

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 Parts 302, 332, and 337

[Docket ID: OPM–2023–0015]

RIN 3206–AN80

Recruitment and Selection Through Competitive Examination, and Employment in the Excepted Service (Rule of Many)

AGENCY: Office of Personnel Management.

ACTION: Proposed rule; request for comments.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations to implement changes authorized by the National Defense Authorization Act (NDAA) for Fiscal Year 2019 governing the selection of candidates from competitive lists of those who are eligible. These changes will provide expanded flexibility to agencies in the selection of candidates under delegated examining procedures. These changes also affect how agencies select candidates for excepted service appointments.

DATES: Comments must be received on or before September 19, 2023.

ADDRESSES: You may submit comments, identified by Regulation Identification Number (RIN) “3206–AN80” using any of the following methods:

Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identification Number (RIN) for this rulemaking.

Email: employ@opm.gov. Include “RIN 3206–AN80, Recruitment and Selection” in the subject line of the message.

Fax: (202) 606–4430.

Mail: Kimberly A. Holden, Deputy Associate Director for Talent Acquisition, Classification, and

Veterans Programs, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW, Washington, DC 20415–9700.

FOR FURTHER INFORMATION CONTACT: Roseanna Ciarlante by telephone at (202) 936–3282 or Katika Floyd by telephone at (202) 606–0960; by email at employ@opm.gov; by fax at (202) 606–4430; or by TTY at (202) 418–3134.

SUPPLEMENTARY INFORMATION:

Background

The proposed rule is written for the immediate audience of Federal agency human resources practitioners and Federal agency hiring officials, who will implement the rules. For reference, many of the terms and concepts used and referenced below are defined in OPM’s *Delegated Examining Operations Handbook* (DEOH), and its appendices, available at <https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo-handbook.pdf>. The DEOH handbook also provides additional context.

The Federal civilian workforce consists of three categories of service: the competitive service, the excepted service, and the Senior Executive Service. The main differences between the three classes of service are: the manner in which candidates apply and are selected for jobs, the qualifications of the position being filled, the opportunity for appointees to move within or between the three classes of Federal service, and the rights governing appeal and redress options for incumbents of these positions. Each class of service (and its particular employment system(s)) is governed by different laws and regulations.

The competitive service consists of all civil service positions in the executive branch of the Federal Government with some exceptions, which are defined in section 2102 of title 5, United States Code (U.S.C.). Four categories of appointments comprise the competitive service: those subject to delegated examining procedures; those filled through promotion and internal placement (*i.e.*, merit promotion) procedures in accordance with 5 Code of Federal Regulations (CFR) part 335; those filled on a non-competitive basis in accordance with 5 CFR part 315 subparts F and G; and those filled under direct hire authority in accordance with 5 CFR part 337 subpart B. These

proposed regulations impact positions filled in the competitive service using delegated examining procedures.

The Director of OPM has delegated to agency heads the authority delegated to the Director by the President to conduct competitive examinations for positions in the competitive service. [5 U.S.C. 1104]. Each agency with this delegated authority is required to enter into a written agreement with OPM. Agencies with delegated examining authority may fill competitive civil service jobs with applicants from outside the Federal workforce; Federal employees who do not have competitive service status (*i.e.*, temporary or term employees, and individuals who hold or held an excepted service position which did not provide for conversion to the competitive service); or Federal employees with competitive service status (*i.e.*, career or career-conditional employees).

Agencies use delegated examining (also called “competitive examining”) procedures to fill positions in the competitive service for which any U.S. citizen may apply. Competitive examining supports Federal merit system principles by promoting recruitment from all segments of society, fair and open competition among job-seekers, and selection based on an applicant’s competencies or knowledge, skills, and abilities. OPM maintains oversight of its delegated examining authority to ensure agencies apply their delegated authority in accordance with the merit system principles in 5 U.S.C. 2301.

There are three stages to the competitive service Federal hiring process: the assessment process (*i.e.*, the rating and ranking of applicants and application of veterans’ preference); the certification process (*i.e.*, the process through which applicants are listed on a certificate of eligible candidates (“certificate of eligibles”) in order of their assessed scores, adjusted for veterans’ preference); and the selection process (*i.e.*, the process for choosing among applicants based on their numerical rankings in accordance with veterans’ preference requirements).

Filling Jobs in the Competitive Service

Rule of Three

For readers not familiar with delegated examining, traditionally, applicants for Federal jobs in the

competitive service are assigned numerical scores (including veterans' preference points, if applicable, for preference eligible veterans), listed in rank-order, and considered for selection based on the "rule of three." The rule of three requires that each selection must be made from among the highest three candidates on the certificate with the condition that a hiring official cannot select a non-preference eligible candidate over a preference eligible veteran (*i.e.*, an individual who served in the U.S. Armed Forces, or a relative of the individual, and meets certain statutory criteria, making the individual eligible for an advantage in Federal hiring over those who did not serve or do not meet the statutory criteria) with an equal or higher ranking, unless the agency follows the procedures for formally passing over or objecting to the preference eligible veteran. Under the rule of three, preference eligible candidates (or "eligibles") are given 0, 5, or 10 points, which are added to their passing score on an assessment. Individuals with 0 points added still have an advantage over non-preference eligible candidates with an equal or lower score. [5 U.S.C. 3318(a); 5 CFR part 332]. Numerical ranking is appropriate when a hiring agency needs to make granular distinctions between applicants; *i.e.*, an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than an applicant with a score of 96 or lower.

