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Department of Homeland Security Human Resources Management System; Final Rule

DEPARTMENT OF HOMELAND SECURITY

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Chapter XCVII and Part 9701

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Department of Homeland Security Human Resources Management System

AGENCY: Department of Homeland Security; Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS or the Department) and the Office of Personnel Management (OPM) are issuing final regulations to establish a new human resources management system within DHS, as authorized by the Homeland Security Act of 2002. The affected subsystems include those governing basic pay, classification, performance management, labor relations, adverse actions, and employee appeals. These changes are designed to ensure that the Department's human resources management system aligns with its critical mission requirements without compromising the statutorily protected civil service rights of its employees.

DATES: *Effective Date:* March 3, 2005.

FOR FURTHER INFORMATION CONTACT: At OPM: Ronald P. Sanders, 202–606–9150; at DHS: Kay Frances Dolan, 202–357–8200.

SUPPLEMENTARY INFORMATION:

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AFGE—American Federation of Government Employees
ALJ—Administrative Law Judge
Compensation Committee—Homeland Security Compensation Committee
DHS—Department of Homeland Security
FLRA—Federal Labor Relations Authority
FMCS—Federal Mediation and Conciliation Service
FSIP—Federal Service Impasses Panel
GAO—Government Accountability Office (former General Accounting Office)
GS—General Schedule
HR—Human Resources
HSLRB—Homeland Security Labor Relations Board
MRO—Mandatory Removal Offense
MRP—Mandatory Removal Panel
MSPB—Merit Systems Protection Board
NAAE—National Association of Agriculture Employees
NFFE—National Federation of Federal Employees
NTEU—National Treasury Employees Union
OPM—Office of Personnel Management
SES—Senior Executive Service
SL—Senior Level
SRC—DHS Human Resource Management Senior Review Committee
ST—Scientific or Professional Positions
TSA—Transportation Security Administration

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Introduction

The Secretary of Homeland Security, Tom Ridge, and the Director of the Office of Personnel Management, Kay Coles James, jointly prescribe this final regulation to establish a flexible and contemporary system for managing the Department's human resources (HR). This system has been developed pursuant to a process based on principles articulated by OPM and affirmed by DHS that called for extensive and continuing collaboration with employees and employee representatives. In addition, DHS and OPM have engaged in unprecedented outreach to the public as well as to the Congress and other key stakeholders. As provided by Public Law 107–296 (the Homeland Security Act, signed into law by President George W. Bush on November 25, 2002), the system preserves all core civil service protections, including merit system principles, veterans' preference, and due process. It also protects against discrimination, retaliation against whistleblowers, and other prohibited personnel practices, and ensures that employees may organize and bargain collectively (when not otherwise prohibited by law, including these regulations, applicable Executive orders, and any other legal authority).

This Supplementary Information addresses the following areas:

- The Case for Action
- Summary of the Design Process
- The Meet-and-Confer Process
- Major Issues
- Response to Specific Comments and Detailed Explanation of Regulations
- Next Steps
- Moving Forward

The Case for Action

Since September 11, 2001, this Nation has come together with a unity of purpose that has not been seen or felt since the attack at Pearl Harbor in 1941. Out of that national tragedy emerged a consensus for a comprehensive global war on terrorism. That consensus resulted in the enactment of legislation creating the Department of Homeland Security, and with it, the authority to create a system for managing its human resources that would be flexible and mission-focused without compromising the principles of merit and fitness. Indeed, the Department's mission is to ''lead the *unified* national effort to secure America'' (emphasis added), and its new HR system is aimed at that same result. In order for the Department to sustain that unity of effort, its HR system must also provide for the meaningful participation of employees in its creation, and they must be treated with dignity and respect in its implementation.

These final regulations represent a major step in that historic transformation. They establish a new HR system for the Department of Homeland Security (DHS) that assures its ability to attract, retain, and reward a workforce that is able to meet the critical mission entrusted to it by the American people. As provided by the regulations published here, that system must and does provide for greater flexibility and accountability in the way employees are paid, developed, evaluated, afforded due process, and represented by labor organizations. These regulations respond to comments on a notice of proposed rulemaking published in the **Federal Register** of February 20, 2004 (69 FR 8030). The next step, following the publication of these enabling regulations, is to implement this new system, in continuing collaboration with employee representatives.

The mission of the Department demands that employees and supervisors work together as never before. Managers, supervisors, and employees of the Department must be unified in both purpose and effort if they are to accomplish that mission. And perhaps the most important way to bring about that unity is through an integrated HR system for the Department—a system that assures maximum flexibility and accountability. That system must value, reward, and reinforce high performance, teamwork, commitment to learning and excellence, and selfless service. It must also facilitate communication and collaboration at all levels of the Department. The Secretary and the Director are committed to ensuring that these goals are met.

The mission statement of the Department goes on to state that ''[w]e will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation. We will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce.'' No Federal agency has ever had a mission that is so broad, complex, dynamic, and vital. That mission demands unprecedented organizational agility to stay ahead of determined, dangerous, and sophisticated adversaries. The importance of the Department's HR system to achieving that goal has been underscored by the President and the Congress. In signing the Homeland Security Act into law, President Bush emphasized the Department's critical need to ''put the right people in the right place at the right time in the defense of our country'' while ensuring that the rights of the Department's employees ''[a]s federal workers * * * will be fully protected * * *.'' Senator Susan Collins, Chairman of the Senate Committee on Governmental Affairs, said, ''[w]e need to grant the new Secretary appropriate but not unlimited authority to create a flexible, unified new personnel system that meets the Department's unique demands.''

This was the fundamental challenge faced by Secretary Ridge and Director James in designing this new system—to strike a balance between mission-essential flexibility and protection of core civil service principles. Summarized here and discussed at length in the pages that follow are the changes that we believe strike that balance. Many of those changes are significant, and we have highlighted them in the following pages. We believe they respond to the fundamental concerns of the American public, as well as our employees. Where there is a substantial departure from the status quo in this final plan, it is in furtherance of the Department's statutory mission, with the attendant need for a significant investment in communication and understanding on the part of all parties in order to successfully implement those changes.

Pay and Classification. One of the most fundamental changes in the regulations is the creation of a pay-for-performance system for Department employees that will replace the General Schedule. Under this new system, pay increases will be based solely on performance—not time in grade. It also provides for the establishment of a series of occupational clusters and bands in place of the current General Schedule grades and authorizes DHS to

set and adjust the minimum and maximum rates of pay for each band associated with a cluster. In addition, the system establishes locality rate supplements to address local market conditions, as well as special rate supplements to address special recruitment or retention needs. Only those DHS employees whose performance meets or exceeds expectations will be eligible for a performance- and/or market-based pay increase.

Performance Management. The new performance management system for DHS will complement and support the Department's new pay and classification system by ensuring greater accountability for individual performance expectations and organizational results. The regulations simplify performance management, removing many administrative burdens associated with the current system. For example, ''performance expectations'' need no longer be in writing and may take the form of individual, team, and/or work unit goals or objectives, as well as such things as standard operating procedures or manuals, internal rules and directives, and other generally available instructions applicable to an employee's job. However, performance expectations, including those that may affect the employee's retention, must still be communicated to the employee prior to holding the employee accountable for them.

Labor-Management Relations. To ensure that the Department has the flexibility to carry out its vital mission, the regulations, among other things, revise management's rights and its duty to bargain to ensure that the Department can act as and when necessary. Such critical matters as work assignments and deployments are no longer subject to collective bargaining. However, exclusive representatives will still be able to negotiate over significant and substantial changes, as well as appropriate arrangements for employees adversely affected by those changes, under certain specified conditions. Additionally, the regulations create the Homeland Security Labor Relations Board (HSLRB) to address those issues that are most important to accomplishing the DHS mission, with other matters retained by the Federal Labor Relations Authority (FLRA). The revisions strike the right balance between the mission needs of DHS and the meaningful involvement of employees and their representatives.

Adverse Actions and Appeals. Consistent with the Homeland Security Act, the regulations streamline and simplify adverse action and appeals procedures, but without compromising due process for DHS employees. Employees will still receive notice of a proposed adverse action, the right to reply, and the right to appeal to the Merit Systems Protection Board (MSPB). We have also revised the proposed regulations to raise the burden of proof in adverse actions from ''substantial'' to ''preponderance,'' and to permit arbitration of adverse actions as an option for bargaining unit employees. In addition, the regulations now allow MSPB (and arbitrators) to mitigate penalties, but only under certain specified conditions. The final regulations also retain authority for the Secretary to establish a number of mandatory removal offenses (MROs) that have a direct and substantial effect on homeland security and an independent Panel (selected from a list that will include nominees from DHS exclusive representatives and other sources) to hear MRO appeals.

Summary of the Design Process

As the Congress made clear, ''collaborative effort will help secure our homeland.'' DHS and OPM have been committed to a collaborative approach from the beginning. The General Accounting (now Government Accountability) Office (GAO) recognized this in a report last year, stating that ''DHS's and OPM's efforts to design a new human capital system are collaborative and facilitate participation of employees from all levels of the department.'' In a follow-up report issued in June 2004, GAO observed that ''to date, DHS's actions in designing its human capital management system and its stated plans for future work on the system are positioning the department for successful implementation.'' Those actions included an extensive process of deliberation, discussion, and collaboration with employees, representatives of labor organizations, supervisors, managers, and other stakeholders in order to identify ideas and concerns.

This collaborative process was rooted in conversations Director James held with employee representatives even prior to the passage of the Homeland Security Act to propose a fair and principled process for the design of the HR system. The process itself actually began in April 2003, when the Secretary and the Director established a DHS/OPM Design Team composed of Department managers and employees, HR experts from DHS and OPM, and professional staff from the Department's three largest labor organizations: The American Federation of Government Employees, the National Treasury Employees Union, and the National Association of Agriculture Employees.

The 48 members of the Design Team conducted significant research in the areas of pay, performance, classification, labor relations, adverse actions, and appeals reform. The team gathered data from public and private sector organizations; examined and evaluated successful and promising human capital practices; interviewed leading human resources experts, DHS employees and managers; and consulted a Field Team of employees and managers who provided a front-line perspective. Together, as a team, DHS and OPM also held dozens of focus groups, including visits to Norfolk, Atlanta, Detroit, New York, Miami, El Paso, Los Angeles, Seattle, Baltimore, and Washington, DC. Thus, DHS and OPM heard the concerns of thousands of the Department's employees.

The Design Team developed 52 options for the various elements of the Department's HR system. These were presented to a DHS Human Resource Management Senior Review Committee (SRC) on October 20–23, 2003. The SRC, co-chaired by senior DHS and OPM officials, included the presidents of the Department's three largest labor organizations, as well as the heads of some of its largest and most critical line operations. In addition, five non-Federal experts in public administration were designated as technical advisors to the SRC. During the course of two public meetings, the SRC reviewed the various Design Team options, and thereafter its members reported their views to the Secretary and the Director for consideration. In reaching final decisions regarding the new HR system, the Secretary and the Director relied on the SRC's advice and counsel, as well as the public comments received during the SRC proceedings and the wealth of material developed through the Design Team's research.

These extensive and collaborative design efforts all preceded the formal process for developing the new HR system, and went far beyond that required by the Congress in the Homeland Security Act. The Act established a formal process in this regard, officially beginning when the Secretary and the Director published proposed regulations to establish the new DHS HR system in the **Federal Register** on February 20, 2004. That first formal step provided a 30-day period for the public, employees, and employee representatives to review and submit formal comments on the proposed system. More than 3,800 public comments were received and analyzed by DHS and OPM staff. At the specific

request of the Secretary and the Director, the formal comments of labor organizations were given particular attention and consideration. Commenting jointly, the three largest labor organizations rejected the proposed regulations in their entirety. Public, employee, and labor organization comments are summarized in detail in a subsequent section of this Supplementary Information.

The Meet-and-Confer Process

The public comment period was followed by the second step in the formal development process—an additional 30-day period during which representatives of the Department and its major employee organizations were to ''meet and confer'' in order to resolve differences over the proposed regulations wherever possible. That meet-and-confer process began officially on June 14, 2004. On that date, the Secretary and the Director notified Congress in writing that they had not accepted the labor organizations' recommendation to reject the proposed regulations in their entirety. This notification was required by the Homeland Security Act of 2002 (5 U.S.C. 9701(e)(1)(B)(i)). Even before the meet-and-confer process began, however—and in keeping with our determination to work collaboratively with DHS employee representatives—staff from DHS and OPM met informally for several days with representatives of the three largest labor organizations representing DHS employees to discuss the proposed regulations. Our discussions helped us better understand each other's positions and led to several clarifications regarding the proposed regulations.

As authorized by 5 U.S.C. 9701(e)(1)(B)(iii), and in order to facilitate the meet-and-confer process, the Secretary and the Director issued procedures governing the conduct of this process. The procedures provided for five employee organizations to participate in the meet-and-confer process, including one management association; however, the management association declined to participate. The Secretary, in consultation with the Director, also requested the services of the Federal Mediation and Conciliation Service. Under those procedures, officials of the Department and OPM met with employee representatives from June 14 through August 6, 2004, a period well in excess of the statutory requirement. (Including informal sessions that preceded the meet-and-confer process, DHS, OPM, and labor organization representatives met for a total of more than 36 days—this, of course, is in addition to the 6 months that DHS and OPM representatives spent with employee representatives, full-time, during the HR system design process.) The following principals participated in the actual meet-and-confer process:

- One representative from each of the four largest DHS labor organizations: the American Federation of Government Employees (AFGE), the National Treasury Employees Union (NTEU), the National Association of Agriculture Employees (NAAE), and the National Federation of Federal Employees (NFFE);
- Four representatives from DHS, including the Chief Human Capital Officer, an executive from his staff, and two senior line managers from DHS operational components; and
- Two senior executives from the Office of Personnel Management (OPM).

Finally, at the conclusion of the meet-and-confer process, the Secretary and the Director met with the national presidents of the Department's two largest labor organizations (AFGE and NTEU) on September 10, 2004, to provide them with an opportunity to present their issues and concerns directly to the principals. Their presentation led to further revisions to these regulations as described in this **SUPPLEMENTARY INFORMATION**.

As discussed and described in great detail in subsequent sections of this Supplementary Information, we have made substantial revisions to the proposed regulations in response to the many recommendations made by employees, labor organizations, and others during the public comment period. In addition, we listened to the concerns of the employee representatives and adopted many of the proposals made by labor organization representatives during the extensive meet-and-confer process. A careful comparison of the final regulations to those proposed several months ago will show that we have kept our commitment to an open, inclusive, and participatory process that respected and accommodated employee and labor organization perspectives and concerns.

These extensive revisions notwithstanding, substantial disagreements remain over such fundamental issues as performance vs. tenure as a basis for individual pay increases, and the scope and duty to bargain vs. operational flexibility in the assignment and deployment of front-line personnel. These disagreements were underscored during the meet-and-confer process, and despite the exhaustive, good faith efforts by labor organization and management representatives during that process, the parties were simply not able to resolve them. In point of fact, these issues reach to the core of a flexible, contemporary HR system for the Department, and they represent the sort of transformational change envisioned by the Congress and the President when the Homeland Security Act was enacted into law. And because they are so fundamental, no one should be alarmed by these disagreements, take them as a sign of bad faith on the part of any party, or view them as an indication that the meet-and-confer process failed. Reasonable and honorable people may disagree, especially over such issues as these, but we believe the extensive involvement of employees and employee representatives over the course of the last 18 months added tremendous value—and that the process worked.

While the regulatory process precluded us from agreeing on final regulatory language during the meet-and-confer process, we believe we did reach agreement with the participating labor organizations on numerous substantive issues. Because we could not ''sign off'' on these agreements, as we would in a traditional collective bargaining process, we have tried to exercise caution in characterizing the results. We believe this understates the extent of the conceptual agreements and understandings reached during the process, which we have tried to reflect in the Supplementary Information section of this notice. Thus, where we make the statement ''we agreed'' in the text of this Supplementary Information, we are referring to agreements reached by OPM and DHS in the regulatory process, rather than to agreements reached between management and labor organization representatives during the meet-and-confer process.

Major Issues

Our analysis of the more than 3,800 comments received during the public comment period, as well as the many issues extensively discussed during the subsequent meet-and-confer process, revealed a set of major issues that elicited the most (or most substantive) comments, especially from key stakeholders. They are (1) specificity of the regulations, (2) pay for performance, (3) management rights/scope and duty to bargain, (4) adverse actions and appeals, and (5) mandatory removal offenses. Because these issues are critical to understanding the objectives of the Department's new HR system, we have given them particular attention in the following pages.

1. Specificity of the Regulations

One of the most significant issues raised by employees, labor organizations, and some Members of Congress had to do with the basic structure of the regulations. As jointly prescribed by DHS and OPM, parts of the final regulations establish broad policy parameters for the Department's HR system but leave many of the details of that system to DHS implementing directives. Many of the commenters, especially labor organizations, expressed concern about this fact, arguing that the proposed regulations lacked sufficient detail, and they recommended that the regulations include far greater specificity.

These comments and concerns focused almost exclusively on three of the subparts in the proposed regulations—those dealing with classification, pay, and performance management (subparts B, C, and D, respectively). Those subparts were (and remain) relatively general in nature, and they expressly provide for the Department to develop and issue directives implementing their precepts subsequent to the promulgation of these regulations. In contrast, the subparts dealing with labor relations, adverse actions, and appeals (subparts E, F, and G, respectively) are quite detailed, requiring little in the way of implementing directives.

In response to these comments, and as a result of the meet-and-confer process, we have added greater detail to the subparts at issue—particularly subpart C. However, even with added detail, all three of the subparts at issue retain their original structure in the final regulations, establishing a general policy framework to be supplemented by detailed Departmental implementing directives. Comments notwithstanding, we believe that this is the appropriate approach. In these final regulations which have the full force and effect of law, we have intentionally adopted a structure that mirrors the very statutes that they replace. Moreover, this structure provides the Department the flexibility it requires in implementing an HR system of this scope and complexity.

In this regard, the provisions of title 5, U.S. Code, governing classification, pay, and performance management establish general policies and authorities, with the details left to OPM to regulate. For example, 5 U.S.C. chapter 51 establishes the General Schedule (GS) classification system but leaves to OPM the definition of occupational series and families and the development and promulgation of detailed job grading standards and qualification requirements—presently encompassing hundreds of detailed classification standards and qualifications requirements (note that those standards and requirements are not subject to public notice and comment under the Administrative Procedure Act). Subpart B of these regulations, which now replaces 5 U.S.C. chapter 51, follows suit, establishing the basic ''architecture'' of the Department's job classification system—that is, its core elements and parameters—but it leaves the specific definition of occupational clusters and bands and the development of job grading standards to Departmental implementing directives (all subject to OPM review and coordination). Chapters 53 and 43 of title 5, U.S. Code, follow the same pattern and so too do the subparts that replace them—subparts C and D, respectively.

While commenters did not express concern about the structure of subparts E, F, and G, dealing with labor relations, adverse actions, and appeals, respectively, they too reflect their statutory underpinnings. Like their ''legacy'' chapters in title 5 (chapters 71, 75, and 77, respectively), they are extremely detailed and, except for procedures for the operation of the two adjudicating bodies that they establish, they require little in the way of implementing directives.

While the final regulations retain their basic structure as originally proposed, we have added detail in subparts B, C, and D as a result of public comment and the meet-and-confer process. These additions are documented at length in our responses to the detailed comments that follow. However, some of them are worth highlighting. For example, in subpart C, we have included specific policies governing pay adjustments upon promotion from a lower pay band to a higher one; pay progression for employees in entry/developmental pay bands; limits on reductions in basic pay for performance or conduct reasons; pay adjustments for employees on pay retention; and the impact of an ''unacceptable'' performance rating on an individual's pay. Similarly, subpart D now includes additional detail regarding requirements for setting and communicating performance expectations (especially those that may affect an employee's retention) and policies dealing with rating and rewarding performance.

According to labor organization feedback during the final stages of the meet-and-confer process, these additions still fall short of the detail they recommend. Labor organization comments in this regard focus primarily on process, asserting that by including greater detail in the proposed regulations, they would have been given an opportunity to participate and provide input to the final regulations via the statutory meet-and-confer process set forth in 5 U.S.C. 9701(e). Among other things, that statutory process requires the Department and OPM to provide employee organizations with an opportunity to comment on proposed regulations and thereafter, meet with DHS and OPM officials (under the auspices of the Federal Mediation and Conciliation Service, if necessary) in an attempt to resolve any concerns and disagreements. As the labor organizations and other commenters have correctly pointed out, the proposed regulations did not provide for an analogous opportunity with respect to the issuance of implementing directives. This became a major topic of discussion during the meet-and-confer process, with labor organizations insisting that DHS and OPM either include all implementing details in these final regulations, or subject Department implementing directives to collective bargaining.

We did not adopt either alternative. Including such detail in these regulations would be inconsistent with the ''legacy'' statutes that they replace and contrary to our best judgment—based on years of experience administering those statutes. Moreover, such detail would result in untenable rigidity in a Department whose mission requires just the opposite. In authorizing these regulations, Congress mandated that we develop a human resources system that is ''flexible'' (*see* 5 U.S.C. 9701(b)(1)); indeed, of all of the various objectives set by Congress for this system in the Homeland Security Act, flexibility was the very first it enumerated, and unnecessary and excessive detail in subparts B, C, and D would undermine that objective.

Collective bargaining is also inappropriate for the development of implementing directives. First, Congress could have provided for collective bargaining to develop directives, but did not. Instead, it expressly provided for a meet-and-confer process as a way of providing for labor organization involvement, and there is no evidence whatsoever that it intended that Departmental implementing directives be collectively bargained; rather, Congress clearly provided for ''continuing collaboration'' (but implicitly, not collective bargaining or ''meet and confer'') in this regard. Moreover, we note that no labor organization enjoys exclusive

recognition at the Department level—indeed, labor organizations represent fewer than 40 percent of the Department's eligible civilian workforce; granting labor organizations the right to collectively bargain implementing directives that cover all of the Department's employees would be inappropriate.

However, from the beginning DHS and OPM have recognized the value of involving employees and their representatives in the design of this system and included this as one of our guiding principles. Moreover, as noted previously, 5 U.S.C. 9701(e)(1)(D) requires the Department and OPM to provide a means for ensuring ''continuing collaboration'' with employee representatives in implementing these regulations. In keeping with those objectives, we have included a ''continuing collaboration'' process at § 9701.105. This is consistent with the statutory provision which states that the Secretary and Director ''shall * * * develop a method for each employee representative to participate in any further planning or development (of the personnel system) which might become necessary.'' The new section now assures employee representative involvement in the development of the Department's implementing directives. Named after the section in the law that requires it, this section provides employee representatives with an opportunity to discuss their views and concerns on implementation and design concepts with DHS officials and/or to review and provide written comments on proposed final draft implementing directives in advance.

In summary, three of the subparts in these final regulations remain relatively general in nature, providing broad policy parameters but leaving much of the details to implementing directives, while three others are specific. We believe that this structure, patterned after the chapters in title 5 that they replace, is appropriate. By providing for detailed implementing directives, the subparts dealing with classification, pay, and performance management provide the Department with the flexibility mandated by Congress, and they do so without compromising the Department's commitment to substantive employee representative involvement in the development of those directives.

2. Pay for Performance

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

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

We have retained the system described in the proposed regulations. We believe Congress and the American people expect their public employees to be paid according to how well they perform, rather than how long they have been on the job. They also expect the Department to do everything it can to recruit and retain the most talented individuals it can find to carry out its critical mission. These expectations are difficult, if not impossible, to achieve under the current system. The General Schedule does not provide the opportunity to appropriately reward top performers or to pay them according to their true value in the labor market. Under the General Schedule, performance is rewarded as an exception rather than the rule, and market is defined as ''one size fits all.''

The GS pay system is primarily a longevity-based system—that is, pay increases are linked primarily to the passage of time. While time-in-grade determines eligibility for a GS step increase, it is true that a finding that the employee is performing at an acceptable level of competence is also required. However, this minimal requirement is met by roughly 99 percent of all GS employees. Thus, at any given grade level, the vast majority of employees can expect to automatically receive base pay increases of up to 30 percent over time—in addition to the annual across-the-board pay increases—so long as their performance is ''acceptable.'' Even employees whose performance is unacceptable receive annual across-the-board pay increases that range from 3 to 5 percent, and special rates that are even higher. Over time, even minimally productive employees will progress steadily to the top of the GS pay range, and may end up being paid significantly more than higher performing employees with less time in grade. Such a system cannot be fairly characterized as providing performance-based pay.

The DHS pay-for-performance system, by contrast, is designed to recognize and reward performance in two key ways. First, it establishes the fundamental principle that no employee may receive a base pay or locality rate increase if his or her performance does not at least meet expectations. Unlike the GS system, employees rated unacceptable will not get an annual adjustment. Second, the DHS system provides for individual base pay increases based on an employee's performance, whether by demonstrating requisite competencies at the entry/developmental level or by meeting or exceeding stringent performance expectations at the full performance level. Unlike the GS system, tenure and time-in-grade have no bearing. An employee will progress through the pay range based solely on how well he or she performs.

This concept may be simply summarized: The higher the performance, the higher the pay. This, too, is a fundamental principle of the new system, and we choose the order of these words deliberately. This system does not assume that individuals are motivated by pay, but rather that we have an obligation as an employer to reward the highest performers with additional compensation—however they may be motivated to achieve excellence. The Department has a special responsibility in this regard. Thus, the system we have designed is not a ''performance-for-pay'' system, but a ''pay-for-performance'' system. Nevertheless, we believe it will inspire DHS employees to perform at their best. This is in contrast to the GS system, where it is possible for a high-performing employee to be paid the same, or even less, than a lower performing co-worker.

The 50-plus-year-old GS pay system also is not sufficiently market-sensitive, potentially under-valuing the talents of the Department's most critical employees. Under the GS pay system, all employees in a given geographic location receive the same annual pay adjustment without regard to their

occupation or the level of duties and responsibilities they are expected to perform. This one-size-fits-all approach treats all occupations alike, across the board as well as in particular locations, regardless of market value and competition. Thus, we inevitably end up underpaying employees in some occupations and overpaying others. Even within an occupation, the rigidities of the General Schedule sometimes force us to underpay employees at the entry/developmental grades, with recruiting difficulties and high attrition the result.

The new DHS pay system is designed to be much more market-sensitive. First, it allows DHS, after coordination with OPM, to define occupational clusters and levels of work within each cluster that are tailored to the Department's missions and components. Second, it gives DHS considerable discretion, after coordination with OPM, to set and adjust the minimum and maximum rates of pay for each of those occupational clusters or bands, based on national and local labor market factors and other conditions. Instead of ''one size fits all'' pay rates and adjustments, the system allows DHS to customize those adjustments and optimize valuable but limited resources. This kind of flexibility, which is lacking under the GS pay system, will enable DHS to allocate payroll dollars to the occupations and locations where they are most needed to carry out the Department's mission of protecting the homeland.

Thus, the goals and principles of the new system are sound, and we have confidence that the Department has the capability to effectively execute them. Pay-for-performance systems like that proposed for DHS are not new. Paybanding has been around in the Federal Government since 1980, and the Federal Government has substantial experience in implementing performance-based pay systems (e.g., in demonstration projects). Research shows that employees' attitudes toward such systems change over time, as they gain experience with them. For example, employee support for the *circa* 1980 ''China Lake'' broadbanding/pay-for-performance demonstration project was only 29 percent before the project began, reached 51 percent by 1985, and was 69 percent by 1988. Employee support was 70 percent when Congress made the project permanent in 1994. Today, thousands of Federal employees already are covered by successful performance-based pay systems.

