

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 535

RIN 3206-AK87

#### Critical Position Pay Authority

**AGENCY:** Office of Personnel Management.

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

**SUMMARY:** The Office of Personnel Management (OPM) is proposing new regulations to govern the use of a critical position pay authority that allows higher rates of pay for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to the agency's mission. By law, agency requests for critical position pay authority must be approved by OPM in consultation with the Office of Management and Budget.

**DATES:** Submit comments on or before June 25, 2007.

**ADDRESSES:** Send or deliver written comments to Charles D. Grimes III, Deputy Associate Director for Performance Management and Pay Systems Design, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; FAX: (202) 606-4264; or e-mail: [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Joe Ratcliffe, (202) 606-2838; FAX: (202) 606-4264; or e-mail: [pay-performance-policy@opm.gov](mailto:pay-performance-policy@opm.gov).

**SUPPLEMENTARY INFORMATION:** Section 5377 of title 5, United States Code, as revised by section 102 of the Federal Workforce Flexibility Act of 2004 (Public Law 108-411, October 30, 2004), authorizes the Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), to grant authority to an agency to fix the rate of basic pay for one or more positions that are designated as critical positions.

Section 102 shifts responsibility for the critical position pay authority from OMB to OPM to encourage increased application of this underutilized flexibility as a means of attracting talented individuals to critical positions in the Federal Government who would not otherwise accept or stay in Government jobs at lower rates of pay. As the agency charged with assisting the executive branch to meet its growing human capital demands, OPM currently works directly with other agencies to ensure that they use the broad range of existing human resources management tools strategically to recruit, retain, and manage a high-performing workforce.

Under the critical position pay authority, OPM may, upon the request of the head of an agency, grant critical position pay authority for positions that require a very high level of expertise in a scientific, technical, professional, or administrative field and are critical to the accomplishment of the agency's mission. Critical position pay authority may be granted only to the extent necessary to recruit or retain an individual exceptionally well-qualified for a critical position.

Approval of critical position pay authority for a position does not change conditions of employment other than the rate of basic pay. For example, employees who receive critical position pay still remain under their normal pay plan, may still receive applicable performance awards; cash awards; recruitment, retention, and relocation incentives; and other similar payments; and remain subject to the applicable aggregate limitation on pay. However, employees receiving critical position pay may not receive locality pay under 5 U.S.C. 5304 or similar authority. Agencies with employees under the critical position pay authority must use the pay rate determinant code "C" for covered employees in submissions to the Central Personnel Data File.

Guidance on submitting requests for critical position pay authority was published in OMB Bulletin No. 91-09, March 7, 1991. These proposed regulations would generally continue the policies and procedures established by OMB, but critical position pay would not be limited to positions classified above GS-15. A general summary of the proposed regulations is as follows:

- The head of an agency would request critical position pay authority

by sending a written request and supporting documentation to the Director of OPM. Requests would be prepared in accordance with § 535.104.

- Heads of agencies with approved critical position pay authority would be authorized to set the rate of basic pay for a critical position up to the rate for level II of the Executive Schedule (\$168,000 in 2007) without further approval.

- In exceptional circumstances, the head of an agency could seek approval for critical position pay authority up to the rate for level I of the Executive Schedule (\$186,600 in 2007), based on information and data that justify the higher rate of pay.

- In rare circumstances, the head of an agency could seek approval for critical position pay authority at a rate higher than the rate for level I of the Executive Schedule with approval by the President based on information and data that justify the higher rate of pay.

- After establishing a critical position pay rate, the head of an agency would have authority to make subsequent pay adjustments, up to the authorized maximum rate of pay. However, the employee must have at least a rating of Fully Successful or equivalent, and subsequent adjustments must be based on labor market factors, recruitment and retention needs, and individual accomplishments and contributions to an agency's mission.

- A critical position pay rate would be a rate of basic pay for most purposes.

- Critical position pay authority could be granted to one or more specific positions at an agency.

- The law requires that OPM submit an annual report to Congress on the use of the critical position pay authority. To produce this report, agencies using the critical position pay authority would submit to OPM by January 31 of each year the information described in § 535.107. The agency would be required to report with respect to each covered position whether the critical position pay authority is still needed.

- Agencies granted critical position pay authority could continue to use the authority as long as it is needed. OPM would monitor agencies' use of critical position pay authorities through annual reports and could terminate the authority associated with any given position if, in OPM's judgment in consultation with OMB, the authority is no longer needed.

**Executive Order 12866, Regulatory Review**

The Office of Management and Budget has reviewed this rule in accordance with Executive Order 12866.

**Regulatory Flexibility Act**

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

**List of Subjects in 5 CFR Part 535**

Government employees, Wages.

Office of Personnel Management.

Linda M. Springer,

Director.

Accordingly, OPM is proposing to amend title 5, Code of Federal Regulations, by adding a new part 535 as follows:

**PART 535—CRITICAL POSITION PAY AUTHORITY**

Sec.