Category Rating

On June 15, 2004, OPM issued final regulations which provided agencies with increased flexibility in assessing applicants using alternative (category-based) rating and selection procedures rather than individual numerical ratings. This flexibility is known as "category rating" (see 5 CFR part 337, subpart C). Under category rating procedures, in lieu of numerical ranking, applicants are assessed and placed into two or more pre-defined quality categories, with preference eligible veterans listed above non-preference eligible veterans in each category to which the applicants are assessed. Veterans who have a compensable service-connected disability of at least 10 percent must be listed in the highest quality category, except when the position being filled is scientific or professional at the GS-9 grade level or higher. Hiring officials may select from applicants in the highest quality category provided that any preference eligible veteran must be considered before a non-preference eligible applicant. A hiring official cannot select a non-preference eligible

veteran over a preference eligible veteran without going through the formal procedures for passing over or objecting to the preference eligible veteran. [5 U.S.C. 3319; 5 CFR part 337, subpart C.] Category rating is appropriate when the hiring agency does not need to make such fine distinctions among applicants as is made using numerical ranking procedures (*i.e.*, all applicants placed in a particular category are deemed equally qualified). Category rating gives selecting officials potentially more applicants to choose from because all applicants in a given category are equally qualified: hiring officials are not limited to selecting from only the three highest rated applicants.

Filling Jobs in the Excepted Service

By definition, the excepted service consists of those civil service positions which have been excepted from certain requirements of the competitive service or the Senior Executive Service. [5 U.S.C. 2103]. Positions may be excepted from title 5 U.S.C. entirely, or from limited portions of title 5 U.S.C., *e.g.*, excepted from public notice or selection requirements, or from classification and pay otherwise required in accordance with 5 U.S.C. chapter 51. The reasons for and scope of the exceptions vary, depending on the circumstances surrounding the exception and the authority for the exception.

When filling a position in the excepted service, the hiring agency must follow the procedures in 5 CFR parts 213 and 302. Under these provisions, agencies have more flexibility when assessing, rating and ranking, and selecting eligible applicants than they do under competitive examining. Agencies can:

- Use a numerical ranking procedure similar to the rule of three,
- Place eligible applicants into preference categories based on their veterans' preference status (*i.e.*, in descending order from 30 percent or more disabled veterans (CPS); disabled veterans with at least a 10 percent but less than 30 percent disability (CP); less than 10 percent disabled veterans (XP); eligible parents and widows and widowers of a disabled veteran or a veteran killed on active duty (XP-derived); veterans who served during certain periods specified in statute or by the President or who received an armed forces expeditionary medal (TP); and sole survivor veterans pursuant to the Hubbard Act (SSP));¹ or

¹ Veterans' preference codes, *e.g.*, "TP," are a shorthand reference used in competitive examinations. Veteran's preference is recognized by

- Use an agency-developed method that provides preference-eligible veterans with at least as much preference as they would receive under the other two methods. Agencies oftentimes use their competitive service category rating process in conjunction with this last option.

Introduction

The NDAA for Fiscal Year 2019 (or "the Act") authorizes changes governing the selection of candidates from competitive lists of those who are eligible. Such lists are also known as delegated examining certificates. The Act eliminates the "rule of three" in numerical rating and ranking, which required that, for each selection, consideration was limited to the top three candidates on the certificate. Instead, the Act authorizes agencies to certify a "sufficient number" of names, not less than three, from the top of the appropriate register or list of eligible candidates, to be considered for selection, using a cut-off score² or other mechanism established by OPM (described below), known as the "rule of many." The Act also affects how agencies may make selections under 5 CFR part 302, Employment in the Excepted Service.

The proposed rule, called the "rule of many," encompasses the advantages of both "rule of three" and category rating procedures, allowing the hiring agency to make finer distinctions among applicants based on their relative qualifications for the position being filled, while at the same time expanding the range of candidates from which a hiring manager may make a selection. Under the rule of many, a hiring manager is not limited to choosing from among only the three highest applicants to fill each vacancy.

The Act does not change other requirements of delegated examining including public notice and the application of veterans' preference in competitive examining—veterans are still granted preference points under "rule of many" numerical rating procedures and continue to be entitled to selection preference over non-

adding points to the veteran's numerical score. CPS-10 point 30 percent or more disabled veteran; CP-10 point at least 10 percent disabled, but less than 30 percent, disabled veteran; XP-10 point other disabled veteran and those with derived preference; TP-5 point preference; SSP-0-point sole survivorship preference; and NV-non-veteran/non-preference.

² A cut-off score is an established score used to filter out unqualified candidates on any particular test or assessment. For purposes of this proposed rule, a cut-off score is used to reflect a sub-group of qualified applicants who demonstrated, through the assessment, they are highly qualified and can be successful in the position.

preference eligible candidates with the same or a lower numerical score unless the requirements for passing over a preference eligible are satisfied.

Certification Procedures Using Numerical Rating

The Act requires OPM to prescribe regulations for the administration of the “rule of many” numerical rating procedure, which may include cut-off scores. In considering the types of mechanisms that may be appropriate for this use, OPM reviewed candidate assessment and referral procedures when using rank-ordered selection³ under competitive examining. OPM identified four approaches that can be reasonably and practically incorporated into existing processes. OPM proposes that agencies use one of the following ways for determining the number of applicants referred for selection:

1. A cut-off score based on the assessment(s)⁴ used, supported by job analysis data. This referral mechanism involves establishing a cut-off, or minimum, score using test measurement experts knowledgeable about the assessment(s) used. This score should reflect a sub-group of qualified applicants who demonstrated, through the assessment, that they are highly qualified and can be successful in the position.

2. A cut-off score based on business necessity; for example, to keep the number of applicants manageable for costly or labor-intensive assessments such as structured interviews. This way of referring applicants involves establishing a cut-off, or minimum, score that results in identifying an appropriate number of applicants to move forward in the hiring process based on the business needs of the agency, taking into consideration the resources available. This mechanism is also useful when test measurement expertise is not available.

3. A set number of the highest ranked eligible applicants, for example, the top 10 names. This referral mechanism involves establishing a number of applicants to refer from the top of the ranked list of applicants.

4. A percentage of the highest ranked eligible applicants; for example, the top 10 percent will be referred for selection. This referral mechanism involves establishing a percentage of applicants

to refer from the top of the ranked list of applicants.

When using a set number of applicants or top percentage of eligible applicants, all applicants with the same score as the last applicant in the cut will also be referred. For example, if using the top 10 eligible applicants and the 10th applicant has a score of 96.0, then all applicants scoring 96.0 will be referred.

In selecting an appropriate mechanism, agencies should consider the number of positions to be filled, the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action. Agencies should document their decision-making in the case files sufficient to allow for reconstruction or third-party review of the decision. This should include the data and factors used in making the decision.