The system we have devised is also consistent with the findings and recommendations of the National Academy of Public Administration in its May 2004 Report, ''Recommending Performance-Based Federal Pay'': ''The basis for managing individual salary increases should be pay-for-performance. This recommendation has been a constant theme in discussions for more than two decades and the principle in every demonstration project that tested new pay policies. The evidence from the projects confirms that pay-for-performance can be successful in federal agencies. The switch to a pay-for-performance policy should be managed as an organizational change because it will alter each agency's culture and contribute to improved performance.'' Thus, this is not a journey into uncharted waters.

We respect the concerns of employees and agree that it is essential to communicate with employees regarding the changes that DHS is making. Experience has shown that one of the best ways to deal with the concerns associated with change is to involve employees and their representatives in the process. As stated in the Preamble to the proposed regulations, DHS is committed to a high degree of employee involvement in developing the details of the new classification, pay, and performance management system, and by its actions to date, it has lived up to that commitment.

The need for employee involvement, however, will not cease with the publication of these regulations. That is why the final regulations provide for the continuing involvement of employee representatives in the development of the detailed directives that will implement this system and in the evaluation of the system. (See §§ 9701.105 and 9701.107.) That is also why the final regulations provide for the establishment of a new Homeland Security Compensation Committee (Compensation Committee) that will involve representatives from the major DHS labor organizations in addressing strategic compensation matters, such as Departmental compensation policies and principles. The Compensation Committee will consider factors such as turnover, recruitment, and local labor market conditions in providing options and recommendations for consideration by the Secretary. (See § 9701.313.) This involvement will enhance the credibility and acceptance of the system.

The new pay system will require numerous decisions to be made on an annual basis, and the Compensation Committee will play a key role. For example, DHS must determine how available budgetary resources should be allocated between market-based adjustments—such as rate range adjustments and adjustments in locality and special rate supplements—and performance pay increases. DHS must determine the overall amount that will be authorized for rate range adjustments in response to changes in the national labor market for specific occupational clusters and bands and the amounts that will be authorized for more targeted market-based adjustments in specific locality pay areas. The Compensation Committee will provide options and/or recommendations for consideration by the Secretary, who will make final decisions.

The Compensation Committee will include a total of 14 members, with 4 ''seats'' reserved for DHS labor organizations granted national consultation rights. OPM will also serve as an *ex officio* member. It will be chaired by DHS's Undersecretary for Management, who will select a facilitator from a list of nominees developed jointly by representatives of the Department and the labor organizations. In addition to making recommendations to the Secretary on strategic compensation matters, the Compensation Committee also will review summary data regarding annual performance payouts authorized under the new system (§ 9701.342). The Compensation Committee is modeled after the Federal Salary Council, which advises the President's Pay Agent (the Secretary of Labor and the Directors of the Office of Management and Budget and the Office of Personnel Management) on the ongoing administration of the locality pay program for GS employees. It is designed to give DHS employees, through the labor organizations that represent them, a real voice in the ongoing administration of the DHS pay-for-performance system.

In summary, we believe the Department's pay-for-performance system is an imperative, essential to DHS's ability to attract, retain, and reward a workforce that is able to meet the high expectations set for it by the American people—the security of our homeland. Its successful implementation is well within the capability of the Department's leadership.

3. Management Rights/Scope and Duty To Bargain

The ability to act quickly is central to the Department's mission—not just in emergency situations but, more importantly, in order to prepare for or prevent emergencies. This principle was critical to President Bush and the Congress throughout the formation of

the legislation and the congressional debate that followed its introduction. This ability to act quickly is necessary even in meeting day-to-day operational demands. The Department must be able to assign and deploy employees, and to introduce the latest security technologies without delay. Congress clearly stated that the Department's HR system must provide the flexibility DHS needs to respond to a variety of vital operational challenges and to carry out its wide-ranging mission.

To achieve this mandate, the proposed regulations revised the management rights and duty to bargain provisions found in 5 U.S.C. chapter 71. We expanded the list of management rights that are prohibited from negotiation to include numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work—those rights that deal directly with the Department's homeland security operations. We also excluded from mandatory negotiations the procedures that the Department would follow in exercising these expanded management rights. And we proposed changes to allow the Department to take action in any of these areas without advance notice to labor organizations and without pre-implementation bargaining.

Without exception, comments received from labor organizations objected to the proposed regulations, arguing that altering the scope of bargaining in any way was contrary to the Homeland Security Act. Further, labor organizations asserted that these changes were not necessary, and that current law already provided the Department with sufficient flexibility to deal with emergencies. Labor organizations did acknowledge the Department's need to take certain actions without pre-implementation bargaining, and during the meet-and-confer process, they proposed a process for accelerated post-implementation bargaining and third-party impasse resolution. Additionally, their proposal would have allowed the Department to temporarily suspend procedural provisions of collective bargaining agreements in situations where there is a direct or substantive connection to protecting homeland security. However, even under those stringent conditions, they insisted that employees automatically be ''made whole'' for any adverse consequences stemming from the suspension, as if management had violated the agreement.

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

With respect to procedures, the proposals offered by the labor organizations do not go far enough. They would still require the Department to bargain, as a mandatory matter, over the procedures it would be required to follow in exercising management rights, especially those that deal directly with its operations. Those procedures can and do constrain such critical actions as the assignment of work, the deployment of personnel, and the staffing of tours of duty. These procedures are negotiable under 5 U.S.C. chapter 71. Labor organizations would have the Department continue that obligation, but with an ''escape clause'' that would allow the Department to suspend those procedures and act under exceptional circumstances.

This is too high a bar. In today's operational environment, the exceptional has become the rule. During the meet-and-confer process, we provided numerous and frequently alarming examples where such negotiated procedures have hindered day-to-day operations—for example, in redeploying personnel from a seaport to an airport to meet an unexpected operational need, port directors today must draw from a pre-established pool of volunteers even if in so doing they would under-staff other critical line functions. Department managers, supervisors, and employees are on the frontlines of the war on terrorism and the efforts to preserve homeland security. The Department must be able to rely on the judgment and ability of these managers and supervisors to make day-to-day decisions—even if this means deviating from established or negotiated procedures. The reality in the Department today is that such deviations would be constant, thereby rendering any negotiated procedures meaningless. Moreover, the Department's managers and supervisors must be able to make split-second decisions to deal with operational realities free of arbitrarily imposed standards.

With respect to post-implementation bargaining, the proposals offered by labor organizations are similarly flawed. While they would allow for management to implement without bargaining in advance over impact and appropriate arrangements for employees adversely affected by the exercise of a management right, they would still require immediate post-implementation negotiations and third-party impasse resolution over such matters. However, the reality of DHS's operational environment today is that change is constant, and as a consequence, so too would be post-implementation negotiations, with the prospect of continuous third-party involvement. These negotiations would be required even in cases where the change has come and gone and/or where its impact was insignificant or insubstantial. The demand on DHS's frontline managers and supervisors to engage in constant post-implementation negotiations would divert them, and other critical resources, from accomplishing the mission. This is unacceptable and inconsistent with the vision for the Department.

Further, under 5 U.S.C. chapter 71, negotiated agreements over appropriate arrangements are binding, under the assumption that those agreements have anticipated future changes. Once again, today's operational environment belies that assumption. Not only are changes necessitated by operational demands constant, but they are also of almost infinite variety. Our frontline managers and supervisors must not be bound by past agreements when they must face current and future exigencies.

Nevertheless, in recognition of the concerns articulated by the participating labor organizations and other commenters, and as a result of the September 10 meeting with the national presidents of AFGE and NTEU, the Secretary and the Director directed that the proposed regulations be revised to ensure the involvement of labor organizations in such matters. First, the regulations provide for management, at the level of recognition, (1) to confer with an appropriate exclusive representative to consider its views and recommendations with regard to procedures that managers and supervisors will follow in the exercise of those management rights that deal directly with operational matters; (2) to meet for up to 30 days in an attempt to reach agreement on such procedures, with the possibility of extensions and third-party assistance; and (3) to deviate from those procedures as necessary. We believe this strikes the right balance between the Department's need for maximum flexibility and speed and the value of labor organization involvement.

Second, as a result of the September 10 meeting with the national presidents of AFGE and NTEU, the Secretary and the Director also directed that the proposed regulations be revised to require post-implementation negotiations over impact and

appropriate arrangements for employees adversely affected by the exercise of a management right. They have also been revised to allow for pre-implementation notice and bargaining on arrangements when operational circumstances permit.

However, to ensure that those negotiations do not distract or divert managers and supervisors from their operational mission, those negotiations are required only when the action or event has a ''significant and substantial'' impact on the bargaining unit as a whole, or on those employees in that part of the bargaining unit affected by the management action. For example, a management action that impacted employees from various locations could trigger negotiations at the level of recognition under this provision, as would a management action that impacted employees in a single district or port covered by a nationwide bargaining unit. Those negotiations must be consistent with the Department's general duty to bargain over conditions of employment, as established by these final regulations. In such instances, bargaining is not required unless the act or event is expected to exceed or has exceeded 60 days, in order to ensure that managers are not bargaining over short-term changes that may become moot before negotiations can even begin. While management is not required to negotiate when the impact is on a single employee, Department managers will be encouraged to address individual employee hardships that result from a management action, whether or not that management action triggers an obligation to bargain. In addition, the revised regulations provide for reimbursement for reasonable, actual, and non-routine expenses incurred as a result of such actions or events.

We have also revised the proposed regulations to require mid-term bargaining over personnel policies, practices, and matters affecting working conditions only insofar that they are ''foreseeable, substantial, and significant in terms of impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.'' For example, in addition to requiring negotiations over bargaining unit-wide changes in working conditions that are ''foreseeable, substantial, and significant,'' this provision would also require bargaining if the change in working conditions was limited to a location(s) or organizational unit(s) below the level of recognition (such as a port or district), insofar as the impact of such a change was otherwise ''foreseeable, substantial, and significant.'' In so doing, we note that this ''substantial and significant'' test is consistent with current FLRA and private sector case law.

In addition, we have limited mid-term bargaining to 30 days. However, in response to the comments of labor organizations, the Secretary and the Director directed that the proposed regulations be amended to allow for binding resolution of mid-term impasses by the HSLRB. We have also reinstated an exclusive representative's right to be present at formal discussions between Department representatives and employees, except when the purpose is to discuss operational matters. These changes are also in keeping with our attempt to strike the right balance between operational demands and the rights of an exclusive representative.

Taken together, the Secretary and the Director believe these revisions meet the Department's mission needs and are consistent with the Homeland Security Act's promise to preserve collective bargaining rights. While labor organizations have argued that any alteration of the scope of bargaining violates the Act, such an interpretation of the law would have the effect of nullifying the Act itself. The Act authorizes the Secretary and the Director to waive and/or modify 5 U.S.C. chapter 71. Clearly, case law interpreting that chapter may be modified, as well, to carry out the language, intent, and purpose of these regulations. The Act also requires that the Department's HR system be flexible, and these regulations fulfill that statutory requirement.

4. Adverse Actions and Appeals

In authorizing the creation of a new human resources system for the Department, Congress specifically required that employees continue to be afforded the protections of due process. It also prohibited any change in the application of existing statutory provisions involving merit principles, prohibited personnel practices, or protection against whistleblower reprisal or discrimination. Recognizing the critical nature of the Department's mission, Congress also stated in 5 U.S.C. 9701(f)(2) that the new system should provide, ''to the maximum extent practicable, for the expeditious handling'' of appeals of disciplinary and performance-based actions.

The proposed regulations included a number of changes to adverse actions and appeals procedures. Consistent with the Homeland Security Act, these changes were intended to simplify and streamline those procedures and provide for greater individual accountability, all without compromising guaranteed due process protections. Greater accountability is particularly critical to the Department. By its very nature, the Department's mission requires an exceptionally high level of workplace order and discipline. For example, the fact that many DHS employees have arrest authority and other enforcement powers means that they, and the Department, have a special responsibility to the public.

With that in mind, the proposed regulations provided for shorter notice for adverse actions, an accelerated MSPB adjudication process, a lower burden of proof to sustain the Department's action, and a bar on any mitigation of penalty by MSPB (except in the case of a prohibited personnel practice), as well as a bar on the arbitration of adverse actions. The proposed regulations also gave the Secretary authority to establish a number of mandatory removal offenses (MRO)—that is, offenses that have such a direct and substantial impact on homeland security that they must carry a mandatory removal penalty. The proposed regulations also created a special, independent panel appointed by the Secretary to adjudicate MROs; if that panel found that an MRO had been committed, the proposed regulations provided that only the Secretary could mitigate the removal of an employee. While Congress gave DHS and OPM the authority to establish an adjudicatory body other than MSPB, the Secretary and the Director decided that with the changes outlined above, DHS could achieve the objectives of the legislation while retaining MSPB for employee adverse action appeals, except for MROs.

Commenters, including the labor organizations participating in the meet-and-confer process, generally expressed concern that these changes, separately and together, would vitiate the due process rights of DHS employees. They argued that the changes would substantially diminish (or in the case of arbitrators eliminate) the authority of third parties such as MSPB to fully and fairly review and adjudicate adverse actions. Commenters, as well as some Members of Congress, expressed particular concern over the proposal to adopt a lower ''substantial evidence'' standard of proof for adverse actions, as well as the proposal to bar MSPB from mitigating the Department's penalty determination in an adverse action, except in the case of a prohibited personnel practice. Labor organizations argued that the right to arbitrate an adverse action was fundamental to collective bargaining, and that by

removing adverse actions from arbitral review, the proposed regulations were inconsistent with statutory guarantees in this regard.

OPM and DHS have carefully considered these comments, including those received from participating labor organizations during the meet-and-confer process. Accordingly, major revisions have been made to the proposed regulations in four areas.

First, while DHS and OPM continue to provide for a shorter, 15-day minimum notice to an employee of a proposed adverse action (compared to a 30-day notice under current law), we have given employees a minimum of 10 days to respond to the charges specified in the notice of proposed adverse action. This reply period runs concurrently with the notice period; it represents an increase over the 5-day reply period initially proposed, as well as the 7-day reply period provided in current law. Employees have a right to be heard before a proposed adverse action is taken against them. This is a fundamental element of due process in adverse actions. This change protects that right while still providing for a more streamlined process. Similarly, in the performance management section of the regulations, we have also ensured that employees are apprised in advance of performance expectations that may affect their retention.

Second, we re-examined the issue of burden of proof and decided to adopt the ''preponderance of the evidence'' standard for all adverse actions, whether conduct-or performance-based, instead of the ''substantial evidence'' standard set forth in the proposed regulations. ''Preponderance of the evidence'' is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. This is the standard that currently applies to conduct actions taken under chapter 75 of title 5. This is a higher standard of proof than ''substantial evidence,'' which currently applies to performance actions taken under chapter 43.

Third, in response to comments from labor organizations and others, the Secretary and the Director decided to provide bargaining unit employees the option of grieving and, subject to the approval of their exclusive representative, arbitrating adverse actions. Thus, consistent with current law, bargaining unit employees may contest an adverse action either by filing an appeal with MSPB or by grieving and arbitrating the matter through any applicable negotiated grievance procedure. However, when adjudicating such adverse actions, arbitrators will be bound by the same rules and standards governing such things as burden of proof and mitigation that these regulations require of MSPB; this has been a matter of law, and the regulations reiterate this requirement to ensure consistent adjudication, regardless of forum. In order to ensure that consistency, the Department's two largest labor organizations at the September 10 meeting recommended the establishment of a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances. The Secretary and the Director concurred with this recommendation, and the regulations have been revised accordingly.

Finally, the Secretary and the Director have authorized MSPB (as well as arbitrators) to mitigate penalties in adverse action cases, but only under very limited circumstances. We continue to believe that, because the Department bears full accountability for homeland security, it is in the best position to determine the most appropriate adverse action for poor performance or misconduct. Thus, its judgment in regard to penalty should be given deference.

We are persuaded by the concern expressed by commenters, as well as the national presidents of AFGE and NTEU at the September 10 meeting, that the Department's authority over penalties should not be unlimited. Although there is a presumption that DHS officials will exercise that authority in good faith, the Secretary and the Director concluded that it is appropriate to provide an employee affected by an adverse action with an opportunity to rebut that presumption. In this regard, we are persuaded that providing MSPB (and arbitrators) limited authority to mitigate is an appropriate check regarding the exercise of the Department's imposition of penalties. Accordingly, the final regulations preclude mitigation of the penalty selected by DHS except where, after granting deference to the Department, a determination is made that the penalty is so disproportionate to the basis for the action as to be wholly without justification.

This authority is significantly more limited than MSPB's current mitigation authority under the standard first enunciated in *Douglas* v. *Veterans Administration* (5 M.S.P.R. 280 (1981)). Under that 1981 decision, MSPB stated that it would evaluate agency penalties to determine not only whether they were too harsh or otherwise arbitrary but also whether they were unreasonable under all the circumstances. In practice, this has meant that MSPB has exercised considerable latitude in modifying agency penalties. With this new, substantially more limited standard for MSPB mitigation of penalties selected by DHS, our intent is to explicitly restrict the authority of MSPB to modify those penalties to situations where there is simply no justification for the penalty. MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, MSPB or an arbitrator may mitigate a penalty where not all of the charges are sustained. The third party's judgment is based on the justification for the penalty as it relates to the sustained charge(s). The regulations are intended to ensure that when a penalty is mitigated, the maximum justifiable penalty must be applied.

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

5. Mandatory Removal Offenses

The proposed regulations authorized the Secretary to identify offenses that, because they have a direct and substantial impact on the ability of the Department to protect homeland security, warrant a mandatory penalty of removal from the Federal service. Only the Secretary could mitigate the removal of an employee determined to have committed such a mandatory removal offense (MRO). Employees alleged to have committed these offenses would have the right to advance notice, an opportunity to respond, and a written decision. They would also be entitled to appeal that decision to an independent DHS panel, which could reverse the action but could not mitigate the removal penalty. This panel would be composed of three members, who would be appointed by the Secretary. Two examples of possible mandatory removal offenses were provided and comments were solicited on the best and most effective way to provide notice to all employees well in advance of their application.

Commenters expressed a number of objections to the concept of MROs. Since only two examples of potential MROs were provided in the proposed regulations, they feared that removal could be too harsh a penalty for as-yet-

unspecified offenses and that local management might misuse MROs to target individual employees. They also were concerned that employees would not be given full and complete notice of such offenses prior to their application. Finally, they expressed an overriding concern about the independence and objectivity of the proposed internal DHS panel.

As proposed, an MRO should have a direct and substantial impact on homeland security such that there is ''zero tolerance'' for the offense. Accordingly, we have decided to retain MROs and the Mandatory Removal Panel (MRP). However, in response to comments, the Secretary and the Director directed several modifications to the proposed regulations. First, we understand the concern over the lack of specificity with regard to MROs. During the meet-and-confer process, participating labor organizations expressed a similar concern, but we believe we were able to satisfactorily address most of their objections by providing them a preliminary list of potential mandatory removal offenses, as follows:

- Intentionally or willfully aiding or abetting an act, or potential act, of terrorism.
- Intentionally or willfully purchasing, using, selling, and/or transporting weapons of mass destruction or materials related thereto for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper transportation or importation of illegal weapons (including but not limited to weapons of mass destruction) or materials to be used for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper entry of an individual to the U.S. who could compromise, or potentially compromise, homeland security.
- Soliciting or intentionally accepting a bribe or other personal benefit that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise.
- Intentionally or willfully misusing and/or divulging law enforcement sensitive or confidential information (including, but not limited to, classified material) to unauthorized recipients that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise, subject to applicable whistleblower and free speech protections.
- Intentionally or willfully engaging in activities that compromise, or could compromise, the information, economic, or financial infrastructure of the Federal Government, when the employee knew or reasonably should have known of the compromise or potential compromise.

There is no question that employees must be made aware of the final list of MROs when approved by the Secretary. Both the Secretary and the Director believe that this is a basic issue of fairness and a tenet of an organizational culture that establishes clear accountability. The labor organizations participating in the meet-and-confer process were especially concerned about this issue. Accordingly, we agreed to revise the proposed regulations to provide, at a minimum, that MROs will be (1) identified in advance as part of the Department's implementing directives, (2) publicized via notice in the **Federal Register**, and (3) made known to all employees on an annual basis. These offenses should not be a surprise to anyone. The Secretary also intends to consult with the Department of Justice in preparing the list of offenses for publication.

Labor organizations participating in the meet-and-confer process were also apprehensive that managers could misuse MROs. At their specific suggestion, we agreed to add a requirement that every proposed notice of mandatory removal be approved by a Departmental level official before being issued to the employee. This requirement, combined with the Secretary's authority to mitigate the removal penalty, guards against the potential for such abuse and assures consistency of application.

Finally, labor organizations participating in the meet-and-confer process indicated that assurance regarding the independence of the Panel would improve credibility and acceptance, and help resolve any concerns about due process protections. The Secretary and the Director agreed and directed that the proposed regulations be revised to provide that (1) members will be ''independent, distinguished citizens * * * who are well known for their integrity, impartiality, and expertise in labor or employee relations and law enforcement/homeland security''; (2) the Secretary will select members from a list that will include nominees submitted by labor organizations and other sources; and (3) decisions of the Panel will be subject to MSPB record review and appropriate judicial review under the same criteria applicable to other MSPB decisions. We believe these changes effectively resolve the major concerns regarding MROs and the Panel.

With these changes, the final regulations provide for the independence demanded by commenters while assuring DHS's ability to remove employees who engage in conduct or performance that has a direct and substantial impact on homeland security. The Secretary is accountable to the President and the American people for safeguarding homeland security. No other agency or department bears this burden. These regulations ensure that the Secretary's authority aligns with that responsibility.

Response to Specific Comments and Detailed Explanation of Regulations

Subpart A—General Provisions

Section 9701.101—Purpose

Section 9701.101 explains the overall purpose of the regulations in 5 CFR part 9701 to implement the DHS human resources (HR) management system authorized by 5 U.S.C. 9701. In the proposed regulations, this section provided the design goals of the DHS HR system.

During the meet-and-confer process, participating labor organizations recommended that the regulations be revised to clarify the DHS HR system design goals. We have amended § 9701.101 by moving the system goals to a new paragraph (b) and by revising the goals to be consistent with the ''Guiding Principles'' adopted by the Senior Review Committee in 2003 when reviewing options for the DHS HR system.

Section 9701.102—Eligibility and Coverage

Section 9701.102 of the proposed regulations provided the Secretary with the authority to approve the coverage of specific employee categories under one or more provisions in 5 CFR part 9701. During the meet-and-confer process, the participating labor organizations recommended that the regulations clarify the Secretary's authority to cover (and rescind the coverage of) various employee categories under part 9701 and the coverage eligibility of employee categories. Other commenters requested clarification regarding how employees who are not immediately covered by the new HR system (*i.e.*, as the system is phased in) will be treated. In response to these comments, we have revised and reordered § 9701.102 (and made conforming changes elsewhere in the final regulations) to clarify which categories of employees are eligible for coverage under these regulations, and

we have also clarified the Secretary's authority to make coverage determinations and the timing of such determinations, as follows:

• New § 9701.102(a) (formerly § 9701.102(d)) clarifies that all civilian DHS employees *are eligible for coverage* under one or more subparts of these regulations, except those covered by a provision of law outside the chapters of title 5, United States Code, that DHS may waive under 5 U.S.C. 9701.

• New § 9701.102(b) replaces the proposed § 9701.102(a).

• New § 9701.102(b)(1) provides that subpart A becomes applicable to all eligible employees when the regulations take effect—*i.e.*, 30 days after the date of publication of the final regulations in the **Federal Register**.

• New § 9701.102(b)(2) provides that subparts E, F, and G are applicable to all eligible employees on the effective date established by the Secretary or designee, at his or her sole and exclusive discretion and after coordination with OPM; however, the effective date may not be later than 180 days after the date of publication of the final regulations in the **Federal Register** unless otherwise determined by the Secretary and the Director.

• New § 9701.102(b)(3) provides that, with respect to subparts B, C, and D, the Secretary of DHS (or designee), at his or her sole and exclusive discretion and after coordination with OPM, may apply one or more of these subparts to a specific category or categories of eligible employees at any time. The regulations provide that the Secretary may apply some subparts, but not others, to a specific category or categories of eligible employees and that such coverage determinations may be made effective on different dates.

• New § 9701.102(b)(4) contains the requirement (also included in the proposed regulations) that DHS will notify affected employees and labor organizations of all coverage determinations.

• New § 9701.102(c) provides that until the Secretary makes a coverage determination, DHS employees will continue to be covered by the Federal laws and regulations that would apply to them in the absence of the authorities provided by these regulations. For example, GS employees in DHS will continue to be covered by the laws and regulations governing General Schedule classification and pay (*i.e.*, 5 U.S.C. chapter 51 and 5 U.S.C. chapter 53, subchapter III) until the effective date of the Secretary's decision to cover such employees under the classification and pay provisions authorized by 5 CFR part 9701, subparts B and C.

• New § 9701.102(e) (formerly § 9701.102(c)) clarifies that the Secretary or designee may prescribe implementing directives for converting employees to coverage under title 5 if, at his or her sole and exclusive discretion and after coordination with OPM, coverage under one or more subparts of these regulations is rescinded. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration* for additional information on the process for developing implementing directives.) We have also clarified that DHS will notify affected employees and labor organizations in advance of a decision to rescind coverage under these regulations.

In addition, a number of commenters requested clarification regarding the specific categories of employees that are eligible and ineligible for coverage under various subparts of these regulations. The following chart provides additional information on the categories of employees that are eligible (annotated with ''Yes'') and ineligible (annotated with ''No'') for coverage under each subpart of these regulations. The chart and its footnotes must be read together for full coverage information. Employee categories that are eligible for coverage under one or more subparts of these regulations will actually be covered by such subparts only upon approval of the Secretary or designee under § 9701.102(b). DHS will provide advance notice to affected employees and labor organizations regarding coverage decisions.