- 535.101 Purpose.
- 535.102 Definitions.
- 535.103 Authority.
- 535.104 Requests for and granting critical position pay authority.
- 535.105 Setting and adjusting rates of basic pay.
- 535.106 Treatment as a rate of basic pay.
- 535.107 Annual reporting requirements.

**Authority:** 5 U.S.C. 5377; E.O. 13415, 71 FR 70641.

**§ 535.101 Purpose.**

The purpose of this part is to provide a regulatory framework for the critical position pay authority authorized by 5 U.S.C. 5377. The Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions under this part.

**§ 535.102 Definitions.**

(a) *Agency* has the meaning given that term in 5 U.S.C. 5102.

(b) *Employee* means an employee (as defined in 5 U.S.C. 2105) in or under an agency.

(c) *Head of an agency* means the agency head or an official who has been delegated the authority to act for the agency head in the matter concerned.

(d) *Critical position* means a position for which OPM has granted authority to the head of an agency to exercise the pay-setting authority provided in 5 U.S.C. 5377.

(e) *Critical position pay authority* means the authority that may be granted to the head of an agency by OPM under

5 U.S.C. 5377 to set the rate of basic pay for a given critical position under the provisions of that section.

(f) *Critical position pay rate* means the specific rate of pay established by the head of an agency for an employee in a critical position based upon the exercise of the critical position pay authority. A critical position pay rate is a rate of basic pay to the extent provided in § 535.106.

**§ 535.103 Authority.**

(a) Subject to a grant of authority from OPM in consultation with OMB and all other requirements in this part, the head of an agency may fix the rate of basic pay for a critical position at a rate not less than the rate of basic pay that would otherwise be payable for the position, but not greater than—

(1) The rate payable for level II of the Executive Schedule (unless paragraph (a)(2) or (a)(3) applies);

(2) The rate payable for level I of the Executive Schedule in exceptional circumstances based on information and data that justify a rate higher than the rate payable for level II of the Executive Schedule; or

(3) A rate in excess of the rate for level I of the Executive Schedule that is established in rare circumstances with the written approval of the President.

(b) The head of an agency may exercise his or her critical position pay authority only—

(1) When such a position requires expertise of an extremely high level in a scientific, technical, professional, or administrative field and is critical to the agency's successful accomplishment of an important mission; and

(2) To the extent necessary to recruit or retain an individual exceptionally well-qualified for the critical position.

(c) If critical position pay authority is granted for a position, the head of an agency may determine whether it is appropriate to exercise the authority with respect to any proposed appointee or incumbent of the position.

(d) An agency granted critical position pay authority may continue to use the authority for an authorized position as long as needed. OPM will monitor the use of critical position pay authorities annually, through the agency's required reports under § 535.107, and will terminate the authority associated with a given position after notifying the agency if, in OPM's judgment in consultation with OMB, the authority is no longer needed.

**§ 535.104 Requests for and granting critical position pay authority.**

(a) An agency may request critical position pay authority only after

determining that the position in question cannot be filled with an exceptionally well-qualified individual through the use of other available human resources flexibilities and pay authorities. Agency requests must include the information in paragraph (d) of this subsection. OPM, in consultation with OMB, will review agency requests. OPM will advise the requesting agency as to whether the request is approved and when the agency's critical position pay authority becomes effective.

(b) A request for critical position pay authority (or authorities) must be signed by the head of an agency and submitted to OPM. Requests covering multiple positions must include a list of the positions in priority order. The head of an agency may request coverage of positions of a type not listed in 5 U.S.C. 5377(a)(2), as authorized by 5 U.S.C. 5377(i)(2) and Executive Order 13415.

(c) Requests for critical position pay authority to set pay above the rate for level II of the Executive Schedule and up to the rate for level I of the Executive Schedule because of exceptional circumstances require information and data that justify the higher pay. Requests for critical position pay authority to set pay above the rate for level I of the Executive Schedule due to rare circumstances require approval by the President. The head of an agency must submit such requests to OPM with the information required in paragraph (d) of this section. If OPM, in consultation with OMB, concurs with a request to set pay above the rate for level I of the Executive Schedule, OPM will seek the President's approval.

(d) At a minimum, all requests for critical position pay authority must include:

- (1) Position title;
- (2) Position appointment authority (for Senior Executive Service positions, appointment authority for any incumbent);
- (3) Pay plan and grade/level;
- (4) Occupational series of the position;
- (5) Geographic location of the position;
- (6) Current salary of the position or incumbent;
- (7) Name of incumbent (or "Vacant");
- (8) Length of time the incumbent has been in the position or length of time the position has been vacant;
- (9) A written evaluation of the need to designate the position as critical. Such an evaluation must include—
  - (i) The kinds of work required by the position and the context within which it operates;
  - (ii) The range of positions and qualification requirements that

characterize the occupational field, including those that require extremely high levels of expertise;

(iii) The rates of pay reasonably and generally required in the public and private sectors for similar positions; and