Each agency may choose which methodology it will use to certify a sufficient number of candidates to allow them to consider at least three candidates for each vacancy. The hiring agency must decide the approach, or mechanism, it will use before announcing the vacancy and must identify the methodology in the job opportunity announcement. Additionally, the approach used must be clearly documented in the examining case file and available for reconstruction or third-party review. OPM is proposing to amend 5 CFR 332.402 to include these requirements.

Under this proposal, eligible applicants are ranked in score order, including veterans’ preference points, with veterans’ preference breaking ties in scores, and then the previously-chosen mechanism is applied to create the certificate of eligibles. For example, a preference eligible with a rating of 98XP (10-point veteran)⁵ is listed ahead of a preference eligible with 98TP (5-point veteran). Similarly, a preference eligible with a rating of 98TP is listed ahead of a non-preference eligible with a score of 98NV (non-veteran/non-preference veteran). Compensably disabled preference eligibles (CPS and CP veterans)⁶ go to the top of the certificate of eligibles, regardless of numerical rating and ahead of all other eligibles, except when certifying for scientific and professional positions⁷ at

the GS–9 grade level and above in accordance with 5 U.S.C. 3313.

Using the rule of many procedures will occur as the final step before certification. Applicants will have already applied, been reviewed and assessed for qualifications, assessed for rating and ranking purposes and have a final rating. If a pass/fail assessment(s) is used, any applicant who fails to meet the passing grade of an assessment is no longer eligible, including those with priority or preference, and, therefore, will not be certified or referred for selection consideration.

It should be noted that delegated examining certificates issued under rule of many procedures may be shared with other agencies consistent with the Competitive Service Act requirements. See 83 FR 5335.

Selection Procedures Using Numerical Rating

As provided in 5 U.S.C. 3318(a), OPM is proposing to revise 5 CFR 332.404 to change selection procedures from requiring that each selection must be made from the top three candidates (the “rule of three”) to state that a selecting official may select any eligible candidate on the certificate of eligibles. However, under delegated examining rules, a selecting official may not pass over a preference eligible veteran to select a lower ranked non-preference eligible on the certificate unless there are reasons for passing over the preference eligible and the agency has complied with the pass-over procedures at 5 U.S.C. 3318(c). OPM notes that the “three consideration rule” at 5 CFR 332.405 may be used to remove an eligible candidate (to include preference eligibles) from the certificate who has received three bona fide considerations, as described in the next section.

The following is an example of a certificate of eligibles ranked by numerical ratings and veterans’ preference under the proposed rule of many. In this example, the agency established a cut-off score of 95.0 based on the assessment used for the position. Candidates with the same score are ranked in veterans’ preference order.⁸

K of the *Delegated Examining Operations Handbook*.

⁸ CPS–10 point 30 percent or more disabled veteran and CP–10 point at least 10 percent disabled, but less than 30 percent, disabled veteran; XP–10 point other disabled veteran and those with derived preference; TP–5 point preference; SSP–0 point sole survivorship preference; and NV–non-veteran/non-preference.

³ Rank-order selection ranks applicants from highest score to lowest score based on their assessment results including veterans’ preference points, and selections occur on a top-down basis.

⁴ A sample of the most common assessment tools used in the Federal Government may be found in chapter 2 of the *Delegated Examining Operations Handbook*.

⁵ See note 1, above, for an explanation of veterans preference codes.

⁶ See note 1, above, for an explanation of veterans preference codes.

⁷ Professional and scientific positions are identified in the OPM publication *Handbook of Occupational Groups and Families*. For a list of professional and scientific positions, see Appendix

CERTIFICATE OF ELIGIBLES

| Candidate | Score/ veterans' preference (VP) | Action |
|-----------|---|--------|
| 1 | 98.0 TP. | |
| 2 | 96.0 XP. | |
| 3 | 96.0 NV. | |
| 4 | 95.0 TP. | |
| 5 | 95.0 TP. | |
| 6 | 95.0 NV. | |

In this example, 6 candidates are eligible for consideration on the certificate of eligibles. Any of the 4 preference eligible candidates (candidates 1, 2, 4, or 5) may be selected. Under the rule of many procedures, the agency is not limited to considering the top three candidates, nor does the agency have to consider candidates in groups of three. The two non-preference eligibles may not be selected without satisfying pass-over requirements while there are higher ranked veterans' preference candidates available on the certificate. If the agency is filling multiple positions, a possible scenario may look like the below certificate where the first preference eligible declined and the second was selected:

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|---------------|-----------|
| 1 | 98.0 TP | Declined. |
| 2 | 96.0 XP | Selected. |
| 3 | 96.0 NV. | |
| 4 | 95.0 TP. | |
| 5 | 95.0 TP. | |
| 6 | 95.0 NV. | |

For the next vacancy, using the example above, the agency may select candidate 3, 4, or 5. The first non-preference candidate, number 3, may be selected now that there are no available veterans' preference candidates ranked above them on the list. Candidate 6 may not be selected because there are available veterans' preference candidates ranked above candidate 6.

It should be noted that a certificate does not have to be worked from the top down. In this example, any of the preference eligible candidates may be selected. The fifth candidate, a 5-point preference eligible, may have been selected first.

In another example, below, based on the ranked certificate, an agency may select from among any of the top 5 candidates. The top three non-preference eligibles are within reach, or legally eligible, for selection because there are no higher ranked veterans' preference candidates.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|--------|
| 1 | 98.0 NV. | |
| 2 | 96.0 NV. | |
| 3 | 96.0 NV. | |
| 4 | 95.0 TP. | |
| 5 | 95.0 TP. | |
| 6 | 95.0 NV. | |

Three Bona Fide Considerations

The Act codifies at 5 U.S.C. 3318(e) the long-standing practice under 5 CFR 332.405 of applying the "three consideration rule" under numerical rating and ranking selection procedures, whereby, if an appointing officer considers a candidate three times for three separate appointments from the same or different certificates for the same position⁹ and makes a valid (legal) selection of another candidate each time, the appointing officer may remove that candidate from further consideration. As stated above, the Act also retains the pass-over rule, which imposes certain requirements when an appointing authority proposes to pass over a preference eligible in favor of a lower ranked non-preference eligible.