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Summary of Coverage Eligibility under 5 CFR Part 9701[1]

DHS Organization	Classification (Subpart B)	Pay Administration (Subpart C)	Performance Management (Subpart D)	Labor-Management Relations[2] (Subpart E)	Adverse Actions[3] (Subpart F)	Appeals[3] (Subpart G)
DHS Headquarters	Yes	Yes	Yes	Yes	Yes	Yes
Information Analysis & Infrastructure Protection	Yes	Yes	Yes	Yes	Yes	Yes
Science & Technology	Yes	Yes	Yes	Yes	Yes	Yes
• Employees in the Homeland Security Advanced Research Projects Agency who are appointed and paid under section 307(b)(6) of the Homeland Security Act of 2002	No	No	Yes[4]	Yes	Yes	Yes
Emergency Preparedness & Response[5] (including the Federal Emergency Management Agency)	Yes	Yes	Yes	Yes	Yes	Yes
Border & Transportation Security	Yes	Yes	Yes	Yes	Yes	Yes
U.S. Customs & Border Protection	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
U.S. Immigration & Customs Enforcement (ICE)	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
Federal Law Enforcement Training Center	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes

DHS Organization	Classification (Subpart B)	Pay Administration (Subpart C)	Performance Management (Subpart D)	Labor-Management Relations[2] (Subpart E)	Adverse Actions[3] (Subpart F)	Appeals[3] (Subpart G)
Transportation Security Administration (TSA)						
• Screeners	No[7]	No[7]	No[7]	No[7]	No[7]	No[7]
• Federal Air Marshals	No[8]	No[8]	No[8]	No[8]	No[8]	No[8]
• Other employees	No[8]	No[8]	No[8]	No[8]	No[8]	No[8]
U.S. Coast Guard	Yes	Yes	Yes	Yes	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	Yes	Yes	Yes
• Academy Faculty	No	No	Yes[9]	Yes	Yes	Yes
U.S. Secret Service	Yes	Yes	Yes	No[10]	Yes	Yes
• Uniformed Division	No	No	Yes	No[10]	Yes	Yes
• Wage Grade	Yes[6]	Yes[6]	Yes	No[10]	Yes	Yes
U.S. Citizenship & Immigration Services	Yes	Yes	Yes	Yes	Yes	Yes

[1]Unless otherwise noted, all employees in each organization are eligible for coverage under all subparts of 5 CFR part 9701. Actual coverage under each subpart is subject to the approval of the Secretary or designee under 5 CFR 9701.102(b). Members of the Senior Executive Service (SES) are eligible for coverage (subject to specific exclusions), but will not be covered under initial program implementation. Members of the uniformed military service, administrative law judges, employees in Executive Schedule positions, and experts and consultants are not eligible for coverage. Employees covered by a provision of law outside chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, are not eligible for coverage under the applicable subpart(s) replacing those chapters. We also note that some employees are subject to a subpart but may be excluded from coverage under all or some provisions because of eligibility conditions set forth in that subpart.

[2]Labor-management relations regulations in subpart E are not applicable to supervisors or management officials.

[3]Adverse action and appeals subparts do not apply to employees during initial service period, the demotion of a supervisor or manager under 5 U.S.C. 3321, the termination of temporary or term promotions or appointments, SES members, or confidential/policy positions.

[4] Employees are not eligible for any bonus, monetary award, or other monetary incentive except for payments authorized under section 1101 of Public Law 105-261.

[5] Exception: For employees covered by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, DHS may "appoint and fix the compensation of such temporary personnel as may be necessary, without regard to the provisions of title 5 governing appointments in competitive service." (See 42 U.S.C. 5149(b)(1).)

[6] Wage Grade employees are eligible for coverage under subparts B and C (dealing with classification and pay), but will not be covered under these subparts in the initial program implementation.

[7] Under section 111(d) of the Aviation and Transportation Security Act, TSA screeners are employed outside the provisions of title 5, U.S. Code. Thus, they cannot be covered by the DHS HR system established under 5 U.S.C. 9701. However, DHS may direct that the TSA screener personnel system align administratively with the DHS HR system under 5 CFR part 9701, except to the extent that aspects of the DHS system conflict with the statutory authority applicable to TSA screeners.

[8] TSA employees who are not screeners are covered by an independent personnel management system established under the authority of 49 U.S.C. 114(n). Under that authority, TSA nonscreeners are covered by the personnel management system established by the Federal Aviation Administration under 49 U.S.C. 40122, subject to any modifications TSA may make. Under 49 U.S.C. 40122(g), TSA employees are not covered by most provisions in title 5, U.S. Code, including the DHS HR system authority in 5 U.S.C. 9701. Federal Air Marshals (FAMs) are currently TSA employees and have the same status as other TSA nonscreeners ("other employees"), even though they are detailed to ICE. When FAM positions are moved from TSA to ICE, these employees will be eligible for coverage under 5 CFR part 9701, except for the labor relations provisions in subpart E. See special transitional rules for FAMs in 5 CFR 9701.232 and 9701.374 (dealing with classification and pay).

[9] Eligible for coverage under performance management regulations in subpart D, but will not be covered under initial program implementation.

[10] Excluded by 5 U.S.C. 7103(a)(3)(H) and Executive Order 12171 of November 17, 1979.

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Section 9701.102(e) of the proposed regulations provided that nothing in 5 CFR part 9701 prevents DHS from using an independent discretionary authority to establish a parallel system that follows some or all of the requirements in these regulations for a category of employees ineligible for coverage under 5 U.S.C. 9701, as described in this chart. Commenters recommended that DHS cover all employees by the same HR system provisions. For example, commenters urged DHS to treat employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act consistently with other employees who are eligible for coverage under these regulations and to recognize the value of the contributions of intermittent employees in emergency disaster assignments by creating an equivalent parallel system for them and closing the gap in compensation between this cadre and regular DHS employees. Conversely, another commenter recommended that such employees not be subject to the new DHS HR system. Other commenters recommended that DHS cover U.S. Coast Guard academy faculty in a parallel system, while keeping its existing HR system intact. Finally, a commenter felt that the Secretary should not be allowed to use independent discretionary authority to establish a parallel system for categories of employees who are ineligible for coverage and that such authority should be subject to congressional approval.

We have redesignated § 9701.102(e) as § 9701.102(f) and revised it to clarify that the Secretary or other authorized DHS official may exercise an independent legal authority to establish a parallel system that follows some or all of the requirements in these regulations for a category of employees who are not eligible for coverage. DHS may decide to treat each employee category that is ineligible for coverage differently. In all cases, DHS may invoke its independent authority to establish a new or parallel pay system for categories of employees ineligible for coverage under these regulations only to the extent provided under such independent legislation and subject to any procedural protections that such legislation provides. For example, DHS may establish a parallel classification and pay system for Stafford Act employees.

Other commenters requested clarification regarding the coverage of members of the Senior Executive Service (SES) and employees in senior-level (SL) and scientific or professional (ST) positions under the classification, pay, and performance management system in subparts B, C, and D of these regulations in light of the new performance management certification requirements under 5 U.S.C. 5307 and the new pay-for-performance system for SES members under 5 U.S.C. 5383.

Section 1322 of the Homeland Security Act of 2002 amended 5 U.S.C. 5307 to provide a higher limit on the aggregate compensation that SES members and employees in SL/ST positions may receive in a calendar year. In addition, section 1125 of the National Defense Authorization Act of 2003 amended 5 U.S.C. chapter 53, subchapter VIII, to establish a performance-based pay system for SES members.

These final regulations provide DHS with discretionary authority to cover SES members and SL/ST employees under the classification, pay, and performance management provisions of 5 U.S.C. part 9701, subparts B, C, and D. (See §§ 9701.202(b)(3) and (4), 9701.302(b)(3) and (4), and 9701.402(a).) The aggregate pay limitation law and regulations under 5 U.S.C. 5307 and 5 CFR part 530, subpart B, cannot be waived and must continue to apply to SES members and SL/ST employees covered by the DHS pay system under 5 CFR part 9701, subpart C. DHS must obtain certification of its performance appraisal system, as required by 5 CFR part 430, subpart D, in order to apply the higher aggregate cap. (*See* § 9701.303(f).)

In addition, § 9701.102(d) of these final regulations (§ 9701.102(b) in the proposed regulations) allows DHS to cover its SES members under a classification, pay, and performance management system under these regulations. However, the provisions of such a system must be consistent with the performance-based features and pay caps that apply to employees covered by the new Governmentwide SES pay-for-performance system under 5 U.S.C. chapter 53, subchapter VIII, and OPM implementing regulations. If DHS wishes to establish a system for SES members that differs from the Governmentwide SES pay-for-performance system, DHS and OPM must issue joint regulations consistent with the requirements of 5 U.S.C. 9701. DHS and OPM will involve SES members and other interested parties in the design and implementation of any new pay system for SES members.

Other commenters requested clarification regarding why Transportation Security Administration (TSA) screeners are not covered by the new system. Commenters stated that the applicability of the regulations to TSA is addressed ambiguously and the regulations do not appear to recognize certain statutory impediments to coverage (whether implemented administratively as a ''parallel system'' or under the coverage of regulation) that differ with respect to screeners and nonscreeners.

Under section 111(d) of the Aviation and Transportation Security Act, TSA screeners are employed outside the provisions of title 5, United States Code. Thus, they cannot be covered by the DHS HR system established under 5 U.S.C. 9701. Similarly, other TSA employees (nonscreeners) are covered by an independent personnel management system established under the authority of 49 U.S.C. 114(n). Under that authority, TSA nonscreeners are covered by the personnel management system established by the Federal Aviation Administration under 49 U.S.C. 40122, subject to any modifications TSA may make. Under 49 U.S.C. 40122(g), TSA employees are not covered by most provisions in title 5, U.S. Code, including the DHS HR system authority in 5 U.S.C. 9701. While TSA employees are excluded from coverage under the HR system established by these regulations, DHS can direct that the TSA personnel systems align administratively with the new DHS HR system except to the extent that aspects of those systems conflict with the statutory authorities applicable to TSA employees.

Commenters also recommended that the regulations be modified to allow DHS to cover administrative law judges (ALJs) and to develop a parallel job evaluation, pay, and performance management system tailored to ALJs consistent with the treatment of DHS SES members and employees in SL/ST positions, including the higher basic pay cap that applies to SES members under § 9701.312(b). The commenters recommended that DHS develop a performance management system that is consistent with the requirements of the Administrative Procedure Act and in line with the guiding principles of the proposed regulations. DHS believes it is desirable to cover its ALJs under the system that applies to other ALJs throughout the Government.

Section 9701.103—Definitions

During the meet-and-confer process, the participating labor organizations requested clarification regarding the exception to the definition of ''employee'' under § 9701.103 of the proposed regulations. We agree that this exception is confusing and have revised 5 CFR part 9701, subpart E, to eliminate the need for the exception language in

§ 9701.103. (See *Section 9701.505—Coverage.*)

During the meet-and-confer process, the participating labor organizations requested that the definition of ''coordination'' be revised so that the OPM coordination process involve employees and employee representatives. Alternatively, the labor organizations recommended that the definition of ''coordination'' be deleted and that all requirements for DHS to coordinate with OPM be replaced with more detailed regulations.

While we understand the desire for the regulations to provide more specificity and assurances on how the HR system will operate, we have not removed the definition of ''coordination'' from these regulations. The regulations must provide DHS with sufficient flexibility to design a classification, pay, and performance management system that can be tailored to DHS's varied mission requirements, performance priorities, and strategic human capital needs.

However, we agree that the DHS HR system must be designed in a transparent and credible manner that involves employees and employee representatives. For this reason, we have added a definition of ''implementing directives'' to § 9701.103. The term ''implementing directives'' is defined as the directives issued by the Secretary or designee at the Department level to carry out any system established under 5 CFR part 9701. Such implementing directives will be developed with the involvement of employee representatives using the continuing collaboration provisions in revised § 9701.105. (*See Section 9701.105—Continuing collaboration.*) In addition, we have made a number of revisions in other sections of these regulations to require DHS to establish implementing directives to carry out the HR authority provided by these regulations.

Section 9701.105—Continuing Collaboration

Section 9701.105 of the proposed regulations provided DHS with the authority to establish internal Departmental directives to further define the design characteristics of any system established under these regulations. During the meet-and-confer process, the participating labor organizations expressed concerns that such directives would be developed without the involvement of employees and employee representatives. The labor organizations recommended that DHS consult with employees and employee representatives before issuing any internal directives.

We agree that the DHS HR system must be designed in a transparent and credible manner and that the development of any internal directives implementing the HR system authorities provided by these regulations involve employees and employee representatives. Although not expressly stated in the proposed regulations, DHS, in the spirit of collaboration used throughout the design process, intends to involve employees and their representatives in the development of the implementing directives. In addition, we have revised and retitled § 9701.105 as ''Continuing collaboration.'' This section requires DHS to issue implementing directives, as newly defined in § 9701.103, to implement these regulations. As required by 5 U.S.C. 9701, employee representatives will be provided with an opportunity to collaborate in developing and issuing these implementing directives. DHS will determine the number of employee representatives that may engage in continuing collaboration and will establish timeframes to provide information and comments. National labor organizations with multiple local labor organizations accorded exclusive recognition will determine how their units will be represented within this framework.

As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives. Employee representatives also will be given a copy of the proposed final draft and will be provided with an opportunity for written and/or oral comment. These comments will become part of the record and will be forwarded with the final directive to the Secretary or designee for a final decision. However, nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

As required by the Homeland Security Act, § 9701.105(f) provides that the Secretary and the Director will jointly establish any procedures necessary to carry out the continuing collaboration process as internal rules of Departmental procedure which are not subject to review.

Section 9701.106—Relationship to Other Provisions

Section 9701.106 describes the relationship of the authority provided DHS under 5 U.S.C. 9701 and these regulations to the authorities in other sections of law and regulations. During the meet-and-confer process, the participating labor organizations requested clarification regarding when waived laws and regulations will and will not apply to categories of employees approved for coverage under one or more subparts of these regulations.

We agree and have revised § 9701.106 to clarify that, for the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under the waivable chapters (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), the referenced provisions are not waived but are modified consistent with the corresponding regulations in part 9701, except as otherwise provided in that part or in DHS implementing directives. For example, hazardous duty differentials under 5 U.S.C. 5545(d) are payable only to General Schedule employees covered by 5 U.S.C. chapter 51 and subchapter III of chapter 53. To ensure that DHS employees continue to be eligible for hazardous duty differentials when they convert from the General Schedule to the DHS pay system, they will be deemed to be covered by the referenced General Schedule provisions of law for the purpose of applying section 5545(d). In addition, in applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of these proposed regulations (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9701.706(h).

We also revised paragraph (c) to clarify that the listed provisions in paragraph (c) do not apply to categories of employees upon conversion to a new classification and pay system established under 5 CFR part 9701, subparts B and C.

We also added a new paragraph (a) to clarify that provisions of title 5 are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform with these regulations—*i.e.*, these regulations supersede the corresponding laws they replace. In addition, for clarification purposes, we have restated the rule of construction, which was located in § 9701.502 of subpart E of the proposed regulations, as a general rule of construction applicable to the entire part. However, in so doing, we do not intend to imply that the rule of construction is limited only to that subpart; rather, the express language of

§ 9701.106(a) extends that rule of construction to the entire part.

Section 9701.107—Program Evaluation

During the meet-and-confer process, the labor organizations recommended that the regulations require DHS to conduct ongoing evaluations of these regulations and that employees and employee representatives be involved in such evaluations. Other commenters also recommended that regulations include a formal evaluation of the HR system with implementation goals, including predetermined benchmarks for success.

Consistent with the commitment made in the Preamble to the proposed regulations, DHS intends to conduct evaluations of its HR system. We added a new § 9701.107 to carry out this intent by requiring DHS to establish procedures for evaluating the regulations and their implementation. DHS will provide employee representatives with an opportunity to be briefed and comment on the design and results of the program evaluation. This opportunity includes participation in identifying the scope, objectives, and methodology to be used in the program evaluation and reviewing draft findings and recommendations, subject to any time limits prescribed in DHS's procedures. Involvement in this process does not waive the rights of DHS or the employee representatives under the applicable laws and these regulations.

Subpart B—Classification

General Comments

As a result of concerns expressed during the meet-and-confer process, we have replaced the term ''job evaluation'' with the term ''classification'' throughout these regulations.

Commenters were concerned about the lack of specificity in subpart B of the proposed regulations regarding the structure and rules for the DHS classification system. Commenters found it difficult to ascertain where their positions would fit within the classification framework of occupational clusters and bands. Although some found the classification concepts simple and clear, most commenters felt the proposed regulations were too vague and difficult to understand because of the lack of detailed information on such features as how occupational clusters and bands will be established, which occupations will be assigned to each cluster, how GS grades will ''cross-walk'' to bands, and which positions will be assigned to each band. Because of the lack of details in the proposed regulations, commenters questioned whether the proposed classification system would be fair and credible. Commenters expressed a strong desire that the regulations be more transparent and that DHS closely involve employees and employee representatives in the design of the DHS classification system.

Because of the lack of specificity, commenters recommended a number of amendments to subpart B of the regulations to provide more detailed criteria and conditions for the DHS classification system or to clarify how positions will be converted into the system. The comments included recommendations on and clarifications regarding the criteria for grouping occupations into clusters and the specific occupational clusters DHS will create, how competencies will be identified and used in the system, the definitions of the bands and the criteria DHS will use to assign positions to bands, the purpose of the Senior Expert band and the criteria that DHS will use to promote employees to that band, how manager and team leader positions will be assigned to clusters and bands, how law enforcement officer positions will be treated, the standards DHS will use to qualify and promote employees to higher bands (*e.g.*, time-in-service, formal education requirements), and the process for converting positions to the DHS classification system. In reaction to the lack of detail in the regulations, the labor organizations recommended that the bar on collective bargaining of the DHS classification system under § 9701.205(b) of the proposed regulations be removed.

We understand the desire for the regulations to provide more specificity and assurances regarding how the DHS classification system will operate. However, the regulations must provide DHS with sufficient flexibility to design a classification system with occupational clusters and bands that support the market-based features of the DHS pay system and that can be tailored to DHS's mission requirements and strategic human capital needs. Except as otherwise explained in this section of the **SUPPLEMENTARY INFORMATION,** we have not modified subpart B of the regulations in response to these comments. DHS will consider the suggestions and recommendations made by commenters as it develops implementing directives for the DHS classification system.

We agree that the DHS classification system must be designed in a transparent and credible manner that involves employees and employee representatives. While we have not removed the bar on collective bargaining in § 9701.205, we have made a number of revisions throughout subpart B that require DHS to carry out the new classification system through detailed implementing directives, as defined in § 9701.103. As previously discussed, these implementing directives will be established using the ''continuing collaboration'' provisions in revised § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration.*)

Other Comments on Specific Sections of Subpart B

Section 9701.201—Purpose

Section 9701.201 explains the purpose of subpart B, which contains regulations establishing a classification structure and rules for covered DHS employees and positions. During the meet-and-confer process, the participating labor organizations recommended that the definition of ''classification'' under § 9701.204 include a reference to the principle of equal pay for equal work. We agree, but rather than revising this definition, we have added the merit principle of ''equal pay for work of equal value'' to the end of the purpose description in new § 9701.201(a).

For clarification purposes, we also moved § 9701.205(a) in the proposed regulations to a new § 9701.201(b) in the final regulations. We have retitled § 9701.205 as Bar on collective bargaining, consistent with the title of § 9701.305.

Section 9701.203—Waivers

Section 9701.203 of the regulations specifies the provisions of title 5, United States Code, that are waived for employees covered by the DHS classification system established under subpart B. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.203(a) to clarify that the waivers apply when a category of DHS employees is covered by a classification system established under subpart B.

We also have amended § 9701.203(a) by adding § 9701.222(d) to the list of exceptions to the waiver of 5 U.S.C. chapter 51. See *Section 9701.222—Reconsideration of classification decisions* for additional information on this exception.

Section 9701.204—Definitions

A commenter suggested adding a definition of ''competency'' to § 9701.204 to clarify its meaning in the definition of ''position'' or ''job.'' We agree and have added a definition of ''competencies'' that is identical to the

definition of that term in § 9701.404 concerning the DHS performance management system.

To help respond to commenters' general confusion with the classification provisions, we also have—

- Added a definition of ''basic pay'' that is identical to the definition of that term in § 9701.304 to clarify its use under § 9701.231, regarding conversion into the DHS classification system.
- Revised the definition of ''classification'' to clarify that this term, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, cluster, and band for pay and other related purposes.
- Amended the definition of ''occupational cluster'' to clarify that an occupational cluster may include one or more occupational series.

Section 9701.211—Occupational Clusters

Section 9701.211 provides DHS with the authority to establish occupational clusters after coordination with OPM. In response to commenters' concerns about the lack of specificity in the regulations regarding how DHS will define occupational clusters, we have revised § 9701.211 to clarify that DHS must document in writing the rationale, as well as the criteria, for grouping occupations or positions into occupational clusters.

Section 9701.212—Bands

Section 9701.212 provides DHS with the authority to establish one or more bands within each occupational cluster after coordination with OPM. Section 9701.212(a)(1)(iv) of the proposed regulations provided that each occupational cluster may include a Supervisory band reserved primarily for first-level supervisors. Commenters observed that limiting Supervisory bands to first-level supervisors does not adequately accommodate the range of supervisory and managerial positions at DHS that are below the executive level. Some commenters questioned whether the Senior Expert band should be used for other supervisory/managerial levels or team leader positions. Others questioned whether the number of Supervisory bands should be limited above the first-level in an effort to ''flatten-out'' organizational structures. We agree that the description of Supervisory band in the proposed regulations was too narrow. To clarify, we have reordered § 9701.212 and revised § 9701.212(b)(4) (formerly § 9701.212(a)(1)(iv)) to provide that a Supervisory band includes work that may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties. DHS will address the number and use of Supervisory bands and the assignment of team leaders to bands in its implementing directives.

Section 9701.212(b) of the proposed regulations provided DHS with the discretionary authority to establish qualification standards and requirements for occupational series, occupational clusters, and/or bands after coordination with OPM. During the meet-and-confer process, the participating labor organizations were concerned that DHS may choose not to establish qualifications standards. To clarify our intent, we have redesignated § 9701.212(b) as § 9701.212(d) and revised this paragraph to require DHS to establish qualifications standards and requirements. Under this provision, DHS has the flexibility to (1) adopt the qualifications standards and requirements issued by OPM and/or (2) establish different qualifications standards and requirements after coordination with OPM. In addition, we have clarified this section to reflect the fact that DHS retains its authority to establish qualification standards under 5 U.S.C. chapters 31 and 33 and implementing regulations.

Section 9701.222—Reconsideration of Classification Decisions

Section 9701.222 of the proposed regulations required DHS to establish policies and procedures for handling an employee's request for reconsideration of classification decisions. The proposed regulations limited reconsideration requests to occupational series or pay system assignment and provided employees no right to appeal classification decisions outside DHS.

Because the proposed regulations provided no authority for independent review of DHS classification decisions, the labor organizations recommended that the regulations be revised to provide bargaining unit employees with the authority to challenge classification determinations through negotiated grievance procedures. They also recommended that employees be provided the right to challenge classification decisions beyond occupational series and pay system assignment. Other commenters advised that DHS's authority to reconsider classification decisions should be appealable to an independent arbitrator.

We agree that the DHS classification system should provide covered employees with the right to a broader scope of review of the classification of their position by an independent third party. We have therefore revised § 9701.222 to provide employees with the right to request that DHS or OPM reconsider the occupational cluster and band assignment as well as the pay system and occupational series of their official position of record at any time. This right is parallel to the classification appeal right of current General Schedule employees under 5 U.S.C. 5112(b). In addition, the regulations require both DHS and OPM to establish implementing directives for reviewing these requests, including, but not limited to, policies on nonreviewable issues, rights of representation, and effective dates of any corrective actions.

Section 9701.222(c) of the regulations allows an employee to request that OPM reconsider a DHS classification reconsideration decision. However, an employee may not request that DHS review an OPM reconsideration decision. If an employee does not request an OPM reconsideration decision, § 9701.222(c) provides that a DHS classification determination is final and not subject to further review or appeal. Section 9701.222(d) provides that OPM's final determination on an employee's request is not subject to further review or appeal. This provision, in conjunction with the waiver exception in § 9701.203(a), is intended to preserve OPM's authority under 5 U.S.C. 5112(b) and 5 U.S.C. 5346(c) to review and issue final classification decisions without judicial review.

During the meet-and-confer process, the participating labor organizations suggested that the regulations authorize retroactive effective dates for promotions if an employee's position is found by OPM to be misclassified. Under the current classification law and regulations (5 U.S.C. chapter 51 and 5 CFR part 511) classification decisions generally may not be made effective retroactively. (*See* 5 CFR 511.701(a)(4).) In addition, the Supreme Court has held that neither the Classification Act under 5 U.S.C. chapter 51 nor the Back Pay Act under 5 U.S.C. 5596 creates a substantive right to back pay for periods of wrongful classifications. (*See United States* v. *Testan,* 424 U.S. 372 (1976).)

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

Section 9701.232—Special Transition Rules for Federal Air Marshal Service

Section 9701.232 provides that if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover such positions under a classification system that is parallel to the classification system that was applicable to the Federal Air Marshal Service within TSA. These revised regulations provide that DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new classification system under subpart B, consistent with the conversion rules in § 9701.231.

Labor organization commenters recommended that the regulations provide DHS with the authority to transfer Federal Air Marshal Service positions only if Federal Air Marshals are granted full collective bargaining rights and the ability to join a labor organization of their choice. We disagree. Federal Air Marshals are excluded from collective bargaining by section 1–123 of E.O. 12666, January 12, 1989.

Subpart C—Pay and Pay Administration

General Comments

Commenters expressed concerns about the lack of specificity in subpart C of the proposed regulations on the pay structure and the pay administration rules governing the proposed DHS pay system. Commenters felt the proposed regulations were too vague and difficult to understand because of the lack of detailed information on such issues as how band rate ranges will be established and adjusted, how locality and special pay supplements (hereafter called locality and special rate supplements) will be established and adjusted, and how performance pay pools will be funded and operated. Commenters had difficulty ascertaining how their pay and pay adjustments would be determined under the new system and how individual and team performance would affect pay. They also were concerned that their pay would not keep up with their counterparts in other Federal agencies. Commenters expressed a strong desire that the regulations be more transparent and that DHS closely involve employees and employee representatives in the design of the pay system. Because of the lack of details in the proposed regulations, commenters questioned whether the proposed pay system would be fair and equitable.

Because of the lack of specificity, commenters recommended a number of different amendments to subpart C of the regulations to provide detailed criteria and conditions for setting and adjusting basic rate ranges and granting rate range increases to employees; setting and adjusting locality and special rate supplements and providing for increases in those supplements; addressing staffing issues that may result from geographic pay differences; funding pay pools; determining and granting performance pay increases; setting pay upon promotion, demotion, initial appointment, and other actions; granting within-band pay increases; granting special skills, assignment, and staffing payments; and transitioning and converting employees into the new pay system. In reaction to the lack of specificity, the labor organizations recommended that the regulations be revised to remove the bar on collective bargaining of the DHS pay structure and system in § 9701.305; require the new pay system to be faithful to merit system principles and protect against prohibited personnel practices; require DHS to assess the impact of the system on employees prior to implementation to maximize fairness, uniformity, and objectivity; implement the current locality pay program, modified to be occupation specific; and establish a Department-level compensation board to address and make recommendations on continuing issues regarding the administration of the new pay system. Labor organization commenters felt that such a compensation board would make pay decisions more credible and transparent. Other commenters felt that employees should receive pay increases equivalent to the increases they would have received under the General Schedule.

We understand the desire for the regulations to provide more specificity and assurances regarding how the pay system will operate. However, the regulations also must provide DHS with sufficient flexibility to design a nimble pay system that is performance-sensitive, market-based, and tailored to DHS's performance goals, mission requirements, and strategic human capital needs. Except as otherwise explained in this section of the Supplementary Information, we have not modified subpart C of the regulations in response to these comments.

However, we agree that the DHS pay system must be designed in a transparent and credible manner that involves employees and employee representatives. While we have not removed the bar on collective bargaining in § 9701.305, we made a number of revisions throughout subpart C that require DHS to establish more detailed policies to carry out the new pay system through implementing directives, as defined in § 9701.103. As previously discussed, these implementing directives will be developed using the ''continuing collaboration'' provisions in revised § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration*.) DHS will consider the suggestions and recommendations made by commenters as it develops implementing directives for the DHS pay system.

