumer products. In furtherance of that goal, Congress established the Consumer Product Safety Commission (CPSC or Commission) as an independent regulatory agency, and granted it broad authority to promulgate mandatory safety standards for consumer products as a necessary alternative to industry self-regulation. 15 U.S.C. 2056(a)(1)(A). As initially enacted, the CPSA did not contain any language referring to voluntary standards.

In 1978, the Commission issued regulations describing the extent and form of Commission involvement in the development of voluntary standards, 43 FR 19216, 16 CFR part 1032—Commission Involvement in Voluntary Standards Activities. In the Background section, the Commission acknowledged the contribution which voluntary standards had made to reducing hazards associated with consumer products, and stated that it supported an effective

<sup>1</sup> Chairman Hal Stratton filed a statement which is available from the Office of the Secretary or on the Commission's Web site at <http://www.cpsc.gov>.