A pass-over must be based on proper and adequate reasons. The *Delegated Examining Operations Handbook* provides information on proper and adequate reasons. When substantiated by documentation supporting the conclusion that one of the adequate and proper reasons has been demonstrated, the eligible is either not qualified or not suitable for the job and may be removed from consideration. Agencies with delegated examining authority have the authority to make a determination on most types of pass-overs. However, it should be noted that OPM retains exclusive authority to:

- Make medical determinations pertaining to preference eligibles (5 CFR part 339);
- Grant or deny an agency's pass-over request of a preference eligible with a compensable service connected disability of 30 percent or more (5 U.S.C. 3318); and
- Make suitability determinations involving material, intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony as required by 5 CFR 731.103(a).

This proposed rule is not intended to affect an agency's obligation under 5 U.S.C. 3317 to notify a preference eligible of the eligible's removal from a standing register based on being

⁹ In this context, the same position means the same title, series, and grade level or equivalent.

considered and passed over for appointment three times.

Additionally, OPM proposes that the three consideration rule does not always apply in cases of filling positions restricted to preference eligibles. Such positions include guards, elevator operators, messengers, and custodians (including housekeeping aides). [5 U.S.C. 3310]. The statute requires that in examining for such positions, "competition is restricted to preference eligibles as long as preference eligibles are available." [5 U.S.C. 3310.] If applications from both preference and non-preference eligibles are accepted, OPM proposes that agencies cannot eliminate preference eligibles from further consideration once they have been certified and received three bona fide considerations if doing so would result in the selection of a non-preference eligible. In such a case, an approved pass-over would be needed to remove the preference eligible from consideration prior to selecting a non-preference eligible candidate.

OPM is proposing the following process to reconcile the use of the three consideration rule in § 3318(e) and the pass-over rule in § 3318(c) to preserve veterans' preference. OPM cautions agencies to take a judicious approach when using the three consideration rule. An agency may not use the three consideration rule to remove large numbers of applicants in lieu of formal pass-over procedures. Agencies should continue to pursue pass-over procedures when warranted and consider using the three consideration provisions when pass-over procedures are not justified. An agency should limit use of the three consideration rule to situations in which an agency has made an individualized determination that a specific applicant does not possess the specific skills or attributes needed for the position being filled. Therefore, in order to remove a candidate from consideration, one or more hiring managers must have made three valid selections and given bona fide consideration to the candidate during this process. OPM has determined that a bona fide consideration under the three consideration rule requires, at a minimum, that the hiring manager(s) has considered the candidate's application material *and* interviewed the candidate for the position. OPM proposes the requirement of an interview to ensure that a candidate is treated as fairly and equitably as other candidates being considered. The interview must have been of the same rigor and thoroughness as that provided to other candidates. Such consideration may have been given by one or more

hiring managers from the same or different certificates under the same appointing officer. When more than one hiring manager is involved, each hiring manager must have interviewed the candidate.

To use the three consideration provision, an agency must document in the case file the bona fide consideration a candidate received (including a copy of the interview and the interviewer's notes and rating) and its reason(s) for removing the candidate from consideration, including a description of why the applicant is not receiving additional consideration, such as the applicant's lack of a specific skill(s) or attribute(s).

When making multiple selections from a certificate, starting with the fourth selection, one individual may be removed per selection using the three consideration rule. OPM is proposing to amend 5 CFR 332.405 to include the requirements for this provision.

Example of Using the Three Consideration Rule

The following example goes through the steps an agency may take when making multiple selections under the proposed rule of many. In this example, the agency issued the following certificate of eligibles based on a cut-score of 95. The agency expects to make 9 selections from this certificate and conducts interviews with all 18 candidates.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Selected. |
| 8 | 96.0 NV | Declined. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Declined. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Selected. |

Any of the veterans' preference candidates referred on the certificate may be selected. In this example, candidates 2 and 6 decline the position. For the first three selections, the agency selects candidates 1, 4, and 5. (For purposes of this illustration, the agency is selecting from the top of the certificate. However, the agency could have selected any preference eligible on the certificate including those further

down on the list, such as candidates 12 or 13.)

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Selected. |
| 8 | 96.0 NV | Declined. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Declined. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Selected. |

The agency has now considered candidate 3 in each of its earlier selection decisions, that is, three times. The agency documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 3 is removed from consideration. At this point, the agency may consider candidates 7, 8, or any of the veterans' preference candidates. The agency selects candidate 8 for the fourth selection.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Selected. |
| 8 | 96.0 NV | Selected. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Declined. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Selected. |

For the fifth selection, the agency may select candidate 7 or 9. Candidates 14 to 18 are still not within reach as there is a higher ranked veterans' preference candidate available. The agency selects candidate 9. The agency has determined to eliminate candidate 10 on the basis of the three consideration rule because three selections have been made and candidate 10 was not chosen. The agency documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 10 is removed from consideration.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Selected. |
| 8 | 96.0 NV | Declined. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Removed—3 considerations. |
| 11 | 95.0 TP | Declined. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Selected. |

For the sixth selection, the agency may select candidate 7 or any of the veterans' preference candidates. The agency selects candidate 13. The agency has determined that candidate 11 has been considered 3 times and documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 11 is removed from consideration.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Selected. |
| 8 | 96.0 NV | Declined. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Removed—3 considerations. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Selected. |

For the seventh selection, the agency may select candidate 7 or 9. Candidates 14 to 18 are still not within reach as there is a higher ranked veterans' preference candidate available. The agency selects candidate 9. The agency has determined that candidate 7 has been considered 3 times and documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 7 is removed from consideration. (It should be noted that non-preference candidates may be non-selected at any time.)

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Removed—3 considerations. |
| 8 | 96.0 NV | Selected. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Removed—3 considerations. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | |
| 15 | 95.0 NV | |
| 16 | 95.0 NV | |
| 17 | 95.0 NV | |
| 18 | | |

For selections eight and nine, the agency may select any of the remaining candidates and selects candidate 15 and 17. Below is the complete certificate of eligibles.