In addition, we agree that labor organization involvement in both the design and administration of the pay system can contribute to its credibility and acceptance with bargaining unit employees. Therefore, we have provided for such involvement by giving the Department's national labor organizations four seats on the newly established Homeland Security Compensation Committee (Compensation Committee). As part of the Compensation Committee, the labor organization representatives and some of the Department's most senior leaders will be able to participate in the development of recommendations and options for the Secretary's consideration on strategic compensation matters such as Departmental compensation policies and principles, the annual allocation of funds between market and performance pay adjustments, and the annual adjustment of rate ranges and locality and special rate supplements. While the Secretary retains the final decisionmaking authority in all of these matters, we believe this degree of labor organization involvement is consistent with our guiding principles. The Department will prescribe procedures governing the membership and operation of the Compensation Committee, including setting schedules for discussions and submission of recommendations. In addition, the establishment of the Compensation Committee will not affect the right of the Secretary to make determinations regarding the annual allocation of funds between market and performance pay adjustments and the annual adjustment of rate ranges and locality and special rate supplements, and to make such determinations effective at any time. See new § 9701.313 of these regulations for additional information.

Finally, as previously discussed, we have added a new paragraph (b) to § 9701.101, which provides the overall criteria for the design of the DHS human resources system, to include a requirement that the system be designed to generate respect and trust and be

based on the principles of merit and fairness embodied in the merit system principles contained in 5 U.S.C. 2301. We also have added a new paragraph (c) to § 9701.301 to require that the DHS pay system, working in conjunction with the performance management system established under subpart D, be designed to incorporate a number of elements, including adherence to the merit system principles, and that it must be implemented and managed in a fair, transparent, and inclusive manner. These criteria are based on similar criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, United States Code.

Other Comments on Specific Sections of Subpart C

Section 9701.301—Purpose

In addition to the new § 9701.301(c) discussed in the General Comments section, we also have added a new paragraph (b) to § 9701.301 to clarify that any pay system under subpart C must be established in conjunction with the classification system described in subpart B. This addition is consistent with a similar provision in § 9701.201(b).

Section 9701.303—Waivers

Section 9701.303(a) specifies the provisions of title 5, United States Code, that are waived for employees covered by the DHS pay system established under subpart C. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.303(a) to clarify that the waivers apply when a category of DHS employees is covered by a pay system established under subpart C. We have also reordered some of the paragraphs in this section for clarification.

Section 9701.303(c)(2) of the proposed regulations raised the limitation on rates of basic pay payable under 5 U.S.C. 5373—for categories of DHS employees whose pay is fixed by administrative action—to the rate for level III of the Executive Schedule, consistent with the level III basic pay cap that applies to employees paid under the DHS pay system established under subpart C of these regulations. (See § 9701.312 of these regulations.) Currently, 5 U.S.C. 5373 provides a basic pay limitation equal to the rate for Executive Level IV. During the meet-and-confer process, the participating labor organizations requested clarification regarding which categories of employees were covered by the pay limitation under 5 U.S.C. 5373. In reordering this section, we have redesignated paragraph (c)(2) as paragraph (c) and revised it to clarify that the pay limitation under 5 U.S.C. 5373 applies to DHS employees whose pay is set by administrative action, such as Coast Guard Academy faculty. We note that 5 U.S.C. 5373 does not apply to employees covered by a pay system established under subpart C. The basic pay limitation for employees covered by subpart C is provided in § 9701.312.

Section 9701.303(c)(3) of the proposed regulations revised 5 U.S.C. 5379 to provide DHS with the authority to establish a student loan repayment program for DHS employees. During the meet-and-confer process, the participating labor organizations requested clarification regarding the process for establishing a new student loan repayment authority. In reordering this section, we have redesignated paragraph (c)(3) as paragraph (d) and revised it to provide that a DHS student loan repayment program under this authority will be established by implementing directives (as defined in § 9701.103). In addition, we have revised § 9701.303(d) to clarify that DHS will coordinate those implementing directives with OPM.

Section 9701.304—Definitions

The definition of ''control point'' has been removed consistent with the removal of the control point provisions in § 9701.321 and other sections of the regulations. (See *Section 9701.321—Structure of bands.*) We have added a definition of ''competencies'' that is identical to the definition of that term in § 9701.404 concerning the DHS performance management system. This is consistent with the addition of that term to the definitions section in subpart B. (See *Section 9701.204—Definitions.*) We have added a reference to the description of ''performance expectations'' in § 9701.406(c) to clarify the use of that term in the definitions of ''rating of record'' and ''unacceptable performance'' in § 9701.304. As a result of comments made during the meet-and-confer process, we have added a definition of ''modal rating'' to explain the use of this term in revised § 9701.342(a)(2). Finally, we have deleted the definition of ''unacceptable rating of record'' as unnecessary.

Section 9701.311—Major Features

Section 9701.311 requires that a DHS pay system established under subpart C include a number of specific features. Commenters noted that the term ''rate'' appeared to be missing after ''basic pay'' in paragraph (b). We agree and have inserted the term in § 9701.311(b).

Section 9701.312—Maximum Rates

Section 9701.312 provides that DHS may not pay an employee covered by a pay system established under subpart C a rate of basic pay in excess of the rate for level III of the Executive Schedule. This section further provides that DHS may establish the maximum annual rate of basic pay at the rate for level II of the Executive Schedule for members of the SES if DHS obtains the certification required under 5 U.S.C. 5307(d). Commenters observed that this proposed basic pay limitation and other features of the pay system proposal will not resolve the pay compression and limitation issues for senior law enforcement officers.

The rate of pay received by senior law enforcement officers and other employees who earn premium pay under 5 U.S.C. chapter 55 is subject to a special limitation in 5 U.S.C. 5547. This limitation is not affected by these regulations. Under 5 U.S.C. 9701(c)(2), DHS is prohibited from waiving the premium pay limitation or any other premium pay provision authorized under 5 U.S.C. chapter 55. See also the discussion of changes made in § 9701.332(c) to clarify that locality and special rate supplements are considered basic pay for the purpose of applying the limitation in § 9701.312 in *Section 9701.332—Locality rate supplements.*

Section 9701.314—DHS Responsibilities

Section 9701.313 of the proposed regulations provided a list of DHS's overall responsibilities in implementing the pay system established under subpart C. This section has been redesignated as § 9701.314 due to the insertion of a new § 9701.313, Homeland Security Compensation Committee. (*See* the discussion of new § 9701.313 under *General Comments.*)

Section 9701.321—Structure of Bands

Section 9701.321 provides DHS with the authority to establish basic pay rate ranges for bands after coordination with OPM. In the proposed regulations, this section also provided DHS with the authority to establish control points within bands to limit the initial pay-setting or pay progression of employees. The labor organizations expressed concerns about the control point provisions. They felt that control points could prevent employees who are meeting or exceeding performance expectations from achieving the same level of pay they could receive under the current system. They recommended that the regulations be modified to require that control point policies be collectively bargained.

We have removed the provisions concerning control points in §§ 9701.321(a) and (d) and 9701.342(d)(3), as well as the definition of ''control point'' in § 9701.304 of the proposed regulations, as it is not our intention to unduly limit pay progression.

Section 9701.321(c) of the proposed regulations provided DHS with the authority to establish different basic pay rate ranges for employees in a band who are stationed in locations outside the 48 contiguous States. Commenters requested clarification regarding how basic pay rate ranges for employees stationed outside the 48 contiguous States will be determined. Other commenters were concerned that employees working in Hawaii, Puerto Rico, Alaska, and other nonforeign areas and foreign areas would never see another annual pay increase because funding will be used for performance pay increases and that employees in such areas will not receive any locality rate supplement. During the meet-and-confer process, the participating labor organizations asked whether locality rate supplements under § 9701.332 would apply to employees stationed outside the 48 contiguous States and what protections would be offered to replicate the current pay-setting criteria for employees in these locations.

We have removed paragraph (c) from § 9701.321. We have also removed paragraph (d) from § 9701.322, which provided DHS with the authority to provide basic pay rate range adjustments in locations outside the 48 contiguous States that differ from the adjustments within the 48 States. Under the revised regulations, employees in a band who are stationed in locations outside the 48 contiguous States will be covered by the same basic pay ranges as other employees in that band who are stationed within the 48 States. In addition, under §§ 9701.332 and 9701.333, and after coordination with OPM, DHS may establish locality or special rate supplements for employees stationed outside the 48 contiguous States. Employees stationed in locations outside the 48 contiguous States also will continue to be entitled to foreign and nonforeign area cost-of-living allowances and other differentials and allowances under 5 U.S.C. chapter 59, as applicable.

Section 9701.322—Setting and Adjusting Rate Ranges

Section 9701.322 provides DHS with the authority to set and adjust the basic pay rate ranges of bands after coordination with OPM. Section 9701.322(b) of the proposed regulations provided DHS with the authority, after coordination with OPM, to determine the effective date of newly set or adjusted band rate ranges and stated that, generally, ranges will be adjusted annually. The labor organizations recommended that the regulations be amended to guarantee that basic rate ranges will be adjusted annually and normally become effective in January.

We have revised § 9701.322(a) to clarify that DHS may set and adjust rate ranges on an annual basis. In addition, we have revised § 9701.322(b) to provide that, unless DHS determines that a different date is needed for operational reasons, annual adjustments to basic rate ranges will become effective on or about the same date as the annual General Schedule pay adjustment authorized by 5 U.S.C. 5303.

Section 9701.322(c) provides that DHS may provide different rate range adjustments for different occupational clusters. A commenter requested clarification regarding whether the pay ranges will vary between occupational clusters. We have clarified paragraph (c) to provide that DHS may establish different rate ranges and rate range adjustments for different bands.

As previously discussed, we also have removed paragraph (d) from § 9701.322, which provided DHS with the authority to provide basic pay rate range adjustments in locations outside the 48 contiguous States that differ from the adjustments within the 48 States. (See *Section 9701.321—Structure of bands.*) Paragraph (e) in the proposed regulations has been redesignated paragraph (d) in these final regulations.

Section 9701.323—Eligibility for Pay Increase Associated With a Rate Range Adjustment

Section 9701.323(a) of the proposed regulations provided that an employee who meets or exceeds performance expectations must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a basic rate range adjustment under § 9701.322. Section 9701.323(b) provides that an employee who has an unacceptable rating of record may not receive a pay increase as a result of a rate range adjustment. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify which type of pay increase paragraph (a) covers and when eligible employees would be entitled to such a pay increase.

We agree and have revised § 9701.323(a) to clarify that when a band rate range is adjusted under § 9701.322, employees covered by that band are eligible for an individual pay increase if they meet or exceed performance expectations. We also clarified that for an employee receiving a retained rate, the amount of the pay increase is determined under § 9701.356. (*See Section 9701.356—Pay retention.*) We have also redesignated paragraph (b) as paragraph (c) for clarification purposes.

The labor organizations also recommended that § 9701.323(a) be revised to provide that an employee who meets or exceeds expectations must receive an increase in pay equal to either (1) the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment (as stated in the proposed regulations) or (2) the percentage value equal to the average of the increase in the minimum rate and the increase in the maximum rate of the employee's band, whichever is greater.

We have not revised § 9701.323(a) in response to this recommendation. Under § 9701.322(d), DHS has the authority to adjust the minimum and maximum rates of band ranges by different percentages. This will allow DHS, for example, to increase the maximum rate by a greater percentage than the minimum rate in response to labor market factors that warrant a broader rate range for a particular occupational category. However, § 9701.323 requires DHS to increase the pay of eligible employees by only the percentage value of any increase in the minimum rate of the band. As a result, DHS has greater opportunities to enhance employee pay through the use of performance pay increases under § 9701.342. Providing greater opportunities for high performers to earn pay increases will help DHS be more competitive in the labor market, since in the private sector high performers are generally provided with larger pay increases.

We also note that increases in the maximum rate may be unrelated to changes in the labor market and, thus, should not be used to determine the general increase for DHS employees. For example, DHS may decide that a rate range is too narrow to appropriately recognize high performers and extend the range by 10 percent. That does not mean that all eligible employees in the band should receive a 10 percent increase.

Commenters also requested that § 9701.323(a) be revised to make the payment of the annual adjustment nondiscretionary. We have not adopted this recommendation. These regulations authorize DHS to establish a contemporary pay system that is more performance-sensitive to help achieve

and sustain a high performance culture. Providing annual basic pay increases only to employees whose performance meets or exceeds expectations will help support this goal. This policy is consistent with the findings of the National Academy of Public Administration (NAPA) in its May 2004 report, ''Recommending Performance-Based Federal Pay.'' The NAPA report states that most private sector companies base all pay adjustments on performance.

Section 9701.323(b) of the proposed regulations provided that the ''denial'' of a pay increase associated with a rate range adjustment is not considered an adverse action under subpart F. To clarify our intent, we have revised this paragraph (now redesignated as paragraph (c)) to state that if an employee's pay remains unchanged because he or she has received an unacceptable rating of record, the ''failure to receive a pay increase'' is not an adverse action.

Section 9701.323(c) of the proposed regulations provided that if an employee does not have a rating of record for the purpose of granting a pay increase under § 9701.323(a), the employee is deemed to meet or exceed performance expectations. During the meet-and-confer process, the participating labor organizations asked that the regulations be revised to provide that such determinations be based on the employee's most recent rating of record.

We agree that this provision must be clarified. Therefore, we have redesignated paragraph (c) as paragraph (b) and revised it to provide that an employee without a rating of record for the most recently completed appraisal period must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to receive an increase based on the rate range adjustment under § 9701.323(a).

Section 9701.323(d) of the proposed regulations provided DHS with the authority to adopt policies under which an employee who is initially denied a pay increase under this section based on an unacceptable rating of record may receive a delayed increase after demonstrating improved performance. The regulations provided that any such delayed increase would be made effective prospectively.

During the meet-and-confer process, the participating labor organizations expressed a concern that certain employees would fall below the minimum pay rate for their bands if they were at or near the low end of the band and were denied a rate range increase as a result of an unacceptable rating of record. They also expressed a concern that the proposed regulations allow managers to continuously rate employees unacceptable and indefinitely deny them pay increases. The labor organizations believe that DHS, and not its employees, should bear the burden of proof in any action that denies employees a rate range increase. The labor organizations also argued that any pay system that allows certain employees to be paid below the minimum rate set for a band is not truly a market-based system.

Other commenters suggested that if an employee loses a pay increase due to poor performance, the increase should be restored automatically when performance becomes satisfactory as an incentive to become successful. Commenters expressed a need for less manager discretion and more policy governing the granting of previously denied pay increases based on performance improvement. The commenters were concerned that the lack of clear policy may result in disparate use of this authority and increased grievances and equal employment opportunity (EEO) complaints.

We agree with some of these concerns and have revised the regulations as follows:

- We have added a new § 9701.324, *Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.* This section provides that an employee who initially does not receive a pay increase under § 9701.323 based on an unacceptable rating of record, and whose rate does not fall below the minimum rate of the band, must receive a delayed increase after demonstrating performance that meets or exceeds performance expectations, as reflected in a new rating of record. Any such delayed increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.
- We have added new § 9701.325, *Treatment of employees whose rate of basic pay falls below the minimum rate of their band.* Paragraph (a) of this section requires that in the case of an employee who does not receive a pay increase under § 9701.323 DHS must (1) initiate action within 90 days after the date of the rate range adjustment to demote or remove the employee in accordance with the adverse action procedures under subpart F, or (2) if the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the rate range adjustment, issue a new rating of record and adjust the employee's pay prospectively.
- Paragraph (b) of new § 9701.325 provides that if DHS fails to initiate a removal or demotion action under paragraph (a) within 90 calendar days after the date of a rate range adjustment, the employee becomes entitled to the minimum rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the rate range adjustment.

We do not agree that managers should be required to initiate an adverse action whenever employees are rated unacceptable. Unless such a rating results in an employee being paid below the minimum band rate, an employee's ability to grieve his or her performance rating is sufficient protection against unfair or inaccurate ratings.

The labor organizations also recommended that § 9701.323(d) be revised to require that delayed increases must be retroactively effective if there is a management error in assessing an unacceptable rating or when a rating is overturned on appeal. We did not make a change in the regulations in response to this comment. If an employee does not receive a pay adjustment because of an error in assessing an unacceptable rating, when the rating error is corrected, the employee is entitled to receive any pay increase associated with the correct rating. This pay increase must be made effective retroactive to the effective date of the incorrectly denied increase and is subject to back pay under 5 U.S.C. 5596.

Section 9701.331—General

Section 9701.331 of the proposed regulations provided that basic pay ranges under the new DHS pay system may be supplemented by locality or special rate supplements. During the meet-and-confer process, the participating labor organizations asked that the regulations provide that payment of such supplements to employees be mandatory.

We agree that locality and special rate supplements should be paid in appropriate circumstances and have revised § 9701.331 to clarify this point. We do not agree that such payments should be mandatory, but have revised § 9701.331 to clarify that DHS may pay locality or special rate supplements in appropriate circumstances. For example, DHS may decide that a locality rate supplement is unnecessary for nonforeign or foreign areas or that a different pay flexibility (e.g., recruitment bonuses, retention allowances, or special staffing payments under § 9701.363) will better address a

particular staffing problem instead of establishing a special rate supplement. DHS must retain the flexibility under §§ 9701.332 and 9701.333 to establish locality rate supplements for geographic areas and occupational clusters when warranted by mission requirements, labor market conditions, and other factors and special rate supplements when warranted by current or anticipated recruitment and/or retention needs.

Section 9701.332—Locality Rate Supplements

Section 9701.332(a) and (b) provides DHS with the authority to establish locality rate supplements and set the boundaries of locality pay areas after coordination with OPM. The regulations provide DHS with the authority to establish different locality rate supplements for different occupational clusters or for different bands within an occupational cluster.

Commenters recommended that § 9701.332 be revised so that locality rate supplements are based on cost-of-living factors instead of the cost of labor, such as through the use of Chamber of Commerce analyses and data on median housing costs in each geographic area. We do not agree. Generally, employers set pay based on the labor market to be sufficiently competitive to avoid staffing problems. Paying above what is necessary to be competitive in the labor market does not make economic sense. If you have a market-based pay system, but grant additional pay for high living costs, you no longer have market-based rates. Also, living costs are very difficult to measure.

If DHS experiences recruitment or retention problems due to living costs in a particular geographic area, other pay flexibilities are available to address such problems. For example, DHS could establish a special rate supplement under § 9701.333 of these regulations or a special staffing payment under § 9701.363 to address staffing problems for a particular category of employees in a given geographic area. DHS also may use recruitment and relocation bonuses under 5 U.S.C. 5753, retention allowances under 5 U.S.C. 5754, and other flexibilities to address staffing problems that may be caused by cost-of-living factors.

Section 9701.332(b) of the proposed regulations provided that if DHS does not use the locality pay areas established by the President's Pay Agent under 5 U.S.C. 5304, it may make boundary changes by regulation or other means. We have revised this paragraph to clarify that DHS may, after coordination with OPM, establish and adjust different locality pay areas within the 48 contiguous States or new locality pay areas outside the 48 contiguous States by regulation. We note that while the final regulations provide DHS with the discretion to establish new or different locality pay areas within and outside the 48 States, DHS will likely adopt the locality pay areas established under 5 U.S.C. 5304 for the purpose of establishing locality rate supplements under § 9701.332.

Section 9701.332(c) lists the purposes for which locality rate supplements are considered basic pay. During the meet-and-confer process, the participating labor organizations requested clarification regarding whether the purposes for which locality rate supplements are treated as basic pay will be different from the purposes for which locality payments under 5 U.S.C. 5304 are treated as basic pay. Another commenter encouraged the consistent treatment of locality supplements as basic pay across the Department.

Under § 9701.332(c), the purposes for which locality rate supplements are considered basic pay include all of the purposes that apply to locality payments under 5 U.S.C. 5304 and 5 CFR part 531, subpart F. We agree that the treatment of locality rate supplements as basic pay should be consistent throughout the Department and only as provided in these regulations, DHS implementing directives, or other laws or regulations, consistent with the requirements in § 9701.332(c). We have revised § 9701.332(c)(6) (as redesignated from § 9701.332(c)(5) in the proposed regulations) to clarify that locality rate supplements may be considered basic pay for the purpose of other payments and adjustments under subpart C only if specified by DHS in implementing directives, consistent with the new definition of ''implementing directives'' in § 9701.103 and the requirement for continuing collaboration with employee representatives in developing implementing directives under § 9701.105. (See *Section 9701.103—Definitions and Section 9701.105—Continuing collaboration*.)

In addition, we inserted a new § 9701.332(c)(5) to clarify that locality rate supplements (and special rate supplements, by reference under § 9701.333) are considered basic pay for the purpose of applying the maximum rate limitation under § 9701.312. The remaining paragraphs (c)(5) through (c)(7) of the proposed regulations are redesignated as paragraphs (c)(6) through (c)(8).

Section 9701.333—Special Rate Supplements

Section 9701.333 provides DHS with the authority to establish special rate supplements after coordination with OPM that provide higher levels of pay for subcategories of employees in an occupational cluster if warranted by current or anticipated recruitment or retention needs. The proposed regulations provided DHS with the authority to establish rules for implementing such supplements. This section also provides that special rate supplements are considered basic pay for the same purposes as locality rate supplements under § 9701.332(c) and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

A commenter encouraged consistent treatment of special rate supplements as basic pay across the Department. We agree that the treatment of special rate supplements as basic pay should be consistent throughout the Department and only as provided in these regulations, DHS implementing directives, or other laws or regulations, consistent with the requirements for locality rate supplements under § 9701.332(c), as revised in these regulations.

Section 9701.334—Setting and Adjusting Locality and Special Rate Supplements

Section 9701.334 of the proposed regulations provided that locality and special rate supplements would ''generally'' be reviewed on an annual basis in conjunction with a rate range adjustment under § 9701.322. Consistent with the changes in revised § 9701.322(a), we have revised § 9701.334(b) to require DHS to review established supplements for possible adjustment on an annual basis in conjunction with a rate range adjustment.

Section 9701.335—Eligibility for Pay Increase Associated With a Supplement Adjustment

We have revised § 9701.335(a) to clarify that when a locality or special rate supplement is adjusted under § 9701.334, an employee is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds performance expectations. This is consistent with part of the revision of § 9701.323(a), which clarifies when an employee is entitled to receive a basic rate range adjustment. (See *Section 9701.323—Eligibility for pay increase associated with a rate range adjustment*.)

Commenters felt that the payment of locality rate supplements should not be discretionary. They argued that locality pay was not designed to reward performance, but to close a salary gap between Federal and non-Federal employees.

The locality rate supplement authority in the DHS regulations is specifically designed to respond to occupation-specific labor market conditions among geographic areas and to support DHS's and OPM's desire to establish a contemporary pay system that is more performance-sensitive to help achieve a high performance culture. Providing locality rate supplement increases only to employees whose performance meets or exceeds expectations will help support this goal and will help DHS become more competitive in recruiting and retaining high performing employees.

Section 9701.335(b) of the proposed regulations provided that an employee who has an unacceptable rating of record may not receive a pay increase as a result of an increase in a locality or special rate supplement. Paragraph (b) of the proposed regulations also provided DHS with the authority to determine the method of preventing a pay increase in this circumstance, including by reducing the employee's rate of basic pay by the amount necessary to prevent an increase.

During the meet-and-confer process, the participating labor organizations expressed concerns about the regulations providing DHS with the authority to reduce the rate of basic pay for an employee with an unacceptable rating of record without adverse action protections in order to offset an increase in a locality or special rate supplement. They expressed the belief that reducing basic pay for unacceptable performance should be considered an adverse action under subpart F even if the employee's total locality or special rate supplement-adjusted pay rate does not change as a result of the basic pay reduction.

We redesignated paragraph (b) as paragraph (c). We revised the language to provide that if an employee has an unacceptable rating of record at the time of an increase in a locality or special rate supplement, the employee will not receive an increase in the applicable supplement. Basic pay will not be reduced under this authority. We have also revised this paragraph to clarify our intent that if an employee's pay remains unchanged because he or she has received an unacceptable rating of record, the failure to receive a pay increase associated with a supplement adjustment is not an adverse action.

Section 9701.335(c) of the proposed regulations provided that if an employee does not have a rating of record for the purpose of granting a pay increase associated with a supplement adjustment, the employee is deemed to meet or exceed performance expectations. We have redesignated paragraph (c) as paragraph (b). We revised this paragraph, consistent with the revision of § 9701.323(b), to provide that an employee without a rating of record must be treated in the same manner as an employee who meets or exceeds performance expectations. (*See Section 9701.323—Eligibility for pay increase associated with a rate range adjustment.*)

Section 9701.335(d) of the proposed regulations provided DHS with the authority to adopt policies under which an employee who is initially denied a pay increase under this section based on an unacceptable rating of record may receive a delayed increase after demonstrating improved performance. During the meet-and-confer process, the participating labor organizations questioned whether a denial of a pay increase as a result of an increase in a locality or special rate supplement could cause an employee's pay to fall below the minimum rate of the band. The labor organizations questioned how long an employee's pay rate could be below the minimum band rate without requiring management to take some action (e.g., demotion or removal).

It is possible for an employee's locality or special rate supplement-adjusted pay rate to fall below the locality or special rate supplement-adjusted minimum band rate as a result of a denial of a supplement increase under § 9701.335(c). We agree with the labor organizations' concern about requiring DHS to take action in this situation. Therefore, we revised and moved paragraph (d) to a new § 9701.336, *Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.* This new section provides the requirements for paying a delayed supplement increase after the employee demonstrates performance that meets or exceeds performance expectations, consistent with the changes made in new § 9701.324. We also have added a new § 9701.337, *Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.* Paragraph (a) of this new section requires DHS to take specific actions within 90 days after the employee's pay rate falls below the adjusted band minimum rate. Paragraph (b) provides that if DHS does not take action within 90 days, the employee's pay rate must be set at the adjusted band minimum rate. This new section is consistent with new § 9701.325 on pay increases associated with rate range adjustments. (See *Section 9701.323—Eligibility for pay increase associated with a rate range adjustment.*)

Section 9701.342—Performance Pay Increases

Section 9701.342(a) provides an overview of the DHS performance-based pay system for employees in a Full Performance or higher band based on ratings of record assigned under a performance management system established under subpart D. We have moved the sentence concerning the rating of record used as a basis for a performance pay increase to a separate paragraph (a)(2). In reaction to concerns about DHS's authority to issue a new rating of record for an employee if the employee's current performance is not consistent with his or her most recent rating of record, we have revised new paragraph (a)(2) to clarify that the employee's supervisor (or other rating official) may make such determinations and prepare any new rating of record. This new language is consistent with the language used in § 9701.409(b) regarding rating employee performance. We note that the definition of ''rating of record'' in §§ 9701.304 and 9701.404 states that a rating of record is prepared at the end of an appraisal period or to support a pay determination under subpart C of these regulations (or other rules). Because DHS plans to make pay determinations shortly after issuing ratings of record at the end of the appraisal period, we anticipate that DHS will rarely need to issue supplemental ratings of record to support pay decisions.

New paragraph (a)(2) also clarifies that if an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle to determine the employee's performance pay increase. This change is consistent with other revisions of the regulations on determining the pay increases and adjustments for employees without a rating of record. (See § 9701.342(f) and (g).)

Section 9701.342(c) provides DHS with the authority to establish point values that correspond to the performance rating levels established by the performance management system under subpart D. These point values will be used to determine performance pay increases. This section also provides DHS with authority to establish a point value pattern for each

pay pool and requires DHS to assign zero points to any employee with an unacceptable rating of record.