(iv) The availability of individuals who possess the qualifications to do the work required by the position;

(10) Documentation, with appropriate supporting data, of the agency's experience and, as appropriate, the experience of other organizations, in efforts to recruit or retain exceptionally well-qualified individuals for the position or for a position sufficiently similar with respect to the occupational field, required qualifications, and other pertinent factors, to provide a reliable comparison;

(11) Assessment of why the agency could not, through diligent and comprehensive recruitment efforts and without using the critical position pay authority, fill the position within a reasonable period with an individual who could perform the duties and responsibilities in a manner sufficient to fulfill the agency's mission. This assessment must include a justification as to why the agency could not, as an effective alternative, use other human resources flexibilities and pay authorities, such as recruitment, retention, and relocation incentives under 5 CFR part 575;

(12) An explanation regarding why the position should be designated a critical position and made eligible for a higher rate of pay under this part within its organizational context (*i.e.*, relative to other positions in the organization) and, when applicable, how it compares with other critical positions in the agency. The agency must include an explanation of how it will deal with perceived inequities among agency employees (*e.g.*, situations in which employees in positions designated as critical would receive higher rates of pay than their peers, supervisors, or other employees in positions with higher-level duties and responsibilities);

(13) Documentation of the effect on the successful accomplishment of important agency missions if the position is not designated as a critical position;

(14) Any additional information the agency may deem appropriate to demonstrate that higher pay is needed to recruit or retain an employee for a critical position;

(15) Unless the position is an Executive Schedule position, a copy of the position description and qualification standard for the critical position; and

(16) The desired rate of basic pay for requests to set pay above the rate for level II of the Executive Schedule and justification to show that such a rate is necessary to recruit and retain an individual exceptionally well-qualified for the critical position.

**§ 535.105 Setting and adjusting rates of basic pay.**

(a) The rate of basic pay for a critical position may not be less than the rate of basic pay, including any locality-based comparability payments established under 5 U.S.C. 5304 (or similar geographic adjustment or supplement under other legal authority) that would otherwise be payable for the position.

(b) If critical position pay authority is granted for a position, the head of an agency may set pay initially at any amount up to the rate of pay for level II or level I of the Executive Schedule, as applicable, without further approval unless a higher maximum rate is approved by the President under § 535.104(c).

(c) The head of an agency may make subsequent adjustments in the rate of pay for a critical position each January at the same time general pay adjustments are authorized for Executive Schedule employees under section 5318 of title 5, United States Code. Such adjustments may not exceed the new rate for Executive Schedule level II or other applicable maximum established for the critical position. However, the employee must have at least a rating of Fully Successful or equivalent, and subsequent adjustments must be based on labor market factors, recruitment and retention needs, and individual accomplishments and contributions to an agency's mission.

(d) Employees receiving critical position pay are not entitled to locality-based comparability payments established under 5 U.S.C. 5304 or similar geographic adjustments or supplements under other provision of law.

(e) If an agency discontinues critical position pay for a given position (on its own initiative or because OPM, in consultation with OMB, terminates the authority under § 535.103(d)), the employee's rate of basic pay will be set at the rate to which the employee would be entitled had he or she not received critical pay, as determined by the head of the agency.

**§ 535.106 Treatment as rate of basic pay.**

A critical position pay rate is considered a rate of basic pay for all purposes except—

(a) Application of any saved pay or pay retention provisions (*e.g.*, 5 U.S.C. 5363); or

(b) Application of any adverse action provisions (*e.g.*, 5 U.S.C. 7512).

**§ 535.107 Annual reporting requirements.**

(a) OPM must submit an annual report to Congress on the use of the critical position pay authority. Agencies must submit the following information to OPM by January 31 of each year on their use of critical position pay authority for the previous calendar year:

(1) The name, title, pay plan, and grade/level of each employee receiving a higher rate of basic pay under this subpart;

(2) The annual rate or rates of basic pay paid in the preceding calendar year to each employee in a critical position;

(3) The beginning and ending dates of such rate(s) of basic pay, as applicable;

(4) The rate or rates of basic pay that would have been paid but for the grant of critical position pay. This includes what the rate or rates of basic pay were, or would have been, without critical position pay at the time critical position pay is initially exercised and any subsequent adjustments to basic pay that would have been made if critical position pay authority had not been exercised (estimate rates where a range would apply, such as for Senior Executive Service positions); and

(5) Whether the authority is still needed for the critical position(s).

(b) [Reserved]

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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 204, 214, and 299**

[CIS No. 2302-05; DHS Docket No. USCIS-2005-0030]

RIN 1615-AA16

**Special Immigrant and Nonimmigrant Religious Workers**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend U.S. Citizenship and Immigration Services (USCIS) regulations regarding the special immigrant and nonimmigrant religious worker visa classifications. This rule addresses concerns about the integrity of the religious worker program by proposing a petition requirement for religious organizations seeking to classify an