CERTIFICATE OF ELIGIBLES

| Candidate | Score/VP | Action |
|-----------|----------|---------------------------|
| 1 | 98.0 CP | Selected. |
| 2 | 98.0 CPS | Declined. |
| 3 | 98.0 TP | Removed—3 considerations. |
| 4 | 98.0 TP | Selected. |
| 5 | 98.0 TP | Selected. |
| 6 | 96.0 TP | Declined. |
| 7 | 96.0 NV | Removed—3 considerations. |
| 8 | 96.0 NV | Selected. |
| 9 | 95.0 TP | Selected. |
| 10 | 95.0 TP | Removed—3 considerations. |
| 11 | 95.0 TP | Removed—3 considerations. |
| 12 | 95.0 TP | Selected. |
| 13 | 95.0 TP | Selected. |
| 14 | 95.0 NV | Non-selected. |
| 15 | 95.0 NV | Selected. |
| 16 | 95.0 NV | Non-selected. |
| 17 | 95.0 NV | Selected. |
| 18 | 95.0 NV | Non-selected. |

OPM welcomes the public’s views on the impact this application of the three consideration rule would have on agency hiring outcomes.

Supplemental Certification

Under competitive examining procedures, a supplemental certificate may be issued when the original certificate results in fewer than three eligible and available candidates per vacancy. Reasons why supplemental certificates are needed often include: (1) the declination and failure to respond rates are higher than anticipated; (2) additional vacancies materialize in the office where the original certificate was sent; or (3) a supervisor in another office

(but still under the same appointing officer) has an identical vacancy.

OPM proposes that, to allow for instances when a certificate of eligibles issued under rule of many procedures results in fewer than three eligible and available candidates per vacancy and the agency needs to issue a supplemental certification, the agency must have already decided how to expand the group of candidates for whichever of the referral mechanisms used. This decision must be made before announcing the vacancy and must be clearly documented in the examining case file and available for reconstruction or third-party review. In making this decision an agency may, for example, establish a standard policy that the cut-off score used to establish the original certificate of eligibles may be augmented by dropping down 10 points, for example, from 95 to 85 points, as determined on a case-by-case basis based on business necessity. Following are illustrations of how this process might work.

1. A cut-off score based on the assessment(s) used, supported by job analysis data. A supplemental cut-off score may be established for instances when the original certificate is exhausted. For example, the original cut-off score may be set at 95 and, if additional applicants are needed after exhausting the certificate of eligibles, a cut-off score of 90 will be used.

2. A cut-off score based on business necessity. A supplemental cut-off score may be established for instances when the original certificate is exhausted. For example, the original cut-off score may be set at 98 and, if additional applicants are needed after exhausting the certificate of eligibles, a cut-off score of 94 will be used.

3. A set number of the highest ranked eligible applicants. For example, if the top 10 applicants are referred and then exhausted, the next ranked 10 applicants may be referred.

4. A percentage of the highest ranked eligible applicants. For example, if the top 10 percent are referred and then exhausted, then the next 5 percent of top applicants may be referred.

The eligible candidates remaining on the original certificate retain their higher order of placement on the expanded certificate and candidates on the supplemental certificate are ranked below them. In working the expanded certificate, *i.e.*, the original and supplemental certificates together, any preference eligible may be selected. A non-preference eligibles may be selected only if there is no preference eligible above them on the list. That is, a hiring manager may not select a non-

preference eligible when there is an equal or higher-ranked preference eligible veteran(s) unless there are reasons for passing over the preference eligible and the agency has complied with the pass-over procedures at 5 U.S.C. 3318(c). Alternatively, as previously described, the three consideration rule may be used to remove an eligible candidate (to include preference eligibles) from the certificate who has received three bona fide considerations.

OPM is proposing to amend 5 CFR 332.402 to include the provision for issuing supplemental certification. Additionally, OPM will provide these and other examples in the guidance it issues when this proposed rule is implemented.

Category Rating

OPM notes that the NDAA added a provision at 5 U.S.C. 3319(c)(6) (renumbered from (c)(7) and amended by the Act) to allow an agency to use category rating procedures when issuing certificates from a standing register. When an appointing officer has three times considered and removed a preference eligible certified from a standing register through pass-over procedures, certification of the preference eligible may be discontinued. OPM will include this change in its category rating guidance in the *Delegated Examining Operations Handbook (DEOH)*; however, no modifications to the regulations are needed as § 337.304 already directs that veterans’ preference be applied as prescribed in 5 U.S.C. 3319, which incorporates the recent amendment. OPM is proposing to amend 5 CFR 337.304 to reflect the new numbering of 5 U.S.C. 3319(c)(6). Additionally, OPM is proposing to retitle part 337, subpart C—Category Rating to conform to the statute.

Excepted Service Selections

Appointments in the excepted service are made in the same manner and under the same conditions required for the competitive service, as required by 5 U.S.C. 3320. With the proposed elimination of the rule of three, OPM is proposing to revise the procedures in 5 CFR part 302 to remove the requirement to make selection from among the highest three names available when using numerical scores and to add that agencies may apply the methods identified by OPM for identifying the number of applicants referred for selection. These methods (which are the same as described above for filling positions in the competitive service) are:

1. The use of a cut-off score based on the assessment(s) used, supported by job analysis data.

2. The use of a cut-off score based on business necessity; for example, to keep the number of applicants manageable for costly or labor-intensive assessments such as structured interviews.

3. A set number of candidates, for example, the top 10 applicants.

4. A percentage of the highest rated applicants; for example, the top 10 percent will be referred for selection.

In selecting an appropriate mechanism, agencies should consider the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

The NDAA also amended 5 U.S.C. 3320 to allow agencies to apply the provisions of 5 U.S.C. 3319, category rating, when making excepted service appointments in the same or similar manner as in the competitive service. OPM is proposing to revise the procedures for accepting, rating, and arranging applications in 5 CFR part 302 to include the option of using the category rating procedures as outlined in 5 U.S.C. 3319. Agencies are reminded that instructions for creating quality categories and procedures for certification and selection under category rating are provided in the DEOH available at www.opm.gov/deu.