One commenter recommended that DHS not limit its pay-for-performance options to only the point value system defined in the proposed regulations. The commenter was concerned about unintended consequences of the proposed system that would require regulatory changes to address those consequences. The commenter recommended that the regulations allow alternative pay-for-performance systems to be adopted within major components, subject to DHS objectives, criteria, and approval.

We understand the commenter's desire that the regulations provide DHS with the flexibility to develop different types of pay-for-performance systems tailored to the performance and mission requirements of individual DHS components and not be limited to the proposed point value system. However, in developing the regulations for the DHS pay system, we balanced the need for flexibility with the need for a system that generates respect and trust and is credible and transparent. Subpart C of the regulations provides the parameters and criteria for the point value system in sufficient specificity so that managers, employees, and employee representatives can better understand how performance pay increases will be determined and paid. At the same time, the regulations allow DHS to tailor the point value system to the mission and performance needs of individual components and the specific performance requirements and priorities of individual positions and occupations.

Another commenter requested clarification regarding the logic of establishing different point value patterns by pay pool, as provided in § 9701.342(c)(2). The regulations provide DHS with the flexibility to establish different point value patterns for each pay pool so that each pay pool can better reflect the performance goals, objectives, and priorities of the employees and organizations covered. This matter will be further clarified in implementing directives.

Section 9701.342(d) provides DHS with the authority to determine the value of performance points (as a percentage of basic pay or as a fixed dollar amount), the amount of an employee's performance payout, and the effective dates of performance pay adjustments. This paragraph also specifies that a performance payout may not cause an employee's rate of basic pay to exceed the maximum basic rate of the band and provides DHS with the authority to pay excess amounts as lump-sum payments.

Commenters were concerned that if more employees receive higher ratings, the value of the payout for each employee lessens. We acknowledge that this is a consequence of this type of pay-for-performance system. A point value system requires managers to make distinctions in ratings if they want to grant the highest performers the greatest pay increases. In keeping with our guiding principles, this type of system is designed to place greater emphasis on making distinctions among employees' performance.

Commenters also were concerned that lump-sum payments are taxed at a greater percentage than a basic pay increase and will not have the same lasting effect over time as a basic pay increase. We have removed the language from § 9701.342(d)(3) that stated that the payment of performance payouts as basic pay increases is subject to any applicable control point within a band, consistent with the removal of control point provisions elsewhere in the regulations. (See *Section 9701.321—Structure of bands.*) Lump-sum performance payouts may be paid in lieu of basic pay increases only when an employee's rate of basic pay would otherwise exceed the band maximum rate. While tax withholdings may be greater in the short term, lump-sum payments are not taxed at a higher rate than any other form of income. Also, consistent with other changes in the regulations that clarify how DHS will grant pay increases to retained rate employees, we have added a new paragraph (d)(5) to § 9701.342 to clarify that for an employee receiving a retained rate under § 9701.356, DHS will issue implementing directives (as defined under § 9701.103) to provide that a lump-sum performance payout may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record who is at the maximum rate of the band.

Another commenter suggested that the regulations allow all employees on certain ''teams'' (or offices) to receive a bonus based on a percentage of their pay when the team achieved its goals. Team awards, such as goalsharing awards, are generally paid under 5 U.S.C. chapter 45, which is not waived by these regulations. DHS continues to have the flexibility to grant group or team-based awards and bonuses under this authority.

Section 9701.342(e) specifies the circumstances under which performance payouts may be prorated. Section 9701.342(f) of the proposed regulations provided for the payment of performance pay increases for employees upon reemployment after performing honorable service in the uniformed services.

During the meet-and-confer process, the participating labor organizations requested that § 9701.342(e)(2) clarify, as necessary, the circumstances in which it would be illegal to prorate performance payouts for employees in a leave-without-pay status. We have revised § 9701.342(e)(2) to clarify that DHS may not prorate performance payouts for employees in a leave-without-pay status while performing honorable service in the uniformed services or while in a workers' compensation status, as provided in paragraphs (f) and (g) of this section. In addition, DHS may issue implementing directives regarding the proration of performance payouts for employees in other circumstances.

During the meet-and-confer process, the participating labor organizations recommended that § 9701.342(f) be revised to clarify how DHS will set the rate of basic pay for employees upon reemployment after performing honorable service in the uniformed services and how intervening performance pay adjustments for such employees would be determined upon reemployment. We have revised § 9701.342(f) of the proposed regulations to require DHS to issue implementing directives (as defined in § 9701.103) governing how it will set the rate of basic pay for employees upon reemployment and that DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), developmental pay adjustments under § 9701.345, and performance pay adjustments under § 9701.342 based on the employee's last rating of record. The regulations clarify that, for an employee without a rating of record, DHS will use the modal rating received by other employees in the same pay pool. Paragraph (f) also clarifies that employees returning from qualifying service in the uniformed services and returning to duty after receiving injury compensation will receive the full value of their next performance pay increase associated with their rating of record.

As a result of the labor organization's comments, we also have added a new paragraph (g) to § 9701.342 to address pay setting and determining intervening performance pay adjustments for employees upon reemployment after being in a workers' compensation status. The provisions in new paragraph (g) are identical to the provisions in revised § 9701.342(f) regarding setting pay for employees upon reemployment after

performing honorable service in the uniformed services.

Section 9701.343—Within Band Reductions

Section 9701.343 provides DHS with the authority to reduce an employee's rate of basic pay within a band for unacceptable performance or conduct under the adverse action procedures in subpart F of these regulations. During the meet-and-confer process, the participating labor organizations were very concerned that the proposed regulations provided DHS with the authority to reduce an employee's pay within a band without limit. We have revised § 9701.343 to provide that a within-band reduction in basic pay may not be greater than 10 percent, as discussed during the meet-and-confer process. The regulations continue to provide that a within-band reduction may not cause an employee's rate of basic pay to fall below the minimum rate of the employee's band. (*See* related discussion at *Section 9701.354—Setting pay upon demotion*.)

Commenters observed that §§ 9701.343 and 9701.357(a) appeared to be inconsistent regarding the ability of an employee with an unacceptable rating of record to be paid less than the minimum rate of his or her band. We have revised the regulations to clarify that § 9701.357(a) does not apply in the case of an employee who does not receive a pay increase based on an unacceptable rating of record under § 9701.343.

Other commenters felt that pay reductions should not be permitted for any reason and that pay reductions do not improve performance and have greater impact on an employee's family than on the employee. We do not agree. We understand that pay reductions can adversely affect an employee's family. However, DHS feels it is necessary to retain flexibility to reduce the pay of an unacceptable performer in order to achieve and retain a high performing workforce.

Section 9701.344—Special Within-Band Increases for Certain Employees

Section 9701.344 of the proposed regulations provided DHS with the authority to approve special basic pay increases for employees in a Senior Expert band who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment. A commenter recommended that the within-band increase provision be available in all bands. The commenter felt that this would be a useful management tool in all pay bands, particularly with reference to recognizing and retaining top performers. We have revised this section to allow DHS to issue implementing directives (as defined in § 9701.103) to provide special within-band basic pay increases for employees in a Full Performance or higher band. We also have revised this section to clarify that such increases may not be based on length of service.

The labor organizations asked that the regulations clarify what constitutes ''exceptional skills'' or ''exceptional contributions'' for any particular occupation, with labor organization involvement. We did not revise the regulations to define or clarify these terms. This specificity is better suited for DHS implementing directives regarding the use of special within-band pay increases. DHS implementing directives may provide that such increases may be used to help recruit or retain employees demonstrating extraordinary performance or as an incentive for employees with exceptional skills to accept increased responsibility.

During the meet-and-confer process, the participating labor organizations requested clarification regarding the differences between special within-band increases for employees in a Senior Expert band, special rate supplements under § 9701.333, special skills payments under § 9701.361, special assignment payments under § 9701.362, and special staffing payments under § 9701.363. See the comparison chart under the section entitled *Section 9701.361—Special skills payment; Section 9701.362—Special assignment payments;* and *Section 9701.363—Special staffing payments* for information on each of these special pay flexibilities.

Section 9701.345—Developmental Pay Adjustments

Section 9701.345 of the proposed regulations provided DHS with the authority to establish policies and procedures for adjusting the pay of employees in an Entry/Developmental band. During the meet-and-confer process, the participating labor organizations requested that the regulations clarify how employees will progress through an Entry/Developmental pay band. The labor organizations also recommended that the regulations require that increments of pay progression link to identified levels of knowledge, competencies, and skills. Another commenter noted that DHS must provide the necessary means to attain the requisite skills and competencies to advance within the Entry/Developmental band, either through on-the-job opportunities or formal training. The same commenter expressed the view that without clearly defined and funded means to do this (*i.e.*, career development and employee training and education), employees may not be able to gain skills and grow as necessary to move up within the band and be promoted out of the band. The commenter suggested that the regulations mandate the establishment of a policy for adjusting pay within the Entry/Developmental pay band and that employees who more quickly attain requisite skills and competencies be accelerated in their advancement.

We have revised § 9701.345 to clarify that DHS will issue implementing directives (as defined in § 9701.103) regarding pay adjustments for employees in the Entry/Developmental band. The regulations provide that such directives may require employees to meet certain standardized assessment points as part of a formal training/developmental program. The regulations also clarify that in administering pay progression plans, DHS may use measures that link pay progression to the demonstration of knowledge, skills, and abilities (KSAs)/competencies.

In addition, we have revised § 9701.373 to provide DHS with the authority to issue implementing directives governing the conversion of employees currently in career ladder positions into Entry/Developmental bands. (See *Section 9701.373—Conversion of employees to the DHS pay system*.)

Section 9701.346—Pay Progression for New Supervisors

A number of commenters were concerned about the ability of supervisors to apply the new DHS pay system provisions. Commenters felt that training for supervisors and employees will be critical to the equitable application of the new pay-for-performance system and in conducting performance reviews.

We have added a new § 9701.346 regarding pay progression for new supervisors that requires DHS to issue implementing directives requiring an employee newly appointed to or selected for a supervisory position to meet certain assessment or certification points as part of a formal training/developmental program. In administering performance pay increases under § 9701.342 for new supervisors, the regulations provide DHS with the authority to take into account the employee's success in completing a formal training/developmental program in addition to his or her performance.

Section 9701.353—Setting Pay Upon Promotion

Section 9701.353 of the proposed regulations provided that upon promotion DHS must provide an increase in an employee's rate of basic pay equal to the greater of (1) 8 percent, or (2) the amount necessary to reach the minimum rate of the higher band. During the meet-and-confer process, the participating labor organizations were concerned that this section of the regulations provided a promotion pay increase that is less than the normal increase for a GS two-grade interval promotion. Other commenters also expressed this concern. The labor organizations also requested that the regulations clarify the policies DHS will issue regarding pay-setting upon promotion and how pay will be set upon promotion for an employee receiving a retained rate.

We have revised this section of the regulations as follows:

- Under § 9701.353(a), DHS must increase an employee's rate of basic pay upon promotion to a higher band by at least 8 percent, but pay may not be set less than the minimum rate of the higher band.
- Under § 9701.353(b), DHS will issue implementing directives providing for an increase other than that specified in paragraph (a) in certain situations. We also removed the pay-setting criteria under § 9701.353(b)(3) for an employee who was demoted and is then repromoted back to the higher band because these kinds of rules are better suited for DHS implementing directives.
- Under § 9701.353(c), we revised the promotion pay-setting rule for retained rate employees, consistent with the change in § 9701.353(a).

Section 9701.354—Setting Pay Upon Demotion

Section 9701.354 of the proposed regulations provided DHS with the authority to prescribe rules governing how to set an employee's pay upon demotion. During the meet-and-confer process, the participating labor organizations were very concerned that the proposed regulations provided DHS with the authority to reduce an employee's pay upon demotion without limit. We have revised § 9701.354 to provide that a reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

Section 9701.356—Pay Retention

Section 9701.356(a) of the proposed regulations provided DHS with the authority to prescribe policies governing the application of pay retention. Section 9701.356(c) provided that a retained rate is a frozen rate that is not adjusted in conjunction with rate range adjustments. During the meet-and-confer process, the participating labor organizations recommended that the rules for providing a rate range adjustment for employees receiving a retained rate be consistent with the rules for GS retained rate employees. We have revised § 9701.356 to provide that in applying the basic rate range adjustment provisions under § 9701.322, any increase in the rate of basic pay for an employee receiving a retained rate is equal to one-half of the percentage value of any increase in the minimum rate of the employee's band.

Section 9701.361—Special Skills Payments; Section 9701.362—Special Assignment Payments; and Section 9701.363—Special Staffing Payments

Sections 9701.361, 9701.362, and 9701.363 provide DHS with the flexibility to authorize three different types of special payments to employees possessing certain skills (special skills payments) or serving on certain special assignments (special assignment payments) or to address significant recruitment or retention problems (special staffing payments). Such payments may be paid at the same time as basic pay or in periodic lump-sum payments, are not considered basic pay for any purpose, and may be terminated or reduced at any time.

During the meet-and-confer process, the participating labor organizations requested clarification regarding the differences among these special payments and how these payments differ from special rate supplements under § 9701.333 and special within-band increases under § 9701.344. Other commenters also requested that the regulations clarify the purposes of these payments and how they will be used by DHS. The following chart provides additional information on the purpose and criteria for granting special rate supplements and special within-band increases. Other features of these special payments are also highlighted. In addition, the chart provides illustrative examples of these special payments. Nothing in this chart obligates DHS to authorize these payments for any particular category of employees.

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Summary of Special Rate Supplements and Special Payments Provisions

	Special Rate Supplements § 9701.333	Special Within-Band Increases § 9701.344	Special Skills Payments § 9701.361	Special Assignment Payments § 9701.362	Special Staffing Payments § 9701.363
Definition	Provides higher pay levels for subcategories of employees within an occupational cluster if warranted by current or anticipated recruitment and/or retention needs. *Similar to special salary rates used today*	Within-band increases for employees in a Full-Performance or higher band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment.	Additional payments for special skills for which the incumbent is trained and ready to perform at all times.	Additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band.	Additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment or retention problems.
Illustrative Examples	Police officers in high labor cost areas	Research and development scientist with cutting edge technology	Foreign language, K-9 handler, or information technology (critical infrastructure)	Leading a security team at a major event or performing undercover work	Remote/isolated location where amenities are not readily available or locations where housing costs are unusually high
Payment Provision	Treated as basic pay for the same purposes as locality rate supplements and for computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.	Treated as basic pay. Addition to performance pay increases; does not affect the performance pay pool associated with that band. Increases may be made at any time	Not treated as basic pay for any purpose. May be terminated or reduced at any time without triggering pay retention or adverse action procedures. Payments may be made at the same time as basic pay or in periodic lump-sum payments.		

	Special Rate Supplements § 9701.333	Special Within-Band Increases § 9701.344	Special Skills Payments § 9701.361	Special Assignment Payments § 9701.362	Special Staffing Payments § 9701.363
Criteria	DHS to establish implementing directives after coordination with OPM.	DHS to establish implementing directives.	DHS to establish implementing directives to include amount of payments, eligibility conditions, performance and/or service agreement requirements, etc.		

BILLING CODE 6325–39–C; 4410–10–C

Commenters also requested that the regulations be revised to make special skills payments under § 9701.361 and special assignment payments under

§ 9701.362 nondiscretionary. We do not agree. The special skills and special assignment payment authorities are designed to provide DHS with additional pay flexibility to address specific human capital needs. For example, DHS may wish to establish a special assignment payment for employees performing temporary emergency or mission critical duties in an identified geographic location or component where employees do not normally perform such duties. However, DHS may choose not to pay this special assignment payment to employees working in a different geographic location or organization who regularly perform these same duties. Requiring the nondiscretionary use of special skills or special assignment payments would reduce DHS's ability to use these pay flexibilities in strategic ways.

Section 9701.373—Conversion of Employees to the DHS Pay System

Section 9701.373(e) of the proposed regulations provided the Secretary with the discretionary authority to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. The labor organizations recommended that the regulations be amended to require (1) within-grade increase buy-ins as basic pay adjustments and (2) career-ladder increase buy-ins as a basic pay adjustment upon conversion of employees into the new pay system. Other commenters were concerned that employees currently in GS career-ladder positions who are converted into the new pay system have no guarantee of receiving increases comparable to what they would have received under the GS system. We have not revised the regulations to require DHS to pay a within-grade increase or career-ladder increase buy-in payment to employees converted into the new DHS pay system. As we stated in the Preamble to the proposed regulations, DHS employees will be converted at their current rate, adjusted on a one-time, pro rata basis for the time spent toward their next within-grade increase. As provided in revised § 9701.373(e), DHS will issue implementing directives for such pay adjustments, including the rules governing eligibility, pay computations, and timing of payments.

We also agree that DHS employees in career-ladder positions prior to conversion into an Entry/Developmental band under the new pay system (1) will be converted at their current rate, adjusted on a one-time, pro rata basis for the time spent toward their next within-grade increase, and (2) will also receive pay increases equivalent to the promotion pay increases they would have received under their previous pay system when they otherwise would have been eligible. These increases will continue until DHS establishes a formal pay progression plan for such employees. As provided in revised § 9701.373(f), DHS will issue implementing directives governing the conversion of employees into the Entry/Developmental band, including rules regarding employee eligibility, pay computations, and the timing of such payments.

Section 9701.374—Special Transition Rules for Federal Air Marshal Service

Section 9701.374 of the proposed regulations provided DHS with the authority to cover Federal Air Marshal Service positions under a system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within the TSA if DHS transfers such positions from TSA to another organization within DHS. DHS may modify that system after coordination with OPM. This section also provides DHS with the authority to establish rules for converting Federal Air Marshal Service positions to any new pay system consistent with the conversion rules under § 9701.373.

The labor organizations recommended that this section be deleted. They felt that Federal Air Marshal Service transition rules must be promulgated in regulations. We do not agree. However, we have revised § 9701.374 to clarify that DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new pay system, consistent with the new definition of ''implementing directive'' under § 9701.103 and the requirement for ''continuing collaboration'' before issuing implementing directives under § 9701.105. (*See Section 9701.103—Definitions* and *Section 9701.105—Continuing collaboration*.)

Subpart D—Performance Management

General Comments

In response to commenters' general concerns regarding the clarity of the regulations, we have reorganized subpart D, Performance Management. We have also removed redundancies from and clarified the regulatory text.

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

- Subjectivity of the rater, consistency of rater, rater favoritism, rater bias, and potential for cronyism;
- Managers will be buried in paperwork in evaluating employees;
- The fact that managers are no longer required to use written performance plans, performance elements, and standards is potentially problematic;
- This system does nothing to hold supervisors accountable;
- There needs to be monitoring of performance by leaders through all levels of the organization to ensure that decisions are made based on principle, equality and fair-mindedness; and
- To the greatest extent possible and in the quickest time practical, align the DHS HR governance structure so that all employees are covered by the same performance management and pay systems.

The regulations make every attempt to ensure that the performance management system(s) will be fair. First, the regulations adopt guiding principles based on the performance management system criteria that Congress has recently enacted with respect to chapters 47, 54, and 99 of title 5, United States Code. These principles require any performance management system(s) established by DHS to be fair, credible, and transparent, and to adhere to the merit system principles found in 5 U.S.C. 2301. Furthermore, DHS has always been committed to extensive training for managers, supervisors, and employees so that they understand the requirements of the performance management system. The training of managers and supervisors is of particular concern and will focus on how to establish and communicate performance expectations and how to assess employee performance. Finally, the Department is committed to creating a performance culture in DHS that creates and sustains a high performance organization.

Another concern that is related to fairness deals with the ability to accurately measure employee performance. Commenters believe it will be difficult to evaluate employees whose performance is not measurable. Many commenters feel this will be particularly difficult when dealing with law enforcement employees. They expressed the following concerns:

- The proposed rule does not take into consideration the unique and distinctive work performed by the Department's law enforcement employees;
- Law enforcement jobs are not measurable or are difficult to measure by tangible means; and
- Focusing on measurable performance creates an incentive for law enforcement officers to focus on quantity rather than quality.

The regulations specifically allow for a wide variety of ways to capture performance expectations. (*See* § 9701.406(c) of the final regulations.) DHS, using the continuing collaboration process, will identify the most appropriate approach, or establish separate performance management systems, if needed, for different groups of employees.

Commenters recommended that DHS include proper training programs for managers regarding performance reviews and funding for training programs. Some suggested that military supervisors will need to be trained on performance appraisal. Other commenters believe training managers to do performance management will not improve managers' ability to rate employees. Several changes have been made in the regulations to address these issues. As stated previously, DHS is committed to training managers, supervisors, and employees in the new performance management system(s).

Commenters also suggested that there should be a formal evaluation of any performance management system. Both the proposed and final regulations include a requirement for the evaluation of any performance management system established by DHS. (*See* § 9701.410(b) of the final regulations.) This evaluation requirement addresses the system's compliance with these regulations and DHS implementing directives and policies, as well as the system's effectiveness.

Another commenter made several suggestions that deal with the broader aspects of performance management, as compared to the narrower aspects of performance appraisal/evaluation. Most of these suggestions, by their nature, relate to the operation of the performance management system that DHS will establish through implementing directives. As such, they are not specifically addressed by these enabling regulations. These comments will be taken into account by DHS as it develops its implementing directives.

Other Comments on Specific Sections of Subpart D

Section 9701.401—Purpose

Section 9701.401 provides for the establishment of at least one DHS performance management system and sets out the guiding principles that govern it. These guiding principles are based on the criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, U.S. Code.

Section 9701.403—Waivers

Section 9701.403 specifies the provisions of title 5, U.S. Code, and title 5, Code of Federal Regulations, that are waived for employees covered by the DHS performance management system(s) established under subpart D. We have amended § 9701.403 to clarify that these waivers become effective only after a decision is made to convert specific categories of DHS employees to a new performance management system(s) established under this subpart.

Section 9701.404—Definitions

One commenter suggested that we define ''supervisor'' as a management official who oversees the daily work assignments of an employee within a well-defined management structure. We believe the term ''supervisor'' is well understood and does not require a specific definition for the purpose of this subpart of the regulations.

During the meet-and-confer process, the participating labor organizations suggested that the definition of ''performance measures'' in the proposed regulations be deleted and replaced by a definition of ''performance standards'' based on current law and regulations. In response, we have added a definition of ''performance expectations'' that encompasses the concept of performance standards. Also in response to discussions during the meet-and-confer process, we have revised the definition of ''competencies'' to substitute ''other characteristics'' for ''attributes'' required by a position.

Section 9701.405—Performance Management Systems

Section 9701.405 has been renamed to clarify that it provides the requirements for performance management systems within the Department of Homeland Security. Several commenters had specific ideas and recommendations for the design and operation of performance management systems, including employee involvement, linkage to the Department's strategic plan, meaningful distinctions in performance, reasonable transparency, and appropriate accountability. Many of the requirements previously addressed in this section of the proposed regulations are now covered by the guiding principles found in the purpose section, § 9701.401. The guiding principles address the concerns raised by the commenters. We have revised the regulations to remove redundancies and reorganized the remaining requirements for clarity.

Other commenters made suggestions regarding specifying the length of time for appraisal periods and the minimum period before a rating can be given. The proposed regulations were silent on any specified time periods. No change has been made, and the regulations continue to provide DHS with the flexibility to determine whether its needs are best met by specifying the time periods in its implementing directives or by delegating that system feature to DHS components.

Section 9701.406—Setting and Communicating Performance Expectations

Section 9701.406 provides the requirements and guidelines for communicating with employees regarding their performance. The proposed regulations addressed the form performance expectations could take. Commenters made very specific suggestions regarding how to amend various provisions regarding the nature and form of the performance expectations. Some of these are included in the performance management system requirements in § 9701.405, and the rest are addressed in the following paragraphs. We have reorganized § 9701.406 for clarity. To underscore one of the guiding principles of these regulations, we have given primacy to aligning performance expectations with DHS's operating mission and organizational goals and measures.

During the meet-and-confer process, the participating labor organizations agreed that performance expectations need not be in writing. We have revised the regulations to clarify our intent that performance expectations must be communicated to the employee prior to holding the employee accountable for them. The regulations also have been revised to state that, notwithstanding this requirement, employees are always expected to demonstrate appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others.

Other commenters made suggestions regarding the purpose and content of performance expectations. These comments reflect concerns about management's ability to change work assignments swiftly and a concern that DHS's mission will make it difficult to set goals at the individual level. We believe the proposed regulations provided sufficient detail in this regard, and the final regulations preserve that detail. The remainder of the comments relate to the operation of the

performance management system and will best be addressed in DHS implementing directives or operating procedures.

Section 9701.407—Monitoring Performance

Section 9701.407 establishes the basic responsibility for supervisors to monitor employee and organizational performance and inform employees of their progress in meeting their performance expectations. We have renamed the section to clarify that it includes providing feedback to employees. Commenters had concerns about the frequency and timeliness of the feedback provided to employees and the form it might take. During the meet-and-confer process the participating labor organizations made a number of proposals in this regard. We have revised the section to include the requirement that feedback must be timely and to provide for one or more interim reviews.

Section 9701.408—Developing Performance

Section 9701.408 addresses two aspects of developing or improving performance; the first addresses the continual improvement that is part of a high performance culture, and the second addresses remedial improvement and dealing with poor performance. The section has been retitled, *Developing performance and addressing poor performance.*

For § 9701.408(a), commenters had suggestions for specific language changes and also suggested the inclusion of a requirement for an individual development plan. We decided to leave individual development plans optional. DHS is committed to designing specific development programs for Entry/Developmental band employees (*see* § 9701.345) and could address individual development plans for other employees in its implementing directives or operating procedures.

Regarding § 9701.408(b), some commenters suggested requiring an improvement period before an adverse action based on unacceptable performance can be taken. The proposed regulations provided for an improvement period as one of several options available to address or correct unacceptable performance prior to taking an adverse action. We continue to believe that an improvement period should be an option, but not a requirement, of the new system.

Section 9701.409—Rating Performance

Section 9701.409 establishes the requirements regarding rating and rewarding employee performance, including the rating levels that may be used by DHS performance management systems, the purposes for which ratings may be issued, and a prohibition of any forced distribution of ratings. Therefore, the section has been retitled, *Rating and rewarding performance.*

A commenter suggested that the removal of a pass/fail performance rating system is a step in the right direction. However, during the meet-and-confer process, participating labor organizations supported the continued use of pass/fail ratings for employees in the Entry/Developmental band and proposed that the final regulations provide for pass/fail ratings in other situations. While we continue to believe that, as a general matter, pass/fail ratings are incompatible with a pay-for-performance system, we have adopted that suggestion. The regulations now require the use of at least three summary rating levels for most employees, but permit DHS to use pass/fail appraisal systems for employees in the Entry/Developmental band or in other bands under extraordinary circumstances as determined by the Secretary or designee.

Commenters expressed concerns and made suggestions regarding the rating process. These comments included proposals to use multi-rater approaches such as 360-degree appraisals, require higher-level review of ratings, establish documentation requirements, and tie supervisory ratings to their timely completion of appraisals. Commenters also expressed concerns about supervisors' ability to understand and interpret the regulations. These issues involve the actual operation of the performance management system and will be addressed in DHS implementing directives or operating procedures.

Another commenter suggested that we require a detailed explanation of all formulas used to derive an overall summary rating. This, too, can best be handled by DHS in its implementing directives or operating procedures. We have not changed the regulations in response to this comment.

Commenters expressed concern that ratings of record could be lowered without sufficient justification. During the meet-and-confer process, participating labor organizations requested that we provide additional detail regarding the circumstances in which a new rating of record may be issued. We have complied with their request and have clarified § 9701.409(b) to provide that new ratings of record may be prepared only when there has been a substantial change in an employee's performance since the last rating of record was assigned. We also have revised § 9701.409(f) to prohibit lowering an employee's rating for any approved absence.

Other commenters raised concerns that allowing the grievance of ratings of record would allow arbitrators to change those ratings and/or superimpose their judgment of the employee's performance. We have revised § 9701.409(g) to specify that arbitrators are subject to the standards of review in § 9701.521(g)(2).

Section 9701.410—Rewarding Performance

Section 9701.410 of the proposed regulations has been incorporated into the revised § 9701.409 for clarity and to remove redundancies. In addition, the revised section has been retitled, *Rating and rewarding performance.*

Commenters questioned why the proposed regulations included references to within-grade and quality step increases under title 5, Code of Federal Regulations. This specific reference was included in the event a group of employees is covered by the provisions of the performance management system under subpart D of these regulations while they continue to be covered by the within-grade and quality step increase provisions of 5 CFR part 531. We have revised the regulation to clarify that references to provisions in 5 CFR part 531 are applicable only until an employee is covered by the pay system established under subpart C of these regulations.

Section 9701.411—Performance Review Boards

Section 9701.411 of the proposed regulations authorized the establishment of Performance Review Boards (PRBs) and described their duties and composition. During the meet-and-confer process, the participating labor organizations expressed concern about the operation of PRBs; they felt that PRBs could delay pay decisions based on performance appraisals and give the appearance of unwarranted interference in the performance rating process. We continue to believe that an oversight mechanism is important to the credibility of the Department's pay-for-performance system. To that end, the Homeland Security Compensation Committee established under § 9701.313 will conduct an annual review of performance payout summary data. Therefore, we have removed the

separate section in subpart D dealing with PRBs.

Section 9701.412—DHS Responsibilities

Section 9701.412 of the proposed regulations specified the responsibilities DHS must carry out in order to ensure a fair, credible, and transparent performance management system. This section has been redesignated as § 9701.410. Commenters expressed concern that only startup training would be funded. The purpose section of the regulations (§ 9701.401) has been revised to provide guiding principles for DHS performance management systems based on similar criteria that Congress recently enacted with respect to chapters 47, 54, and 99 of title 5, U.S. Code. These principles require initial and ongoing training for managers, supervisors, and others involved in the performance management process. Finally, to comply with 29 CFR 1614.102(a)(5), we have added a new requirement in § 9701.410 to ensure that managers and supervisors fulfill their equal employment responsibilities.

Subpart E—Labor-Management Relations

General Comments

Commenters expressed concern that the proposed regulations curtailed employees' rights to collectively bargain, with a number suggesting that the limits on collective bargaining are contrary to the provisions of the Homeland Security Act. Commenters also recommended that the design and implementation of every aspect of the proposed DHS human resource system, including the pay, performance, classification and appeals systems, be subject to collective bargaining. As discussed in the Major Issues section, we do not believe that collective bargaining over these matters is appropriate, nor intended by Congress. However, we have provided a number of mechanisms to ensure the substantive involvement of labor organizations in such things as the development of implementing directives, the administration of the Department's new pay system, and the nomination of members to the Homeland Security Labor Relations Board (HSLRB) and the Mandatory Removal Panel (MRP). Other concerns related to the scope of bargaining are addressed in the discussion of the specific related sections of subpart E that follow.

Other Comments on Specific Sections of Subpart E

Section 9701.501—Purpose

The proposed regulation restates the statute's purpose to provide DHS and OPM with flexibility to establish a modern DHS personnel system, permitting waiver of certain statutory provisions while retaining core civil service protections, including the merit system principles. In their comments and during the meet-and-confer process, participating labor organizations recommended that we include in this section a statement that labor organizations and collective bargaining are in the public interest, consistent with the Homeland Security Act's preservation of collective bargaining rights.

We have decided to retain the originally proposed language with minor clarifications. This section of the regulations recognizes and stresses the fundamental purpose underlying the Homeland Security Act and the statutory mandate to build a flexible personnel system that supports the unique mission of DHS. Consistent with the Homeland Security Act, the regulations specifically recognize the right of employees to organize and bargain collectively subject to limitations established by law, including these regulations, applicable Executive orders, and any other legal authority.

Section 9701.502—Rule of Construction

In accordance with the Homeland Security Act's core purpose, these regulations provide the Department with the flexibility necessary to accomplish its vital mission. In so doing, they also provide that interpretations of these regulations by the Secretary and the Director be accorded great deference.

In their comments and during the meet-and-confer process, participating labor organizations suggested that we delete ''great'' and describe the particular circumstances in which DHS and OPM's interpretation of the regulations would not be given deference.

We decided to retain this section as originally proposed. However, in so doing, we do not intend to imply that the rule of construction is limited only to this subpart. In this regard, we have added a new § 9701.106(a), as previously noted, and its express language extends the application of that rule of construction to the entire part. We believe § 9701.106(a), as referenced in this subpart, accurately reflects the Supreme Court's rulings on deference. In this regard, the Court has held that courts and administrative bodies must defer to an agency head's interpretation of a regulation unless an ''alternate reading is compelled by the regulation's plain language or by other indications of [her] intent at the time of the regulation's promulgation.'' *Thomas Jefferson University* v. *Shalala*, 512 U.S. 504, 512 (1994). An agency's interpretation must be given ''controlling weight unless plainly erroneous or inconsistent with the regulation.'' *Id.* The regulation is entirely consistent with Supreme Court decisions. Moreover, the regulation reflects the exceptionally broad grant of regulatory authority that Congress conferred on DHS and OPM to establish and implement a human resources system for the Department.

Section 9701.503—Waivers

The proposed regulations waived sections 7101 through 7135 of title 5 except as otherwise specified in the regulations. During the meet-and-confer process, participating labor organizations requested that the regulations clarify when such waivers will be applied. We have amended § 9701.503 to clarify that the waivers apply to DHS employees when they are covered by the labor-management relations system established under subpart E.

Section 9701.504—Definitions

In their comments and during the meet-and-confer process, participating labor organizations recommended that the current definition of ''conditions of employment'' be expanded to include the classification of any position. In addition, they and other commenters recommended that we include Department-wide regulations as ''conditions of employment.'' We have adopted the second recommendation, and we have adopted the recommendation of participating labor organizations to revert to the definition of ''confidential employee'' contained in 5 U.S.C. 7103. To avoid confusion, we also deleted the definition of ''employee'' and instead, revised § 9701.505 to ensure appropriate coverage. We have also modified the definition of ''exclusive representative'' contained in the proposed regulations by deleting the second paragraph, which dealt with the requirement of the Homeland Security Act that recognition of exclusive representatives would continue as organizations transferred into the Department, because such transfers have already taken place and thus the language was unnecessary and confusing. Further, the provision

remains in force through the Homeland Security Act. In response to labor organization comments, we have revised the definition of ''grievance'' to more closely align with the definition in 5 U.S.C. 7103; however, the revised definition clarifies that grievances must relate to conditions of employment. Finally, we have added a definition of ''professional employee'' by referencing 5 U.S.C. 7103(a)(5) to reflect changes discussed in § 9701.514.

Section 9701.505—Coverage

As noted, we have clarified which employees are covered by this subpart by moving language from the definitions section in the proposed regulations to the coverage section; this parallels the structure of subpart F, Adverse Actions. Labor organizations commented that TSA screeners should be covered by this subpart. We did not accept that recommendation, given that the TSA administrator, exercising his statutory authority, specifically determined that screeners would not be subject to coverage under 5 U.S.C. chapter 71. Similarly, we did not accept the recommendation from other commenters that Customs and Border Patrol officers be excluded from coverage, given that their predecessor occupations have been covered by 5 U.S.C. chapter 71 for some time. We have also clarified two of the exclusions in paragraph (b) by adding a reference to 5 U.S.C. 2101(3) to better define what is meant by the term ''a member of the uniformed services'' and clarified the exclusion for the ''United States Secret Service'' by adding the ''United States Secret Service Uniformed Division,'' as these two exclusions are provided by separate statutory provisions.

Section 9701.506—Impact on Existing Agreements

In their comments and during the meet-and-confer process, participating labor organizations stated that it was unreasonable to void any contract provisions that conflict with the regulations because continuing them would not adversely affect the Department's mission. Instead, they recommended that conflicting contract provisions remain in full force and effect until they expire unless the Department shows that they adversely affect homeland security. In those latter instances only, the parties would be required to engage in bargaining over modifications to existing agreements. There was significant discussion with the participating labor organizations regarding what level of detail would be provided in these regulations and what would be provided in the implementing directives, what the effect of each would be on existing agreements, and what involvement the union would have in the development of the implementing directives. The participating labor organizations recommended that the implementing directives should be subject to the full scope of collective bargaining provided in 5 U.S.C. chapter 71 or, if that were not possible, that they should be afforded the opportunity to participate in the development of the implementing directives.

As a general matter, we have retained this section as originally proposed. We believe that the effect of the alternative posed by participating labor organizations would be to delay implementation of these regulations for years, a result Congress never intended. It would severely hamper the Department's mission by permitting piecemeal, haphazard implementation of these regulations, dictated solely by the happenstance of a local contract's expiration date. This would create a confusing, difficult-to-administer, and Balkanized personnel system. A primary purpose of the Homeland Security Act was to create one Department out of a patchwork quilt of agencies performing similar functions. Accepting the recommendation would impair accomplishment of that goal.

We believe Congress intended the opposite result. Given that these regulations have the full force and effect of law, they have the same effect on collective bargaining agreements as any statutory change. However, in response to the concerns expressed by participating labor organizations, we have modified the regulation to provide for a 60-day period during which the parties to a collective bargaining agreement would bring conflicting and other impacted provisions into conformance. We have also provided that the Secretary may exercise his or her discretion to continue certain contract provisions as appropriate and to cancel such provisions at any time. Note that this process would not delay the effective date of these regulations or their implementing directives. However, in response to discussions with the participating labor organizations, we have adopted a provision for continuing collaboration in § 9701.105 on the development of implementing directives and clarified that all contract provisions must be consistent with implementing directives which, by their very nature, flow directly from the regulations.

Section 9701.508—Homeland Security Labor Relations Board

Commenters, including the labor organizations participating in the meet-and-confer process, objected to the creation of the HSLRB, and recommended that the regulations preserve the authority of FLRA, FMCS, and FSIP. They remarked that these agencies, which are independent and impartial, currently decide many of those matters for which the proposed regulations confer jurisdiction on the HSLRB to adjudicate. In this regard, they challenged the independence and impartiality of any HSLRB member appointed exclusively by the Secretary. Therefore, they objected to any change to the status quo. Other commenters approved of the proposal, indicating that the HSLRB would afford the Department greater regularity and consistency in the processing of cases than that currently provided by FLRA. A commenter noted that the ''one-stop shop'' concept of the HSLRB was preferable to the division of prosecutorial, adjudicatory, and mediation responsibilities provided for in the current system.

We have decided to retain the HSLRB. As we indicated in the Preamble accompanying the proposed regulations, it ensures that those who adjudicate the most critical labor disputes in the Department do so quickly and with an understanding and appreciation of the unique challenges that the Department faces in carrying out its mission. During the meet-and-confer process, participating labor organizations proposed that the HSLRB be required to develop a single, integrated dispute resolution process for matters concerning the scope and duty to bargain. Second, they proposed a new process for nominating HSLRB members. Other commenters made similar recommendations. We have revised the proposed regulations to include a formal opportunity for labor organization participation in the nomination process.

In this regard, the final regulations establish criteria for HSLRB members, requiring that they be known for their integrity and impartiality as well as their expertise in labor relations, law enforcement, or national/homeland or other related security issues (for example, former members of the judiciary). The regulations preserve the Secretary's sole and exclusive discretion to appoint one member who serves as the HSLRB's Chair, with powers and duties enumerated in § 9701.508. However, the regulations provide the Department's labor organizations with an opportunity to participate in the process of nominating the remaining two members of the HSLRB. While the Secretary, like other heads of departments and agencies, retains the

ability to make these senior appointments from any appropriate source (and to remove those appointees), the Secretary and the Director have determined that it is in the Department's interest to include a formal process through which labor organizations can recommend individuals for these positions.

We also received several comments regarding the terms of the HSLRB members. One commenter suggested that the terms of the HSLRB members should be staggered to ensure continuity. We have adopted this suggestion. Another commenter suggested that an HSLRB member should be permitted to serve an additional term beyond his or her initial term because that HSLRB member might have gained valuable experience or expertise that could be of value to the HSLRB. We agree, and have adopted this suggestion as well.

A review of the comments made us realize that estimating the number of cases that the HSLRB might be called upon to handle at any particular time is a difficult, if not impossible, task. To ensure the HSLRB has the resources to process all cases expeditiously, we have given the Secretary the sole and exclusive discretion to appoint additional HSLRB members, subject to the criteria and nomination procedures specified in the regulations. In addition, we have permitted individual HSLRB members to adjudicate disputes. Such changes will provide the HSLRB with more flexibility to manage its workload, but will not significantly prejudice the interests of either the Department or its employees.

The proposed regulations also discussed judicial review of HSLRB decisions and posed two options for consideration by commenters. One option would have the regulations remain silent with regard to judicial review, thus allowing existing governing legal principles to determine the circumstances under which there would be judicial review. The second option would have required FLRA review, under the same procedures and standards for judicial review of FLRA decisions as a condition precedent to appellate court jurisdiction. The labor organizations made no recommendations with regard to the two options. We received other comments that specifically supported allowing judicial review following FLRA review of HSLRB decisions. On the other hand, a commenter argued that the Homeland Security Act gave neither DHS nor OPM the power to confer jurisdiction on FLRA to hear appeals from HSLRB decisions involving the duty to bargain or appropriate unit issues involving DHS employees. We disagree. The Homeland Security Act, within defined parameters, gave DHS and OPM sufficiently wide latitude for designing the Department's labor-management relations program.

Accordingly, after further consultation with FLRA (as well as MSPB with regard to subpart G), we have adopted the second option in § 9701.508(g), which provides that either party may request review of the record of an HSLRB decision by FLRA. In conducting its review, FLRA will defer to findings of fact and interpretations of these regulations made by the HSLRB. The provision also establishes a 30-day time limit for FLRA to render its decision. This 30-day time limit is mandatory, except that FLRA may extend its time for review by a maximum of 15 additional days if it determines that a case is unusually complex, or that an extension is necessary to prevent any prejudice to the parties; however, the regulations do not permit any further extension. In addition, § 9701.508(g) was revised to provide for judicial review under 5 U.S.C. 7123 of any final FLRA order.

Section 9701.509—Powers and Duties of the HSLRB and Section 9701.510—Powers and Duties of the Federal Labor Relations Authority

Commenters, including the labor organizations participating in the meet-and-confer process, recommended that FLRA retain jurisdiction over all labor disputes in DHS. Specifically, they suggested that not all labor relations issues that arise in the Department will have a significant enough impact on homeland security to warrant removing them from the jurisdiction of FLRA. The labor organizations also expressed concern at the HSLRB's authority to assert jurisdiction over any matter submitted to FLRA if the HSLRB determined that homeland security was affected. Following discussion during the meet-and-confer process, we agreed to amend the proposed regulation. In addition to retaining the powers and duties of FLRA that we outlined in our proposed regulations, we also agreed to retain FLRA's current authority to determine the appropriateness of units pursuant to § 9701.514, and to resolve exceptions to arbitration awards which do not involve the exercise of management rights and/or the duty to bargain.

It is imperative that the HSLRB retain jurisdiction over each matter for which an understanding and appreciation of the Department's mission is necessary. As a result, the final regulations give the HSLRB jurisdiction over disputes concerning the duty to bargain, the scope of bargaining, negotiation impasses, and certain exceptions to arbitration awards involving these issues because these disputes typically involve the exercise of management rights under § 9701.511. Similarly, the final regulations continue to give the HSLRB authority to assert jurisdiction over any dispute submitted to FLRA that affects homeland security. Finally, labor organizations suggested that, because the regulations accorded the HSLRB the authority to issue opinions, those opinions should have the force and effect of law and be subject to judicial review. We agree, and have amended the regulations accordingly. Finally, in response to comments from participating labor organizations, we have included procedures for resolving jurisdictional disputes between the HSLRB and the FLRA in § 9701.509(d).

Section 9701.511—Management Rights

In their comments and during the meet-and-confer process, participating labor organizations recommended that we retain the current language in 5 U.S.C. chapter 71 with regard to management rights, arguing that the proposed regulations unduly limited the scope of bargaining. However, they did propose modifications that would allow the Department to take immediate action without bargaining in advance, or without regard to existing collective bargaining agreements, in exceptional circumstances. This issue was discussed extensively during the meet-and-confer process, but no agreement was reached. Even with the modifications recommended by the labor organizations, the current statute does not give the Department the flexibility necessary to carry out its vital mission of protecting homeland security. Title 5, chapter 71, requires bargaining over procedures that govern how employees are assigned or deployed to particular locations, often within the same facility. The resulting procedures often prevent management from quickly assigning the right employee to the right task at the right time. Similarly, the requirement to bargain in advance of the exercise of a management right, over its implementation and impact, also has the potential for impeding or delaying the execution of the Department's mission.

The Department needs greater flexibility to act—for example, in the assignment or deployment of personnel or the introduction of new technology—not just in emergency or exceptional situations, but also on a day-to-day basis to meet operational demands.

Accordingly, we have retained the management right provisions in the proposed regulations. However, this section has been clarified to prohibit bargaining over the exercise of the management rights enumerated in paragraph (a), as well as the procedures associated with the exercise of the management rights enumerated in paragraphs (a)(1) and (2). As noted previously, the Department has found that procedures negotiated under current law have impeded its ability to accomplish its mission, and as a consequence, we have removed these procedures from the scope of bargaining. We have also eliminated the requirement to bargain in advance over implementation and impact of a management action as well as appropriate arrangements when employees are adversely affected by that action.

However, as a result of concerns expressed by participating labor organizations in the meet-and-confer process, we have added a new paragraph (c) establishing a requirement that management ''confer'' with an exclusive representative over operational procedures such as for work assignments and deployments, which are no longer negotiable under § 9701.511(a)(1) and (2) (see § 9701.512). We have also substantially revised the proposed regulations to require that when management exercises a management right and the effect on conditions of employment is foreseeable, substantial, and significant in terms of both duration and impact on the bargaining unit as a whole, or on those employees in that part of the bargaining unit affected by the management action, notice will be provided to the exclusive representative at the time management exercises that right if an obligation to bargain, confer, or consult exists. Such notice also may be provided any time in advance at the discretion of management. Additionally, under certain circumstances and upon request of the exclusive representative, management is obligated to negotiate over impact and appropriate arrangements for employees adversely affected by the action. Each party may exercise sole and exclusive discretion to delegate authority to bargain such matter below the level of recognition. This provision allows either party to exercise unreviewable discretion to decline to bargain below the level of recognition. The regulations continue to provide that such bargaining may occur on a pre-implementation basis at management's discretion.

However, as a result of the September 10 meeting, the regulations have been revised to require bargaining over impact and appropriate arrangements after implementation under certain circumstances specified in § 9701.511 (see the discussion on *Management Rights/Scope and Duty to Bargain* in the Major Issues section of this Supplementary Information). The regulations continue to require bargaining over implementation, impact, procedures, and appropriate arrangements regarding the exercise of nonoperational management rights enumerated in § 9701.511(a)(3), as provided under current law. The proposed regulations have also been modified to provide the exclusive representative with the opportunity to present its views and recommendations regarding the exercise of management rights. We added paragraph (f) to clarify that nothing prevents management from taking action, and that any agreements over impact or appropriate arrangements are neither retroactive nor precedential.

In their comments and during the meet-and-confer process, participating labor organizations raised concerns about out-of-pocket expenses incurred by employees as a result of the exercise of a management right. They argued that employees should not be expected to shoulder unusual or unanticipated expenses incurred as a result of management action. Based on those comments, we have revised the proposed regulation to provide reimbursement of appropriate out-of-pocket expenses incurred by an employee as a direct result of a management action, under certain conditions.

Section 9701.512—Obligation To Confer

In their comments and during the meet-and-confer process, participating labor organizations strongly objected to § 9701.511(b) of the proposed regulations that eliminated mandatory bargaining over the procedures management will follow in the exercise of its rights. As previously discussed, we have clarified that section to prohibit negotiations over these procedures. However, in response to the concerns expressed by participating labor organizations, we have added a new section that requires management to confer with an appropriate exclusive representative to consider its views and recommendations with regard to such procedures. The process established by this section requires that the parties meet for no longer than 30 calendar days to confer over operational procedures governing such matters as work assignments and deployments, unless the parties mutually agree to an extension. Upon mutual agreement, the parties may ask the HSLRB, FMCS, or any other third-party to assist them in reaching resolution. Because these procedures are so critical to accomplishing the Department's mission, the process established under this section is beyond the scope of the unfair labor practice provisions of these regulations, and the Department retains final authority to determine the content of these operational procedures as well as the authority to deviate from them.

Section 9701.513—Exclusive Recognition of Labor Organizations

In their comments and during the meet-and-confer process, the participating labor organizations recommended that the regulations authorize the Secretary to voluntarily recognize a labor organization or two or more labor organizations jointly upon a demonstration that they represent a majority of employees in the unit. However, we believe it is essential that employees have the utmost confidence in the process by which their exclusive representatives are selected and that employees should continue to be afforded the opportunity to vote in representational elections. Therefore, we have not adopted the recommendation and have retained the language of the proposed regulations regarding elections.

Section 9701.514—Determination of Appropriate Units for Labor Organization Representation

We have adopted the recommendation of commenters to retain the current statutory distinction between professional and non-professional bargaining units by incorporating the provision from 5 U.S.C. 7112(b)(5) in § 9701.513(b)(5).

Section 9701.515—Representation Rights and Duties

In connection with this section of the proposed regulations, we received comments pertaining to (1) an employee's right to representation during an investigatory interview; (2) the right of an exclusive representative to attend formal discussions; (3) the standard of conduct applicable to employee representatives; and (4) the scope of the Department's obligation to disclose information to the exclusive representative(s) of its employees.

Commenters strongly objected to the elimination of the right of an employee to request representation when examined by representatives of the Office of the Inspector General, Office of Security, and Office of Internal Affairs, arguing that such representation

protects employees against abusive or illegal interview techniques and provides reassurance and guidance to employees. Accordingly, we modified the regulation to restore the full scope of the ''Weingarten'' right as it currently exists.

In their comments, labor organizations objected to the elimination of formal discussions in the proposed regulations, viewing it as undermining the ability of labor organizations to effectively represent bargaining unit employees. In response to these comments, we revised the proposed regulations to provide the exclusive representative with an opportunity to be present at meetings between Department representatives and bargaining unit employees when the purpose of the meeting is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. However, this right was not extended to meetings between Department representatives and bargaining unit employees that involve operational matters when the discussion of working conditions is incidental or peripheral to the announced purpose of the meeting. Additionally, this right does not apply to discussions that merely reiterate or apply existing personnel policies, practices, or working conditions.

We believe this modification provides clearer guidance to a Department representative as to when he or she is required to notify the exclusive representative of a meeting with bargaining unit employees. Moreover, this provision facilitates the Department's accomplishment of its critical mission by enabling managers and supervisors to have meetings with their employees regarding operational matters without any confusion regarding whether the exclusive representative must receive prior notice.

In their comments and during the meet-and-confer process, participating labor organizations objected to precluding their right to be present during the discussion of an EEO complaint. The parties noted that an exclusive representative's presence during a discussion concerning an EEO complaint has been intensely litigated. Given this ongoing debate, we have modified the language in the proposed regulations to provide that an official of a labor organization may attend formal EEO complaint meetings as an employee's personal representative and only at the request of the bargaining unit employee who filed the complaint. The final regulation provides that if the United States Supreme Court determines whether an exclusive representative has a right to be present at such a meeting under 5 U.S.C. 7114, the Department will interpret and apply that decision to this section. We have also clarified § 9701.515(a)(5) regarding an employee's right to a personal representative in grievance or appeal procedures other than those negotiated grievance procedures established under subpart E.

In their comments and during the meet-and-confer process, participating labor organizations objected to the requirement in the proposed regulations that employee representatives be subject to the same standards of conduct as any other employee, stating that this provision would ''chill'' the employee representatives' ability to exercise their protected rights. The participating labor organizations recommended retaining current case law standards that allow discipline of employee representatives only if they engage in ''outrageous conduct.'' We have deleted this provision but have left the development of any standards in this regard to the discretion of the HSLRB.

In their comments and during the meet-and-confer process, participating labor organizations suggested that we maintain the duty to disclose information as it currently exists under 5 U.S.C. 7114(b). They particularly objected to the proposed exemption for disclosure of information if ''adequate alternative means exist'' for obtaining it. Another commenter stated that it was unclear whether the proposed regulation will utilize the existing ''particularized need'' standard, which requires a labor organization to specifically state why it needs the requested information.

We do not believe the current standards for information disclosure in 5 U.S.C. chapter 71 adequately address the Department's need to withhold information that it determines would compromise its mission, security, or employee safety/privacy. Further, those standards have led to considerable confusion and much unnecessary litigation. Accordingly, we have added language to clarify the conditions for disclosure of information, including the requirement that the exclusive representative must demonstrate a particularized need. We expect the HSLRB to interpret and apply this language in a manner that is consistent with the Department's mission and the established particularized need of exclusive representatives in accordance with law.

Finally, we have revised the language in the proposed regulations to make clear that § 9701.515(b)(5)(ii) applies only to information requested in connection with matters covered by subpart E. However, if a labor organization serves as the personal representative of a bargaining unit employee in connection with the appeal of an adverse action to MSPB, the appeal of a mandatory removal offense to the Mandatory Removal Panel, or the pursuit of a complaint of discrimination before the Equal Employment Opportunity Commission, the applicable discovery rules and procedures of those respective bodies apply.

Section 9701.516—Allotments to Representatives

Commenters suggested that the regulations should allow employees to discontinue their allotments at any time, rather than on an annual basis. In their comments, the labor organizations recommended that we revise the proposed regulation to allow the assignment and allotment of other financial assessments of the exclusive representative, and that we adopt language which provides that after one year has passed, an employee may revoke his or her dues allotment assignment on the anniversary date of his or her enrollment or on a date specified in a collective bargaining agreement. We believe the regulations, which track chapter 71, provide the appropriate mechanism for processing dues allotments and have not adopted these suggestions.

Section 9701.517—Unfair Labor Practices

In the proposed regulations, the Department and OPM identified those actions that would constitute unfair labor practices in the Department's labor-management relations system. This list of unfair labor practices is almost identical to that set forth in 5 U.S.C. 7116. The proposal made only slight modifications to this list. Specifically, we clarified that the HSLRB, not FLRA, would be the arbiter of whether a party refused to consult or negotiate in good faith, or failed or refused to cooperate in impasse procedures and impasse decisions required by the Department's regulations. In addition, because these regulations provide that any provision of a collective bargaining agreement that is inconsistent with these regulations or the implementing directives is unenforceable on the effective date of coverage, we did not identify the action set forth in 5 U.S.C. 7116(a)(7) as an unfair labor practice.

The labor organizations suggested that references to the HSLRB be removed from the regulation because of their

objection to the creation of the HSLRB. In addition, they urged that we retain 5 U.S.C. 7116(a)(7) because an agency should not be permitted to enforce a rule or regulation that is in conflict with a collective bargaining agreement if the agreement was in effect prior to the issuance of the rule or regulation.