Proposed § 302.201(c) provides information on granting veterans' preference when quality categories are used. When an agency chooses to use quality categories, it must list qualified preference eligibles ahead of non-preference eligibles within the same quality category.

OPM is proposing to modify § 302.302(a) to allow the use of either numerical rating or category rating when evaluating candidates.

OPM is proposing to modify § 302.302(b) to include procedures for using category rating. For the convenience of the reader, the existing process for numerical rating is listed as § 302.302(b)(1) and the procedures for using category rating are added as § 302.302(b)(2). An agency will be required to predefine at least two quality categories when using category rating.

OPM is proposing to modify the procedures for the maintenance of employment lists in § 302.303(d) by adding a new subparagraph § 302.303(d)(3) to explain the order used to list preference eligibles within each quality category. Within each quality category, preference eligibles must be listed ahead of non-preference eligibles

and may be listed in preference or alphabetical order.

Proposed § 302.304(b) includes procedures on the order of consideration when quality categories are used. These procedures are added as § 302.304(b)(6). The procedures require an agency to first consider candidates on the reemployment list, followed by candidates in the highest quality category, with preference eligibles listed ahead of non-preference eligibles, and then candidates in the next lower quality category, with preference eligibles listed ahead of non-preference eligibles.

Proposed § 302.401 modifies the current provisions to include procedures for the use of quality categories when making selections. For the convenience of the reader, the procedures for making selections from unranked lists are listed in § 302.401(a)(1) and have been revised to match processes used in the competitive service when unranked lists are used. The procedures for using numerical lists are in § 302.401(a)(2) and OPM is proposing to modify them to allow the agency to use an objective mechanism to define a sufficient number of candidates to refer for selection. The procedures for making selections using category rating are in § 302.401(a)(3) and allow an agency to select a candidate from the highest quality category as long as a non-preference eligible is not selected ahead of a preference eligible (an agency can select any preference eligible veteran in the highest quality category).

Expected Impact of This Proposed Rule

OPM is proposing regulations to implement changes authorized by the NDAA governing the selection of candidates from competitive lists of eligibles. The NDAA eliminated the "rule of three" in numerical rating and ranking, which required that, for each selection, consideration was limited to the top three candidates on the ranked certificate of eligibles. The NDAA, instead, authorizes agencies to certify a "sufficient number" of names, not less than three, from the top of the appropriate register, or list of eligibles, to be considered for selection, using a cut-off score or other mechanism established by OPM. The NDAA also affects how agencies make selections under 5 CFR part 302 procedures for excepted service appointments.

This proposal is part of a larger OPM effort to improve the hiring process by helping agencies make meaningful distinctions among applicants in terms of their relative qualifications for the position being filled, while at the same time expanding the range of candidates

from which a hiring manager may make a selection as compared to the more restrictive rule of three (*i.e.*, a hiring manager is not limited to choosing from among only the three highest applicants).

OPM is proposing four mechanisms for agencies to use to determine a "sufficient number" of names to certify for consideration, and the proposal includes provisions for using the three consideration rule in numerical rating and ranking. The proposed rule does not change the application of veteran's preference in competitive examining—veterans are still granted preference points under numerical rating procedures and continue to be entitled to selection preference over non-preference eligibles with the same or lower numerical score unless the requirements for passing over a preference eligible are satisfied.

The proposed rule also replaces "rule of three" procedures in excepted service hiring and allows agencies instead to use one of the same mechanisms described under competitive examining procedures to determine a "sufficient number" of names to certify for consideration. The NDAA also amended 5 U.S.C. 3320 to allow agencies to apply 5 U.S.C. 3319, category rating, when making excepted service appointments in the same or similar manner as in the competitive service. OPM's proposal revises the procedures for accepting, rating, and arranging applications in 5 CFR part 302 to include the option of using the category rating procedures as outlined in 5 U.S.C. 3319.

Costs

This proposed rule, once finalized and in effect, will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. OPM will provide guidance on implementing this rulemaking in the form of frequently asked questions and updates to the *Delegated Examining Operations Handbook* and Delegated Examining Training. OPM estimates that this rulemaking will require individuals employed by these agencies to modify policies and procedures to implement the rulemaking and train human resources (HR) practitioners and hiring managers on its use. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2023 for GS-14, step 5, from the Washington, DC, locality pay table (\$150,016 annual locality rate and \$71.88 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and

overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$143.76 per hour.

In order to comply with the regulatory changes in this Notice of Proposed Rulemaking, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, doing so will require an average of 300 hours of work by employees with an average hourly cost of \$143.76. This work would result in estimated costs in that first year of implementation of about \$43,128 per agency, and about \$3,450,240 in total Governmentwide. Some agencies may incur additional costs to ensure they have staff with the necessary assessment measurement expertise to use these proposed procedures. Numerical ranking is appropriate when a hiring agency needs to make finer, more granular distinctions between applicants, *i.e.*, an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than an applicant with a score of 96 or lower. Therefore, using these procedures will require assessment tools that make those meaningful distinctions and measurement experts to understand their use to establish appropriate cut-off scores. For the purpose of this cost estimate, the assumed average salary rate of Federal employees performing this work will be the rate in 2023 for GS-14, step 5, from the Washington, DC, locality pay table (\$150,016 annual locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$300,032 annually for those agencies in this situation.

We do not believe this rulemaking will substantially increase the ongoing administrative costs to agencies (including the administrative costs of using these new procedures and training new staff) because the rulemaking is replacing existing procedures and processes. OPM notes that agencies may incur higher costs to develop or purchase more rigorous assessments to use in determining cut-off scores under rule of many procedures. Alternatively, agencies may experience cost savings by identifying and selecting highly-qualified candidates more quickly through expanded choices and may recognize cost savings by eliminating the need to re-advertise and re-work hiring actions when selections were not made.

Finally, we intend and expect that the provisions of this proposed rule will operate independently and be treated as

severable. If any part or section of this proposed rule as finalized were invalidated by a reviewing court, the remaining provisions of the rule will continue to concern and effectuate the purpose of the rule, which is to implement changes in the various procedures for selecting candidates under delegated examining authorized by the NDAA for FY 2019.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In accordance with the provisions of Executive Order 12866, this rulemaking was reviewed by the Office of Management and Budget as a significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Federalism

We have examined this rulemaking in accordance with Executive Order 13132, Federalism, and have determined that this rulemaking will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

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

List of Subjects in 5 CFR Parts 302, 332, and 337

Government employees.
U.S. Office of Personnel Management.
Kayyonne Marston,
Federal Register Liaison.

Accordingly, the Office of Personnel Management proposes to amend title 5, Code of Federal Regulations, as follows:

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 1. The authority citation for part 302 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*

■ 2. In § 302.201, add paragraph (c) to read as follows:

§ 302.201 Persons entitled to veteran preference.

* * * * *

(c) When quality categories are used in the evaluation and referral, the agency shall list preference eligibles under section 2108(3) of title 5, United States Code, ahead of non-preference eligibles in accord with § 302.304(b)(6).

■ 3. In § 302.302, revise paragraphs (a) and (b) to read as follows:

§ 302.302 Examination of applicants.

(a) *Eligibility.* An evaluation of the qualifications of applicants for positions covered by this part may be conducted at any time before an appointment is made. The evaluation may involve only determination of eligibility or ineligibility or may include qualitative rating of candidates. If the evaluation involves only basic eligibility, candidates will not receive numerical scores or be placed in quality categories and will be referred in accordance with the procedures described in § 302.304(b)(5). If qualitative ranking is desired, numerical scores or placement in quality categories may be assigned in accordance with paragraph (b) of this section. Each agency shall make a part of the records the reasons for its decision to use ranked or unranked referral and, for ranked actions, the rating factors used. This information shall be made available to an applicant on his/her request.

(b) *Rating—(1) Numerical rating.* Numerical scores will be assigned on a scale of 100. Each applicant who meets the qualification requirements for the position established under § 302.202 will be assigned a rating of 70 or more and will be eligible for appointment. Candidates scoring 70 or more will

receive additional points for veteran preference as provided in § 302.201. Numerical ratings are not required when all qualified applicants will be offered immediate appointment. When there are an excessive number of applicants, numerical ratings are required only for a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable period of time. The agency must, however, adopt procedures to ensure the consideration of preference eligibles in the order in which they would have been considered if all applicants had been assigned numerical ratings. An agency shall furnish a notice of the rating assigned to an applicant on his/her request.

(2) *Category rating.* In accordance with 5 CFR part 337, subpart C, an agency must predefine at least two quality categories that reflect the requirements to perform the job successfully and to distinguish differences in the quality of candidates' job-related competencies/knowledge, skills and abilities. An agency may not establish a "not qualified" category. Only those found qualified will be placed in a category. Quality categories must be established and defined by the employing agency prior to accepting applications. Quality categories are not required when all qualified applicants will be offered immediate appointment.

* * * * *

■ 4. In § 302.303, add paragraph (d)(3) to read as follows:

§ 302.303 Maintenance of employment lists.

* * * * *

(d) * * *

(3) *When candidates have been placed in quality categories under § 302.302(b).* Within each quality category, preference eligibles must be listed ahead of non-preference eligibles and may be listed in preference or alphabetical order. Preference eligibles having a compensable, service-connected disability of 10 percent or more (designated as CPS or CP) are placed in the highest quality category unless the list will be used to fill scientific or professional positions at the GS-9 level or above, or equivalent.

■ 5. In § 302.304, revise paragraph (b) introductory text and add paragraph (b)(6) as follows:

§ 302.304 Order of consideration.

* * * * *

(b) *Consideration of other candidates.* Except as provided in paragraphs (b)(4), (b)(5) and (b)(6) of this section, an agency shall consider applicants on the reemployment and regular employment

list who have been assigned eligible ratings for a given position in Order A, Order B, or Order C, as described in paragraphs (b)(1) through (b)(3) of this section. Order A must be used when the agency has not established a reemployment list.

* * * * *

(6) *Category rating.* In accordance with 5 CFR part 337, subpart C, qualified preference eligibles will be listed ahead of non-preference eligibles within the same quality category in which they were assigned. Qualified preference eligibles with a compensable service-connected disability of 30-percent or more (CPS) and those with a compensable service-connected disability of at least 10-percent but less than 30-percent (CP) move from the category in which they would otherwise be placed to the highest quality category (except for scientific or professional positions at the GS-9 level or higher). Eligible candidates are considered in the following order:

(i) Candidates on the reemployment list;

(ii) Candidates in the highest quality category with preference eligibles listed ahead of non-preference eligibles; and

(iii) Candidates in each subsequent lower quality category with preference eligibles listed ahead of non-preference eligibles.

■ 6. In § 302.401, revise paragraph (a) to read as follows:

§ 302.401 Selection and appointment.

(a) *Selection—(1) Unranked lists.*

When making an appointment from a priority reemployment, reemployment, or regular list on which candidates have not received numerical scores, an agency must make its selection from among the qualified preference eligibles, as long as at least three candidates remain in that group. When fewer than three preference eligibles remain, consideration may be expanded to include the non-preference eligibles in accordance with paragraph (b) of this section, passing over a preference applicant.

(2) *Numerical lists.* When making an appointment from a list on which candidates have received numerical scores, an agency must use one of the methodologies identified below to determine the number of applicants referred for selection. A selecting official may select any eligible candidate referred for selection.

However, a selecting official may not pass over a preference eligible to select a lower standing non-preference eligible unless the agency has complied with the pass-over procedures in paragraph (b) of this section. The mechanism, or

approach, used must be determined before soliciting for applications and be made available to applicants upon their request. The approach used must be clearly documented in the recruitment file and available for reconstruction or third-party review. The agency may determine, based on the position to be filled, which of the following mechanisms will best meet the hiring needs of the agency and result in at least three names for consideration for appointment in the order provided in § 302.304.