We decline to adopt the first recommendation in light of the fact that we have retained the HSLRB in the final regulations. In addition, for reasons of homeland security, it is imperative that these regulations and any implementing directives trump provisions of existing collective bargaining agreements if these provisions are inconsistent with the regulations or directives. Therefore, we decline to adopt this second recommendation.

We have made technical corrections in the second sentence of paragraph (e) to reflect the intent of the proposed regulations to mirror the language in 5 U.S.C. 7116(d).

Section 9701.518—Duty To Bargain, Confer, and Consult in Good Faith

Commenters, including those labor organizations participating in the meet-and-confer process, objected to (1) the removal of Departmental implementing directives and other regulations from the scope and duty to bargain; (2) the modification to the *de minimis* standard, which limits the duty to bargain to those matters that ''significantly affect a substantial portion of the bargaining unit''; (3) the establishment of a 60-day time limit for term bargaining; and (4) the absence of a mechanism for resolving mid-term bargaining impasses.

We retained the bar on negotiations over Departmental implementing directives and other regulations. Under current law, Departmental implementing directives and other regulations would be subject to collective bargaining at a subordinate level of recognition, unless the Department could demonstrate a ''compelling need'' for uniformity. We believe that this is inconsistent with the basic purposes of the Homeland Security Act. The Department was created, in part, to bring about greater cohesion and coordination among its formerly separate components, and by definition, we believe there is a compelling need for uniformity among those components. Therefore, we have excepted Departmental implementing directives and other regulations from bargaining. The prospect of subjecting critical Department-wide human resources policies to modification through bargaining in over 70 separate bargaining units is untenable, and the resulting patchwork of human resources policies could have an adverse effect on the Department's mission.

However, we have revised the regulation to provide for labor organization involvement in three ways: (1) With respect to Departmental implementing directives, the Department will provide appropriate labor organizations with an opportunity to participate in the ''continuing collaboration'' process under § 9701.105; (2) with respect to other Departmental regulations dealing with conditions of employment, the Department will confer with labor organizations granted national consultation rights under § 9701.518(d)(2), in accordance with the procedures set forth in § 9701.512; and (3) with respect to all other Department-wide matters that impact bargaining unit members, the Department will consult with national labor organizations.

During the meet-and-confer process, we agreed to revise the proposed *de minimis* standard. Participating labor organizations expressed concern that the proposed standard relieved management from the duty to bargain unless the change impacted a majority of bargaining unit employees. In response to those concerns, we further clarified the standard to reflect current Federal and private sector case law, which requires management to afford an exclusive representative an opportunity to bargain over changes that are ''foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.'' Under this standard, management is not required to negotiate when the impact is on a single employee. We also agreed to extend the time limit for term bargaining from 60 days to 90 days. In addition, we provide that the parties may refer a mid-term bargaining impasse to an independent mediator/arbitrator (by mutual agreement), FMCS, and/or HSLRB for assistance or resolution.

Section 9701.519—Negotiation Impasses

The proposed regulation provided the Homeland Security Labor Relations Board with the authority to resolve negotiation impasses. We have retained this authority, but deleted § 9701.519(b) involving the HSLRB's regulations and reincorporated the concepts into § 9701.508, Homeland Security Labor Relations Board, where it more appropriately flows with the HSLRB's authority to issue regulations concerning its impasse resolution procedures. Commenters recommended that negotiation impasses should be referred through the Federal Mediation and Conciliation Service (FMCS) and then to the Federal Service Impasses Panel (FSIP) for resolution. We have incorporated provisions for parties to use the services of FMCS in § 9701.508, Homeland Security Labor Relations Board. However, we continue to believe that FSIP is not positioned to adequately respond to the unique and critical mission of the Department, and the labor organizations during the meet-and-confer process were not opposed to the creation of a streamlined impasse resolution process.

Section 9701.521—Grievance Procedures

In their comments, labor organizations recommended that we modify paragraph (b)(2) of the proposed regulations to retain an arbitrator's current authority to stay a personnel action in the same manner as MSPB if a prohibited personnel action is involved. We agree and have so modified the regulation.

Paragraph (f) of the proposed regulations provided that employees may no longer challenge adverse actions through the negotiated grievance procedure. Several labor organizations commented that access to the grievance/arbitration process is a fundamental element of the statutory right to organize and bargain collectively. Other commenters also opposed this change. We agree and have modified the regulations to permit employees who are subjected to certain adverse actions to seek redress either through the appeals process or grievance procedure, but not both. We have revised the regulations to provide that 5 U.S.C. 7121(f) is modified so that matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review. Section 7121(f) also is modified to provide that judicial review under 5 U.S.C. 7703 will apply to an arbitration award under the same manner and under the same conditions as if the matter had been decided by MSPB under § 9701.706, including the requirement that the preponderance of the evidence standard applies to arbitrators as well as to MSPB. The new § 9701.521(f) is consistent with 5 U.S.C. chapter 71 and requires arbitrators hearing adverse action grievances to be bound by these regulations and MSPB case law as it applies to DHS.

For example, section 9701.706(k)(6) clarifies that MSPB may mitigate a penalty only if the penalty is so disproportionate to the offense as to be wholly without justification. Under the

final regulations, this standard applies with equal force to arbitrators who adjudicate adverse actions under the negotiated grievance procedure. Adverse action penalties which do not meet this standard may not be modified by either MSPB or an arbitrator; in other words, they are barred from substituting their judgment as to the penalty for that of the Department. In cases of multiple charges, MSPB or an arbitrator may still mitigate a penalty where not all of the charges are sustained. The third party's judgment is based on the justification for the penalty as it relates to the sustained charge(s). The regulations are intended to ensure that when a penalty is mitigated, the maximum justifiable penalty will be applied.

In order to ensure consistency in the adjudication of adverse actions, the Department's two largest labor organizations recommended the establishment of a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances. The Secretary and the Director concurred with this recommendation, and § 9701.521(f) has been revised accordingly.

Consistent with the change to allow grievances regarding certain adverse actions, we have revised § 9701.521 to provide that adverse actions under subpart F are grievable, except for mandatory removal offenses and adverse actions taken in the interest of national security under § 9701.613. This revision also eliminates confusion caused by the language in 5 U.S.C. 7121(c)(5) and accurately reflects the current situation that, although adverse actions are grievable, the exclusive recourse with regard to classification disputes is the OPM classification appeals procedure (5 CFR 511.603). The revision also is consistent with the statutory exclusion of classification matters from the definition of ''conditions of employment'' in 5 U.S.C. 7103(a)(14)(B). (See related clarifications in §§ 9701.222 and 9701.604(b)(15).)

In their comments, labor organizations recommended that we delete paragraph (g), which provided that an employee may grieve a performance rating only if it was not raised in connection with an adverse action appeal. However, during the meet-and-confer process, they withdrew their objections.

Labor organizations also objected to that part of paragraph (g) requiring that an arbitrator must sustain a grieved rating of record unless the grievant proves that it was arbitrary or capricious. The labor organizations argued that a rating should be cancelled upon a showing of a prejudicial violation of applicable law or the provisions of a labor agreement. During the meet-and-confer process, we agreed to revise paragraph (g) to address the authority of an arbitrator to cancel a performance rating. Paragraph (g) now provides that an arbitrator may cancel such a rating upon a finding that management applied the employee's established performance expectations in violation of law, regulation, or collective bargaining agreement if the violation prejudices the grievant. Further, the revision precludes an arbitrator from ordering a change to a rating, except when he or she is able to determine the rating that the manager would have given but for the violation; if the arbitrator cannot do so, the case must be remanded for re-evaluation. Finally, paragraph (g) states that an arbitrator does not have authority to conduct an independent evaluation of an employee's performance or otherwise substitute his or her judgment for that of the manager, unless otherwise provided by law.

Section 9701.522—Exceptions to Arbitration Awards

Commenters, including labor organizations, objected to giving the HSLRB jurisdiction over exceptions to arbitration awards and requested that FLRA retain such jurisdiction. We adopted this suggestion in part, revising the regulations to give FLRA jurisdiction over exceptions that do not involve the exercise of management rights and/or the scope and duty to bargain. Because those matters involving the exercise of management rights and/or the scope and duty to bargain potentially impact Department operations, we believe that they should remain within the purview of the HSLRB. This will also facilitate the HSLRB's development of a single, integrated dispute resolution process for such matters. During the meet-and-confer process, participating labor organizations also suggested that we develop procedures to resolve disputes over whether exceptions to a particular arbitration award involve the exercise of a management right or the duty to bargain. The final regulations include such procedures at § 9701.522(b). (See *Section 9701.509—Powers and Duties of the HSLRB* and *Section 9701.510—Powers and Duties of the Federal Labor Relations Authority.*)

Section 9701.527—Savings Provision

We have revised this section to clarify our intent that any remedy that applies after the date of coverage under any provision of subpart E and that is in conflict with applicable provisions of this part is not enforceable.

Subpart F—Adverse Actions

General Comments

Some commenters felt that the proposed regulations would adversely impact due process rights, equal employment opportunity claims, whistleblowing claims, and recruiting and retention efforts. We disagree. Under the Homeland Security Act of 2002, DHS is prohibited from waiving or modifying any provision relating to prohibited personnel practices or merit system principles, including reprisal against whistleblowing or discrimination. We retained these protections intact. The Homeland Security Act also requires DHS to ensure that employees are afforded the protections of due process, and we have done so, not only for actions that trigger due process protections, but for all covered adverse actions. We have retained these protections as well, assuring an employee a right to notice of a proposed adverse action, a right to reply, a right to a final written decision, and a right to appeal the action. Although we have made changes to the proposed regulations, those changes preserve due process and guarantee other legal protections, and as a result, we do not believe they will have any effect on recruiting and retention efforts.

One commenter expressed concern that the new time limits could lead to longer processing times and more burdensome delays for other Federal agencies attempting to defend their adverse actions before MSPB. We intend to conduct an evaluation of the appellate procedures after they have been in effect for 2 years in order to determine, among other things, whether additional modifications to 5 U.S.C. chapter 77 and/or these regulations should be considered.

Other Comments on Specific Sections of Subpart F

Section 9701.601—Purpose

Section 9701.601 of the proposed regulations revised the number of days for a furlough from 30 days or less to 90 days or less. Commenters noted that this revision conflicts with current Governmentwide rules where a furlough of more than 30 days requires the use of reduction in force procedures. This conflict was not intended. We have revised the final regulations to retain the current number of days for a furlough action as 30 days or less. We have also clarified this section by including a statement that DHS may issue

implementing directives to carry out the provisions of this subpart.

Section 9701.602—Waivers

Section 9701.602 of the proposed regulations specified the provisions of title 5, U.S. Code, that are waived for employees covered by the DHS adverse action system established under subpart F. We have revised this section to be consistent with language used in other waivers sections of the regulations.

Section 9701.603—Definitions

Section 9701.603 of the proposed regulations defined an ''initial service period'' as the 1 to 2 years employees must serve upon appointment to DHS before being covered by subpart F, and counts prior Federal service toward this requirement. We have clarified the initial service period in a new separate section in the final regulations, numbered as § 9701.605.

Labor organizations requested that we retain the current probationary period of one year as sufficient time to evaluate employees. However, we note that the initial service period is not a probationary period. A probationary period is an extension of the examination process. An initial service period focuses on an employee's developmental progress. Accordingly, we have retained the initial service period for those jobs that have an extended (12- to 24-month) developmental cycle, in order to allow the Department sufficient time to determine whether a trainee has the potential to acquire the competencies required at the full performance level of the employee's occupation and should be retained. However, in response to the concerns of labor organizations, we have specified that initial service periods will be standardized for particular occupations via DHS implementing directives, rather than left to individual supervisory discretion. We have also revised the definition to specify that the 1- to 2-year initial service period (ISP) applies only to employees selected for a designated DHS position in the competitive service, and to credit relevant prior Federal service towards satisfactory completion of the ISP.

We use the term ''competencies'' in this subpart, and have added this term to the definitions. It is identical to the definition of that term in § 9701.404 concerning the DHS performance management system. Additionally, we use the identical definition of ''band'' found at § 9701.204, rather than referring the reader to that section for the definition. We have also included the current title 5 definitions for ''probationary period,'' ''current continuous service,'' ''similar positions,'' and ''trial period'' to coincide with the use of these terms in subpart F of the final regulations.

Finally, we have added definitions of adverse action, *mandatory removal offense (MRO), and Mandatory Removal Panel (MRP).*

Section 9701.604—Coverage

Section 9701.604(b)(1) of the proposed regulations indicated that employees in the competitive service who are removed during an initial service period are subject to the limited appeal rights under 5 CFR part 315. Labor organizations observed an inconsistency with this section and § 9701.704(c) which indicates that employees in the competitive service who are removed during the first year of an initial service period are covered by 5 CFR part 315, while employees removed during the second year of an initial service period are not covered by either part 315 or subpart G of these regulations. As a result, the labor organizations noted, those employees could conceivably have fewer rights in their second year of service than their first year of service. We have clarified this drafting error in § 9701.704(c) of the final regulations to reflect that the applicable appeal procedures of 5 CFR part 315 apply during the entire initial service period. We have also moved the reference to 5 CFR part 315 coverage in § 9701.604(b)(1) of the proposed regulations to § 9701.605(c) in the final regulations.

We have added a new paragraph (b)(15) to clarify that classification determinations, including classification determinations under subpart B, are not subject to adverse action procedures under subpart F. Under § 9701.222, classification determinations under subpart B are subject to DHS and/or OPM review and are not subject to further review or appeal.

We revised § 9701.604(d) to add employees appointed and serving under Executive Order 11203, members of the Homeland Security Labor Relations Board, and members of the Mandatory Removal Panel to the list of exclusions. The members of the HSLRB and the Panel may be removed only under the same conditions and according to the same procedures applicable to members of the Federal Labor Relations Authority and the Merit Systems Protection Board, respectively, as specified in the relevant sections of the two subparts.

Section 9701.604(d)(1) of the proposed regulations excluded employees serving a term, temporary, or otherwise time-limited appointment. During the meet-and-confer process, participating labor organizations requested that the regulation exclude employees serving a time-limited appointment, except those employees who have completed a trial period. We have partially adopted this suggestion. Preference eligible employees who are serving a time-limited appointment of any length (including a term appointment) and who have completed a probationary or trial period are covered by subpart F. Non-preference eligible employees who are on a time-limited appointment of longer than 2 years and who have completed a trial period are also covered by subpart F except as otherwise provided by §§ 9701.604 and 9701.605. We have revised this paragraph accordingly and have also redesignated this paragraph as § 9701.604(d)(4).

Section 9701.604(d)(2) of the proposed regulation provided that preference eligible employees would be covered by subpart F adverse action procedures, as well as subpart G appeal procedures, after their first year of an initial service period, regardless of the length of the initial service period. During the meet-and-confer process and in their comments, participating labor organizations suggested that the protections for preference eligible employees apply to all DHS employees. We have not adopted this suggestion. Placing non-preference eligible employees on equal footing with preference eligible employees in this instance would diminish preference status. We have redesignated this paragraph as § 9701.604(d)(1) in the final regulations, and revised it to exclude employees in the competitive service who are serving a probationary, trial, or initial service period. We have also moved the reference to 5 CFR part 315 coverage in § 9701.604(d)(2) of the proposed regulations to § 9701.605(c) in the final regulations.

To further clarify coverage of subpart F, we created parallel provisions to 5 U.S.C. 7511 that retain the adverse action procedures for employees in the excepted service. These provisions are included at § 9701.604(d)(2) and (d)(3) of the final regulations.

Section 9701.605—Standard for Action

We redesignated this section as § 9701.606 due to insertion of the new section on ''Initial service period'' at § 9701.605. (*See* discussion of ISP in *Section 9701.603—Definitions.*)

Section 9701.605 of the proposed regulations provided that DHS may take an adverse action only when it establishes a factual basis for the action and a connection between the action and a legitimate Departmental interest.

During the meet-and-confer process, the participating labor organizations requested that the long-standing ''efficiency of the service standard'' be retained. We agree. We originally deleted the efficiency of the service standard in the proposed regulations to allay any confusion that might arise from case law linking this standard with the authority to review and mitigate penalties, an authority we did not provide in the proposed regulations. However, because we have revised the proposed regulations to provide for a limited authority to mitigate in other than mandatory removal offenses, we have also revised the proposed regulations to retain the current efficiency of the service standard. See the discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.606—Mandatory Removal Offenses

This section has been redesignated as § 9701.607. Section 9701.606 of the proposed regulations provided that the Secretary in his or her sole, exclusive, and unreviewable discretion will identify offenses that have a direct and substantial impact on the ability of the Department to protect homeland security. The Secretary intends to consult with the Department of Justice in preparing the list of offenses. An employee who commits such an offense must be removed from Federal service, and must be provided due process including third-party review by an independent DHS Panel. Commenters suggested that the Secretary would have too much discretion in such cases, that removal may be too harsh, and that due process would be diminished. We disagree and have retained this provision, including the Secretary's sole, exclusive, and unreviewable discretion to mitigate.

During the meet-and-confer process, participating labor organizations initially opposed this provision. However, upon their review of a tentative list of MROs, they agreed in concept. They also agreed that the proposed regulations met due process requirements. In that regard, the participating labor organizations recommended that the final list of MROs be publicized and communicated annually to employees. We agree. We will publish the final list of MROs in the **Federal Register** and will include it in DHS implementing directives; we have also revised § 9701.607(a) to provide for making them known to employees annually. See the discussion on ''Mandatory Removal Offenses'' in the Major Issues section of the Supplementary Information.

Also in response to proposals made by labor organizations during the meet-and-confer process, we added a requirement in § 9701.607(c) that a proposed notice of a MRO be reviewed and approved by the Secretary or designee prior to issuance of the notice to the employee. In addition, we moved the reference to the Secretary's mitigation authority from paragraph (b) to a new paragraph (d). Finally, we have added a new paragraph (f) to clarify that the current authority to remove an employee based on the revocation of a security clearance is not limited by the establishment of MROs.

Section 9701.607—Procedures

We redesignated this section as § 9701.608. Section 9701.607 of the proposed regulations provided shorter advance notice and reply periods. Labor organizations and other commenters requested that we retain the current notice and reply periods (currently 30 and 7 days, respectively) because they believed proposed shorter periods deprive employees of a full and fair defense or would make it extremely difficult for employees to enforce their rights. However, we believe that one of the fundamental objectives of the Homeland Security Act was to streamline the process for taking an adverse action, and as a result, we have retained a minimum notice period of 15 days as originally proposed. However, based on the comments of participating labor organizations, we have extended the reply period from a minimum of 5 days to a minimum of 10 days. Moreover, employees may always request an extension of their reply period.

We have revised the notice period in paragraph (a) for mandatory removal offenses from ''at least 5 days'' to ''at least 15 days'' to be consistent with the notice period for other adverse actions. Should DHS need longer notice periods when taking an adverse action, the regulations provide that flexibility as well in that the notice periods are only minimum required timeframes. Similarly, we have revised the reply periods in paragraph (b) for both mandatory removal offenses and other adverse actions from ''at least 5 days'' to ''at least 10 days''. The net result is a shorter notice period coupled with a longer, but concurrent, reply period than currently provided under 5 U.S.C. 7513. The only situation where a shorter 5-day notice and reply period is permitted is where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. This ''crime provision'' is patterned after that provided for in the current law at 5 U.S.C. 7513.

Section 9701.607 of the proposed regulations established a single, integrated process for taking adverse action based on unacceptable performance and for disciplinary reasons, and eliminated the requirement for a formal, set period for an employee to improve performance before management can take an adverse action. Some commenters indicated that the requirement for an opportunity to improve should be retained, while another commenter agreed with having the single process. We have not revised the proposed regulations in this regard. However, the final regulations continue to provide for the optional use of performance improvement periods.

Section 9701.607(b)(4) of the proposed regulation provided that the Department may disallow an employee's choice of representative when that choice could compromise security. One commenter expressed concern that employees would not be able to be represented by attorneys who did not have security clearances. Labor organizations participating in the meet-and-confer process raised similar concerns. Generally, we agree and have revised the regulation to reflect 5 CFR 752.404(e). However, we have limited the applicability of this section to mandatory removal offenses because of their very nature. We have also clarified that an employee must designate his or her representative in writing.

Section 9701.607(b)(5) of the proposed regulations provided that the Department must comply with 5 CFR part 339 when addressing an employee's medical condition relevant to a proposed adverse action. A commenter suggested that we include language to clarify the Department's compliance requirement with the Rehabilitation Act found at 29 CFR 1614.203. During the meet-and-confer process, participating labor organizations suggested that we edit § 9701.607(b)(5) and (c) so that it reads as it currently does in 5 CFR part 752. We agree and have revised this section in the final regulations to better clarify the Department's required compliance with the Rehabilitation Act, 29 CFR 1614.203. We have also revised § 9701.607(b)(5)(i) and (c) of the proposed regulations so that they read as they currently do in 5 CFR part 752.

Finally, to aid the reader, we have split the material in this section of the regulations into a total of four sections (§ 9701.608—Procedures, § 9701.609—Proposal notice, § 9701.610—Opportunity to reply, and § 9701.611—

Decision notice), and we have redesignated the subsequent sections accordingly.

Section 9701.608—Departmental Record

We redesignated this section as § 9701.612. Section 9701.608(a) of the proposed regulations provided that the Department must retain a record of the adverse action pursuant to the General Records Schedule and the Guide to Processing Personnel Actions. One commenter asked that we clarify whether an employee's SF–50 and Official Personnel Folder (OPF) will be documented. We have revised this section in the final regulations to correct the citation from the Guide to Processing Personnel Actions to the Guide to Personnel Recordkeeping. The Department will comply with the requirements for documenting an employee's SF–50 and OPF as provided by the General Records Schedule and the Guide to Personnel Recordkeeping.

Section 9701.609—Suspension and Removal

We redesignated this section as § 9701.613. Section 9701.609 of the proposed regulations provided procedures for taking an adverse action based on national security reasons, as provided by 5 U.S.C. 7532. Labor organizations suggested that we delete this section because they believe Congress needs to designate DHS as one of the agencies with the authority to use these special procedures. We have not revised this section in the final regulations. Such a designation is not necessary because Congress already gave the Department the authority to waive and/or modify 5 U.S.C. chapter 75 through the Homeland Security Act.

We revised paragraph (c) to clarify that employees who have completed their initial service period, probationary period, or trial period are covered by this section.

Section 9701.614—Savings Provision

We have added this new section in the final regulations to clarify that this subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart G—Appeals

Section 9701.701—Purpose

Section 9701.701 of the proposed regulations specified that the purpose of subpart G is to provide regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F. During the meet-and-confer process, the participating labor organizations recommended that we either delete this section or revise it to accurately reflect the text from the Homeland Security Act of 2002. We agree and have deleted it as unnecessary, given that it is a legal requirement.

Section 9701.702—Waivers

Section 9701.702 specifies the provisions of title 5, U.S. Code, that are waived for employees covered by the DHS appeals system established under subpart G. We have revised this section to be consistent with language used in other waivers sections of the regulations.

This section also specifies that the appellate procedures in subpart G replace those of the Merit Systems Protection Board (MSPB) to the extent MSPB's procedures are inconsistent with these regulations, and that MSPB must follow these regulations until it issues conforming regulations. In this regard, commenters questioned how the deadlines for handling DHS cases would impact MSPB's handling of non-DHS cases and suggested that rather than include the streamlined procedures in the final regulation, DHS and MSPB should instead enter into a voluntary memorandum of understanding streamlining the MSPB's procedures. In addition, during the meet-and-confer process, the participating labor organizations questioned the authority of DHS and OPM to waive, modify, or supersede MSPB's appellate procedures or otherwise diminish its authority to take final action on any matter within its jurisdiction. However, they concurred with the substance of the streamlined procedures contained in the regulations. We believe that sufficient legal authority exists to modify MSPB procedures. Moreover, as required by the Homeland Security Act, we have consulted extensively with MSPB on these matters, and MSPB has indicated an intention to issue its own conforming regulations pursuant to this section.

The participating labor organizations also suggested that this section be amended to clarify that appeals of actions not covered by subpart F continue to be covered by 5 U.S.C. 7701. We have not revised this section. We believe that the proposed regulation is clear with respect to the continued applicability of 5 U.S.C. 7701 to actions not covered by subpart F.

We also received numerous comments expressing concern that limiting the discretion of MSPB to mitigate penalties would make MSPB review ''practically meaningless,'' and would decrease the credibility of MSPB. The labor organizations participating in the meet-and-confer process also argued strongly for retaining MSPB authority to mitigate, identifying this as one of their most important priorities. Based on these comments and concerns, we have reconsidered this provision and have attempted to balance the equity issues raised by commenters and participating labor organizations with the Department's critical homeland security mission. In this regard, we have decided to authorize MSPB to mitigate penalties, but only under certain limited circumstances, and have thus included a standard for mitigation that is more stringent than current case law. See the discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION.**

Commenters and participating labor organizations also recommended that we return to the status quo with respect to the criteria for the award of attorney fees. We agree that awards of attorney fees should be based on current requirements and have revised the final regulations accordingly. See §§ 9701.706 and 9701.707.

Section 9701.704—Coverage

Section 9701.704(c) of the proposed regulation provided that the removal of an employee in the competitive service during an initial service period is subject to the provisions of 5 CFR 315.806. During the meet-and-confer process, participating labor organizations requested that we delete the initial service period and replace it with the existing probationary or trial period. As previously discussed with regard to § 9701.604, we have retained the initial service period in the final regulations.

Section 9701.705—Alternative Dispute Resolution

Section 9701.705 of the proposed regulations provided for the development of alternative dispute resolution (ADR) methods to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Commenters endorsed the concept of ADR and we continue to provide for these techniques in the final regulations, as appropriate. Participating labor organizations during the meet-and-confer process requested that the Department negotiate with the labor organization(s) before implementing a new ADR process or making changes to an existing ADR process. We have revised this section to add that ADR will be subject to collective bargaining to the extent permitted by subpart E.

Section 9701.706—MSPB Appellate Procedures

This section established streamlined MSPB appellate procedures and provided for such things as limited discovery, summary judgment, and expedited timeframes. The process for computing number of days allowed for filing under the expedited timeframes, however, will be consistent with current MSPB procedures. For example, if a filing deadline falls on a weekend or Federal holiday, the filing period will include the first workday after that date.

During the meet-and-confer process, participating labor organizations questioned our authority to establish streamlined procedures to replace current MSPB regulations. However, those labor organizations ultimately agreed that these streamlined procedures would serve appellants without compromising fundamental fairness. Accordingly, we have retained all of these provisions, with specific revisions as follows.

Section 9701.706(d)(1) of the proposed regulations provided that the Department's adverse action decision must be sustained if it is supported by substantial evidence. Several commenters, including labor organizations, commented that the reduction in the standard of proof from a preponderance of the evidence to substantial evidence violated the fundamental notions of fairness and due process. During the meet-and-confer process, participating labor organizations also identified this issue as one of major import and proposed that we revert to the current ''preponderance'' standard. Based on those discussions, we have revised this paragraph to retain the current preponderance of the evidence standard. See discussion on burden of proof in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.706(d)(2) of the proposed regulations also provided that the MSPB may not reverse a Department action based on the way the charge is labeled or the conduct characterized, provided the employee is on notice of the facts sufficient to respond to the factual allegations of the charge. During the meet-and-confer process, participating labor organizations expressed concern that this proposal would violate the right of employees to due process in that the Department would not be required to prove all the specific elements of a charge. Although we do not agree, we have revised this section to delete the provision regarding the framing of charges or charge-labeling.