(i) The agency may establish a cut-off score based on the assessment(s) used, supported by job analysis data;

(ii) The agency may use of a cut-off score based on business necessity;

(iii) The agency may use a set number of the highest ranked eligible applicants; or

(iv) The agency may use a set percentage of the highest ranked eligible applicants.

In selecting an appropriate mechanism, agencies should consider the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

(3) *Category rating.* When making appointments from a list on which candidates have been placed in quality categories, in accordance with 5 CFR part 337, subpart C, an agency may select any eligible candidate(s) in the highest quality category; except the selecting official may not select a non-preference eligible over a preference eligible unless the agency has complied with the pass-over procedures in paragraph (b) of this section. If there are fewer than three candidates in the highest quality category, the agency may combine (merge) the top two quality categories and make selections from the newly merged category. The newly merged category is the new highest quality category. Preference eligibles must be listed ahead of non-preference eligibles in the newly merged category.

(4) *Conditions.* Under any of the above selection methods, an agency is not required to—

(i) Accord an applicant on its priority reemployment or reemployment list the preference consideration required by § 302.304 if the list on which the applicant's name appears does not contain the names of at least three preference eligibles; or

(ii) Consider an applicant who has previously been considered three times or a preference eligible if consideration of his/her name has been discontinued for the position as provided in paragraph (b) of this section.

PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE EXAMINATION

■ 7. The authority citation for part 332 continues to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 2108, 3301, 3302, 3304, 3312, 3317, 3318, 3319; sec. 2(d), Pub. L. 114–137, 130 Stat. 310; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

■ 8. Revise § 332.402 to read as follows:

§ 332.402 Referring candidates for appointment.

OPM or a delegated examining unit (DEU) will use one of the mechanisms identified below to refer a sufficient number of candidates for consideration, in accordance with this section and the agency's delegated examining policies.

(a) Agencies must establish a policy on the use of these procedures.

(b) OPM or a DEU may determine, based on the position to be filled, which of the following mechanisms will best meet the hiring needs of the agency and result in at least three names for consideration.

(1) OPM or a DEU may establish a cut-off score based on the assessment(s) used, supported by job analysis data;

(2) OPM or a DEU may establish a cut-off score based on business necessity;

(3) OPM or a DEU may use a set number of the highest ranked eligible applicants to certify; or

(4) OPM or a DEU may use a set percentage of the highest ranked eligible applicants to certify.

(5) When using a set number of candidates or top percentage of eligible applicants, all applicants with the same score and veterans' preference category as the last candidate in the cut, will also be referred.

(6) In selecting an appropriate mechanism, agencies should consider the number of positions to be filled, the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

(c) The mechanism, or approach, used must be determined before announcing the vacancy and must be stated in the job opportunity announcement.

(d) The approach used must be clearly documented in the examining case file and available for reconstruction or third-party review.

(e) Hiring managers will receive sufficient names, when available, to allow them to consider at least three candidates for each vacancy.

(f) In instances when a certificate of eligibles results in fewer than three eligible and available candidates per vacancy and an agency needs to issue a

supplemental certification, OPM or a DEU must have decided, before announcing the vacancy, how to expand the group of candidates for whichever of the referral mechanisms used in accordance with the guidance in the *Delegated Examining Operations Handbook*.

(g) OPM or a DEU will refer candidates for consideration by simultaneously listing a candidate on all certificates for which the candidate is interested, eligible, and within reach, except that, when it is deemed in the interest of good administration and candidates have been so notified, OPM or a DEU may choose to refer candidates for only one vacancy at a time.

■ 9. Revise § 332.404 to read as follows:

§ 332.404 Order of selection from certificates.

A hiring manager, with sole regard to merit and fitness, shall select any eligible candidate certified for appointment on a certificate of eligibles, except the hiring manager may not pass over a preference eligible to select a lower standing non-preference eligible on the certificate unless the agency complies with pass over procedures in accordance with § 332.406.

■ 10. Revise § 332.405 to read as follows:

§ 332.405 Three considerations for appointment.

An appointing officer is not required to consider an eligible who has been considered by one or more hiring managers for three separate appointments from the same or different certificates for the same position (*i.e.*, the same title, series, and grade). In order to remove a candidate from consideration, one or more hiring managers must have made three valid selections and given bona fide consideration to the candidate during this process.

(a) *Bona fide consideration.* To use this provision, a hiring manager must consider the candidate's application material and interview the candidate for the position. The interview must have been of the same rigor and thoroughness as those conducted with other candidates interviewed for the position.

(b) *Documentation.* The agency must document in the case file the bona fide consideration a candidate received and its reason(s) for removing the candidate from consideration, including a description of why the candidate is not receiving additional consideration, such as the candidate's lack of a specific skill(s) or attribute(s).

(c) *Selection consideration.* An agency may use the three consideration

provision to remove one candidate from further consideration starting with the fourth selection, *i.e.*, after three valid selections have been made, and may remove one candidate for each subsequent selection made from a certificate of eligibles as long as bona fide consideration has been given and documented as required by this section.

PART 337—EXAMINING SYSTEM

■ 11. The authority citation for part 337 continues to read as follows:

Authority: 5 U.S.C. 1104(a), 1302, 2302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980; 116 Stat. 2135, 2290; 117 Stat. 1392, 1665; and E.O. 13833.

■ 12. Revise the heading to subpart C to read as follows:

Subpart C—Category Rating

■ 13. Revise § 337.304 to read as follows:

§ 337.304 Veterans' preference.

In this subpart:

(a) Veterans' preference must be applied as prescribed in 5 U.S.C. 3319(b) and (c)(6);

(b) Veterans' preference points as prescribed in § 337.101 are not applied in category rating; and

(c) Sections 3319(b) and 3319(c)(6) of title 5 U.S.C. constitute veterans' preference requirements for purposes of 5 U.S.C. 2302(b)(11)(A) and (B).

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BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 11

[Docket No. APHIS–2011–0009]

RIN 0579–AE76

Horse Protection; Licensing of Designated Qualified Persons and Other Amendments

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is proposing to withdraw a final rule that was filed for public inspection by the Office of the Federal Register on January 19, 2017, in advance of