Section 9701.706(h) of the proposed regulations established a new standard for recovering attorney fees which was intended to simplify the process. Comments received on the proposed regulations and during the meet-and-confer process argued that the new standard was unreasonable, beyond the authority provided under the Homeland Security Act, and would discourage employees from challenging wrongful terminations. As noted previously, we have revised this paragraph to retain the current statutory standard under which such fees may be awarded.

Section 9701.706(i)(1) of the proposed regulations provided that the MSPB may not require settlement discussions in connection with any appealed action. A commenter remarked that settlement can contribute to fast and simple case resolution. We agree that settlement can aid in timely case resolution. However, we have not revised this section because we believe strongly that settlement should be a completely voluntary decision made by the parties on their own, based on their individual interests.

Section 9701.706(k)(3) of the proposed regulations provided for limited discovery. A commenter suggested that the proposed discovery changes were ''one-sided,'' and should be reconsidered. Another commenter thought the proposed changes failed to address the disproportionate impact of current discovery procedures on Federal agencies. The commenter suggested that the regulations provide for motions by DHS to preclude factual assertions or legal arguments made by appellants in their prehearing submissions, or at the hearing, where they have failed to respond to DHS discovery requests seeking complete information on their defenses to the charges against them and their affirmative defenses. We believe we have this authority now and have decided not to revise this section. These rules of discovery are derived from the Federal Rules of Civil Procedure and apply equally to all parties.

Section 9701.706(k)(5) of the proposed regulations provided that the MSPB must render summary judgment on the law without a hearing when there is no dispute of material fact. We received comments from labor organizations and others expressing concern that this change would violate or ''scrap'' employee due process rights. We have not revised this section. Summary judgment will help to significantly expedite and streamline the appeals process. When material facts are in dispute, a hearing will be held and a transcript will be kept (as is the case today, a tape recording is sufficient for this purpose). Thus, the regulations retain due process protections.

Section 9701.706(k)(6) of the proposed regulations also established procedures for appeals in which the MSPB sustains fewer than all of the Department's charges. A commenter observed that the proposal would effectively eliminate MSPB review of the charges. We have revised this section to provide for limited mitigation, and eliminated the special procedures for processing of MSPB decisions that sustain fewer than all of the charges. See discussion on mitigation in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

We moved the reference to judicial review to a new paragraph on judicial review at § 9701.706(m).

We also received suggestions from commenters to clarify that whistleblower and prohibited personnel practice protections are unchanged. We have not revised the proposed regulations in response to these suggestions because we believe that the waiver sections of this subpart clearly identify the provisions of law that we have waived. Whistleblower and prohibited personnel practice protections are unchanged.

Section 9701.707—Appeals of Mandatory Removal Actions

Section 9701.707 of the proposed regulations established the appellate procedures for a mandatory removal action (MRO), including creation of the DHS independent panel to decide MRO appeals. Commenters and participating labor organizations stated that the MRO panel would not be transparent, accountable, or objective, nor would it protect employee due process rights. A commenter suggested that the judicial review issue could be resolved by providing for MSPB review of mandatory removal offenses. Another commenter suggested that the Department consider having members of the panel removed only by a majority decision of the panel, and that we stagger the terms of the members to ensure a degree of continuity.

During extensive discussions in the meet-and-confer process, participating labor organizations emphasized that the nomination process for that panel should be credible, transparent, and not subject to politicization. We agree and have established a process for appointing Panel members by the Secretary that includes labor organization involvement in the nomination of candidates. (See § 9701.708.) The process for appointing members of the Mandatory Removal Panel (MRP) mirrors those for

appointing members of the Homeland Security Labor Relations Board, as described in § 9701.508 of the final regulations. Specific revisions include—

- § 9701.708(a), which provides that the MRP is a standing panel composed of three members who are appointed by the Secretary for fixed terms. The members must be independent, distinguished citizens of the U.S. who are well known for their integrity, impartiality, and expertise in labor or employee relations and law enforcement/homeland security. Also, members serve for 3-year staggered terms.
- § 9701.708(b), which provides that the Secretary appoints the Chair of the MRP.
- § 9701.708(c), which authorizes labor organizations to submit lists of proposed nominees to serve as non-Chair MRP members.

In addition, § 9701.707(b) provides that all members of the MRP will hear a particular appeal and will decide the appeal based on a majority vote of the members. The MRP must provide a hearing, and may not mitigate the Department's penalty. An employee may petition the Equal Employment Opportunity Commission to review the MRP decision as a ''mixed case'' under procedures established in 5 U.S.C. 7702, except that a Special Panel convened under those procedures will include a member of the MRP and not MSPB.

The proposed regulations also discussed judicial review of MRO Panel decisions and posed two options for consideration by commenters. One option would have the regulations remain silent with regard to judicial review, thus allowing existing governing legal principles to determine the circumstances under which there would be judicial review. The second option would have required MSPB review, under the same procedures and standards for judicial review of MSPB decisions as a condition precedent to Federal Circuit jurisdiction.

One commenter noted that under the first option, judicial review would most likely be available under 5 U.S.C. 704. However, another commenter recommended the second option because, according to the commenter, the first option could permit review in a broad array of Federal courts of competent jurisdiction, resulting in greater second-guessing of DHS management decisions, as well as the creation of fragmented and inconsistent case law in this area. This commenter favored the second option because it has the advantage of keeping interpretation and enforcement of the DHS regulations within the existing MSPB/Federal Circuit review structure and therefore promises much greater uniformity and consistency than the first option. The commenter cautioned, however, that based on its experience with the Federal Circuit, that court would likely subject to very searching and critical scrutiny any Panel claims to special deference under the U.S. Supreme Court's decision in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)). Therefore, this commenter believes the likelihood of the court respecting those claims is somewhat debatable. The labor organizations did not have any recommendations in this regard during the meet-and-confer process. Accordingly, after further consultation with MSPB (as well as FLRA with regard to subpart E), we have adopted the second option in revising § 9701.707(d), which now provides that either party may request review of the record of an MRP decision by MSPB. In conducting its review, MSPB will accept the findings of fact and interpretations of these regulations made by the MRP. The provision also establishes a 30-day time limit for MSPB to render its decision. This 30-day time limit is mandatory, except that MSPB may extend its time for review by a maximum of 15 additional days if it determines that a case is unusually complex, or that an extension is necessary to prevent any prejudice to the parties; however, the regulations do not permit any further extension. In addition, § 9701.707(f) was revised to provide for judicial review under 5 U.S.C. 7703 of any final MSPB order or decision on an MRO. See the discussion on mandatory removal offenses and mandatory removal panel in the Major Issues section of the **SUPPLEMENTARY INFORMATION**.

Section 9701.709—Savings Provision

We have added this new section in the final regulations to clarify that this subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Next Steps

The mission of homeland security has never been more important. Whether it be the ability to appropriately compensate and reward our top performers, the ability to attract top talent from industry to our key mission areas, the ability to more rapidly respond to workforce and organizational requirements, or the ability to identify and establish career progression opportunities for all of the workforce, the flexibilities contained in the new DHS regulations are a top priority.

These regulations affect people, processes, and technology across the Department and represent a significant change management undertaking. The communications and training requirements to ensure success are enormous. DHS will apply the new labor relations, adverse actions, and appeals provisions no sooner than 30 days, but no later than 180 days, after the publication of these final regulations (unless the Secretary and the Director jointly approve a later date). The Preamble to the proposed regulations also outlined a tentative schedule for implementing classification, pay and performance management system changes, starting with employees of DHS Headquarters, Science and Technology and Intelligence Analysis and Infrastructure Protection, as well as GS employees of the Coast Guard (Phase 1).

The proposed regulations contemplated conversion of these groups of employees to a new performance management system in the fall of 2004, with a subsequent conversion to the new classification and pay system in early 2005. At that time, affected employees would have been converted to the new system with a one-time within-grade increase buy-out and would have received their first performance-based pay increase in the summer/fall of 2005, to coincide with the completion of their FY 2005 performance management cycle. The first annual rate range adjustment for these employees was contemplated for early 2006.

A second phase would convert all remaining GS employees to new performance management provisions in fall 2005, with conversion to new job evaluation and pay systems in early 2006. The first annual rate range adjustment for Phase 2 employees was contemplated for early 2007.

However, many commenters voiced concern over the proposed schedule for conversion to the new pay and performance systems. Specific concerns were noted regarding the ability of the Department to adequately provide DHS leaders with the requisite training and skills that would be required to manage a pay-for-performance system during the Phase 1 proposed schedule. Other concerns included the need for additional time to plan for and conduct a thorough evaluation of Phase 1, making necessary course corrections prior to expanding the scope of the deployment effort to all remaining GS employees. Additionally, during the meet-and-confer process, participating

labor organizations repeatedly stated their case for conducting a pilot test of the systems prior to converting bargaining unit employees.

DHS is committed to the successful implementation of these regulations and to addressing employee concerns. Accordingly, we have revised our implementation schedule with respect to pay, classification, and performance management. The revised implementation plan has been adjusted to provide the majority of employees with at least 2 full years under the new performance management system before the results of performance ratings are used for pay purposes.

The performance management cycle for all employees (except civilian employees of the U.S. Coast Guard) will run concurrently with the fiscal year (October through September). Under the revised schedule, the new DHS performance management system will be applied to as many DHS employees as feasible during calendar year 2005. No later than October 2006, the new DHS performance management system will be applied to all covered employees.

We have also redefined the phases for implementation of the pay-for-performance system. The first phase will include covered employees at DHS Headquarters, Information Analysis and Infrastructure Protection, Science and Technology, Emergency Preparedness and Response, and the Federal Law Enforcement Training Center. The second phase will include covered employees at the U.S. Secret Service and the U.S. Coast Guard. The third will include covered employees at Customs and Border Patrol, Immigration and Customs Enforcement, and Citizenship and Immigration Services. Conversion to the new pay system will occur for employees in the first phase in early calendar year 2006. The first performance-based pay adjustments under the new DHS pay system will occur at the beginning of calendar year 2007. Employees in the second phase will be converted to the new pay system in early calendar year 2007; performance-based pay adjustments for these employees will occur at the beginning of calendar 2008. Employees in the third phase will be converted to the new pay system in early calendar year 2008; performance-based pay adjustments for these employees will occur at the beginning of calendar 2009.

This revised schedule will provide (1) additional time for implementation and evaluation of the pay-for-performance system and (2) adequate lead time to train DHS managers and employees on their pay-for-performance responsibilities under the new system.

Moving Forward

Every day the men and women of DHS work tirelessly to maintain the safety and security of the Nation. They patrol 195,000 miles of coastline and navigable waters and 7,500 miles of borderline with Canada and Mexico. They inspect tons of imported food products and review thousands of visa and green card applications. They work with States, cities, and citizens to help them prepare for and recover from emergencies such as tornados and hurricanes. They review dozens of technology proposals, some 500 cyber security reports, and more than 1,000 pieces of intelligence, maintaining constant daily communication with authorities throughout the country to safeguard our Nation's most critical infrastructure and assets.

With the enactment of the Homeland Security Act of 2002, DHS Secretary Tom Ridge and OPM Director Kay Coles James made a commitment that the Department's new HR system would be the result of a collaborative and inclusive process involving managers, employees, the Department's largest labor organizations, and a broad array of stakeholders and experts from the Federal sector and private industry in order to provide the best system possible for the men and women of Homeland Security. The final regulations governing the new human resources system for DHS are a testament to that commitment to carefully weigh, and include as appropriate, the constructive recommendations of the labor organizations with which DHS and OPM collaborated throughout the entire design and development process, as well as others who provided comments. The Secretary and the Director are confident that these regulations will enable DHS to—

- Act swiftly and decisively in response to mission needs,
- Recognize and reward high performance,
- Adapt readily and rapidly to the changing nature of the Department's work,
- Attract and maintain a highly skilled and motivated workforce, and
- Protect the rights guaranteed by the Homeland Security Act.

Regulatory Requirements

E.O. 12866, Regulatory Review

DHS and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is a significant public interest in revisions of the Federal employment system. DHS and OPM have analyzed the expected costs and benefits of the HR system to be adopted for DHS, and that analysis is presented here.

Integral to the administration of the new DHS pay system is a commitment to ''manage to budget.'' Accordingly, the new pay system carries with it potential implications relative to the base pay of individual employees, depending upon local labor market conditions and individual, team, and organizational performance. However, actual payroll costs under this system will be constrained by the amount budgeted for overall DHS payroll expenditures, as is the case with the present GS pay system. Moreover, assuming that a normal, static population will exist over time, DHS anticipates that accessions, separations, and promotions will net out and, as with the present system, not add to the overall cost of administering the system.

The creation of a new DHS pay and performance management system will, however, result in some initial implementation costs, including some payroll related conversion costs (*e.g.,* the ''buyout'' of within-grade increases). In addition, DHS will incur costs relating to such matters as training (including the cost of overtime pay required to backfill for front-line DHS employees during periods of training), reprogramming automated payroll and HR information systems, developing and conducting pay surveys to determine future pay adjustments in relation to the labor market, and conducting employee education and communication activities. The extent of these costs will be directly related to the level of comprehensiveness desired by DHS, especially in relation to training in the new system and developing and conducting labor market pay surveys for the wide variety of jobs in DHS.

Programming costs relating to automating the payroll, HR information, and performance management systems and for administering pay in a performance-focused pay system should not be extensive, since such systems already are in use elsewhere in the Federal Government and could be adapted for use by DHS. In some cases, however, DHS could benefit from contracting with outside providers for the development and maintenance of such systems.

DHS estimates the overall costs associated with implementing the new DHS HR system—including the development and implementation of a new pay and performance system, the

conversion of current employees to that system, and the creation of the new Homeland Security Labor Relations Board—will be approximately $130 million through FY 2007 (*i.e.*, over a 4-year period); less than $100 million will be spent in any 12-month period.

The primary benefit to the public of this new system resides in the HR flexibilities that will enable DHS to build a high-performance organization focused on mission accomplishment. The new job evaluation, pay, and performance management system provides DHS with an increased ability to attract and retain a more qualified and proficient workforce. The new labor relations, adverse actions, and appeals system affords DHS greater flexibility to manage its workforce in the face of constantly changing threats to the security of our homeland. Taken as a whole, the changes included in these final regulations will result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and above all, supports the primary mission of DHS—protecting our homeland.

Regulatory Flexibility Act

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

E.O. 12988, Civil Justice Reform

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

E.O. 13132, Federalism

DHS and OPM have determined that these regulations will not have Federalism implications because they will apply only to Federal agencies and employees. The regulations will not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

Unfunded Mandates

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

List of Subjects in 5 CFR Part 9701

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

Department of Homeland Security.

Tom Ridge,

Secretary.

Office of Personnel Management.

Kay Coles James,

Director.

■ Accordingly, under the authority of section 9701 of title 5, United States Code, the Department of Homeland Security and the Office of Personnel Management amend title 5, Code of Federal Regulations, by establishing chapter XCVII consisting of part 9701 as follows:

CHAPTER XCVII—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM (DEPARTMENT OF HOMELAND SECURITY—OFFICE OF PERSONNEL MANAGEMENT)

PART 9701—DEPARTMENT OF HOMELAND SECURITY HUMAN RESOURCES MANAGEMENT SYSTEM

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Authority: 5 U.S.C. 9701.

Subpart A—General Provisions

§ 9701.101 Purpose.

(a) This part contains regulations governing the establishment of a new human resources management system within the Department of Homeland Security (DHS), as authorized by 5 U.S.C. 9701. As permitted by section 9701, these regulations waive and replace various statutory provisions that would otherwise be applicable to affected DHS employees. These regulations are issued jointly by the Secretary of Homeland Security and the Director of the Office of Personnel Management (OPM).

(b) The system established under this part is designed to be mission-centered, performance-focused, flexible, contemporary, and excellent; to generate respect and trust through employee involvement; to be based on the principles of merit and fairness embodied in the statutory merit system principles; and to comply with all other applicable provisions of law.

§ 9701.102 Eligibility and coverage.

(a) All civilian employees of the Department are eligible for coverage under one or more subparts of this part except those covered by a provision of law outside the waivable chapters of title 5, U.S. Code, identified in § 9701.104. For example, Transportation Security Administration employees, employees appointed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Secret Service Uniformed Division members, Coast Guard Academy faculty members, and Coast Guard military members are not eligible for coverage under any classification or pay system established under subpart B or C of this part. Refer to subparts B through G of this part for specific information regarding the coverage of each subpart.

(b)(1) Subpart A of this part becomes applicable to all eligible employees on March 3, 2005.

(2) The Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, establish the effective date for applying subparts E, F, and G of this part to all eligible employees. Unless otherwise determined by the Secretary and the Director, subparts E, F, and G of this part will become applicable to all eligible employees no later than August 1, 2005.

(3) With respect to subparts B, C, and D of this part, the Secretary or designee may, at his or her sole and exclusive discretion and after coordination with OPM, apply one or more of these subparts to a specific category or categories of eligible civilian employees at any time. With respect to any given category of civilian employees, the Secretary or designee may apply some of these subparts, but not others, and such coverage determinations may be made effective on different dates (e.g., in order to phase in coverage under a new classification, pay, and performance management system).

(4) DHS will notify affected employees and labor organizations in advance of the application of one or more subparts of this part to them.

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

(d) Any new DHS classification, pay, or performance management system covering Senior Executive Service (SES) members must be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance system authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable implementing regulations issued by OPM. If the Secretary determines that SES members employed by DHS should be covered by classification, pay, or performance management provisions that differ substantially from the Governmentwide SES pay-for-performance system, the Secretary and the Director must issue joint regulations consistent with all of the requirements of 5 U.S.C. 9701.

(e) At his or her sole and exclusive discretion, the Secretary or designee may, after coordination with OPM, rescind the application under paragraph (b) of this section of one or more subparts of this part to a particular category of employees and prescribe implementing directives for converting that category of employees to coverage under applicable title 5 provisions. DHS will notify affected employees and labor

organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f) The Secretary or other authorized DHS official may exercise an independent legal authority to establish a parallel system that follows some or all of the requirements in this part for a category of employees who are not eligible for coverage under this part.

§ 9701.103 Definitions.

In this part:

Authorized agency official means the Secretary or an official who is authorized to act for the Secretary in the matter concerned.

Coordination means the process by which DHS, after appropriate staff-level consultation, officially provides OPM with notice of a proposed action and intended effective date. If OPM concurs, or does not respond to that notice within 30 calendar days, DHS may proceed with the proposed action. However, if OPM indicates the matter has Governmentwide implications or consequences, DHS will not proceed until the matter is resolved. The coordination process is intended to give due deference to the flexibilities afforded DHS by the Homeland Security Act and the regulations in this part, without compromising OPM's institutional responsibility, as codified in 5 U.S.C. chapter 11 and Executive Order 13197 of January 18, 2001, to provide Governmentwide oversight in human resources management programs and practices.

Department or *DHS* means the Department of Homeland Security.

Director means the Director of the Office of Personnel Management.

Employee means an employee within the meaning of that term in 5 U.S.C. 2105.

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

Implementing directives means directives issued at the Departmental level by the Secretary or designee to carry out any policy or procedure established in accordance with this part. These directives may apply Departmentwide or to any part of the Department as determined by the Secretary at his or her sole and exclusive discretion.

OPM means the Office of Personnel Management.

Secretary means the Secretary of Homeland Security or, as authorized, the Deputy Secretary of Homeland Security.

Secretary or *designee* means the Secretary or a DHS official authorized to act for the Secretary in the matter concerned who serves as—

(1) The Undersecretary for Management; or

(2) The Chief Human Capital Officer for DHS.

§ 9701.104 Scope of authority.

Subject to the requirements and limitations in 5 U.S.C. 9701, the provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9701:

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

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

(c) Chapter 53, dealing with pay for General Schedule employees, pay and job grading for Federal Wage System employees, and pay for certain other employees;

(d) Chapter 71, dealing with labor relations;

(e) Chapter 75, dealing with adverse actions and certain other actions; and

(f) Chapter 77, dealing with the appeal of adverse actions and certain other actions.

§ 9701.105 Continuing collaboration.

(a) In accordance with 5 U.S.C. 9701(e)(1)(D), this section provides employee representatives with an opportunity to participate in the development of implementing directives. This process is not subject to the requirements established by subpart E of this part, including but not limited to §§ 9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(b)(1) For the purpose of this section, the term ''employee representatives'' includes representatives of labor organizations with exclusive recognition rights for units of DHS employees, as well as representatives of employees who are not within a unit for which a labor organization has exclusive recognition.

(2) Consistent with 5 U.S.C. 9701(e)(2)(A), (B), and (D), DHS will determine the number of employee representatives to be engaged in the continuing collaboration process.

(3) Each national labor organization with multiple collective bargaining units accorded exclusive recognition will determine how its units will be represented within the limitations imposed by DHS.

(c)(1) Within timeframes specified by DHS, employee representatives will be provided with an opportunity to submit written comments and/or to discuss their views with DHS officials on proposed final draft implementing directives.

(2) As the Department determines necessary, employee representatives will be provided with an opportunity to discuss their views with DHS officials and/or to submit written comments at initial identification of implementation issues and conceptual design and/or at review of draft recommendations or alternatives.

(d) Employee representatives will be provided with access to information, including research, to make their participation in the continuing collaboration process productive.

(e) Any written comments submitted by employee representatives regarding proposed final draft implementing directives will become part of the record and will be forwarded to the Secretary or designee for consideration in making a final decision.

(f) Nothing in the continuing collaboration process affects the right of the Secretary to determine the content of implementing directives and to make them effective at any time.

(g) In accordance with 5 U.S.C. 9701(e)(2), any procedures necessary to carry out this section will be established by the Secretary and the Director jointly as internal rules of Departmental procedure which will not be subject to review.

§ 9701.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived or modified to the extent authorized by 5 U.S.C. 9701 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical mission of the Department. Each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary or designee. The interpretation of the regulations in this part by DHS and OPM must be accorded great deference.

(b) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this

section) or in DHS implementing directives. Applications of this rule include, but are not limited to, the following:

(1) If another provision of law or Governmentwide regulations requires coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 43, 51, 53, 71, 75, and 77 of title 5, U.S. Code), DHS employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DHS employees (notwithstanding coverage under subparts B through G of this part) include, but are not limited to, the following:

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

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

(iii) Differentials for duty involving physical hardship or hazard under 5 U.S.C. 5545(d);

(iv) Recruitment, relocation, and retention payments under 5 U.S.C. 5753–5754;

(v) Physicians' comparability allowances under 5 U.S.C. 5948; and

(vi) The higher cap on relocation bonuses for law enforcement officers established by section 407 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509).

(2) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart G of this part (dealing with appeals), the reference in section 5596(b)(1)(A)(ii) to 5 U.S.C. 7701(g) (dealing with attorney fees) is considered to be a reference to a modified section 7701(g) that is consistent with § 9701.706(h).

(3) In applying the back pay law in 5 U.S.C. 5596 to DHS employees covered by subpart E of this part (dealing with labor relations), the reference in section 5596(b)(5) to section 7116 (dealing with unfair labor practices) is considered to be a reference to a modified section 7116 that is consistent with § 9701.517.

(c) When a specified category of employees is covered by a classification and pay system established under subparts B and C of this part, the following provisions do not apply:

(1) Time-in-grade restrictions that apply to competitive service GS positions under 5 CFR part 300, subpart F;

(2) Supervisory differentials under 5 U.S.C. 5755; and

(3) Law enforcement officer special rates and geographic adjustments under sections 403 and 404 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101–509).

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d). Employees and applicants for employment in DHS will continue to be covered by EEOC's Federal sector regulations found at 29 CFR part 1614.

§ 9701.107 Program evaluation.

(a) DHS will establish procedures for evaluating the regulations in this part and their implementation. DHS will provide designated employee representatives with an opportunity to be briefed and a specified timeframe to provide comments on the design and results of program evaluations.

(b) Involvement of employee representatives under this section will occur at the following stages:

(1) Identification of the scope, objectives, and methodology to be used in program evaluation; and

(2) Review of draft findings and recommendations.

(c) Involvement in the evaluation process does not waive the rights of any party under applicable law or regulations.

Subpart B—Classification

General

§ 9701.201 Purpose.

(a) This subpart contains regulations establishing a classification structure and rules for covered DHS employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51 and the job grading system in 5 U.S.C. chapter 53, subchapter IV, in accordance with the merit principle of equal pay for work of equal value.

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

§ 9701.202 Coverage.

(a) This subpart applies to eligible DHS employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees and positions are eligible for coverage under this subpart:

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

(2) Employees and positions that would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

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

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

§ 9701.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 and 5 U.S.C. 5346, and related regulations, are waived with respect to that category of employees, except as provided in paragraph (b) of this section, § 9701.106, and § 9701.222(d) (with respect to OPM's authority under 5 U.S.C. 5112(b) and 5346(c) to act on requests for review of classification decisions).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS–15, is not waived.

§ 9701.204 Definitions.

In this subpart:

Band means a work level or pay range within an occupational cluster.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

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

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Occupational series means the number OPM or DHS assigns to a group or family of similar positions for identification purposes (for example: 0110, Economist Series; 1410, Librarian Series).

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

employee whom the Secretary or designee approves for coverage under § 9701.202(a).

§ 9701.205 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in § 9701.504, any classification system established under this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the classification system, including but not limited to coverage determinations, the design of the classification structure, and classification methods, criteria, and administrative procedures and arrangements.

Classification Structure

§ 9701.211 Occupational clusters.

For the purpose of classifying positions, DHS may, after coordination with OPM, establish occupational clusters based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. DHS must document in implementing directives the criteria and rationale for grouping occupations or positions into occupational clusters.

§ 9701.212 Bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, DHS may, after coordination with OPM, establish one or more bands within each occupational cluster.

(b) Each occupational cluster may include, but is not limited to, the following bands:

(1) Entry/Developmental—work that involves gaining the competencies needed to perform successfully in a Full Performance band through appropriate formal training and/or on-the-job experience.

(2) Full Performance—work that involves the successful completion of any required entry-level training and/or developmental activities necessary to independently perform the full range of non-supervisory duties of a position in an occupational cluster.

(3) Senior Expert—work that involves an extraordinary level of specialized knowledge or expertise upon which DHS relies for the accomplishment of critical mission goals and objectives; reserved for a limited number of non-supervisory employees.

(4) Supervisory—work that may involve hiring or selecting employees, assigning work, managing performance, recognizing and rewarding employees, and other associated duties.

(c) DHS must document in implementing directives the definitions for each band which specify the type and range of difficulty and responsibility, qualifications, competencies, or other characteristics of the work encompassed by the band.

(d) DHS must, after coordination with OPM, establish qualification standards and requirements for each occupational cluster, occupational series, and/or band. DHS may use the qualification standards established by OPM or, after coordination with OPM, may establish different qualification standards. This paragraph does not waive or modify any DHS authority to establish qualification standards or requirements under 5 U.S.C. chapters 31 and 33 and OPM implementing regulations.

Classification Process

§ 9701.221 Classification requirements.

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

(b) An authorized agency official must—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105 and 5346 or by DHS, after coordination with OPM; and

(2) Apply the criteria and definitions required by § 9701.211 and § 9701.212 to assign jobs to an appropriate occupational cluster and band.

(c) DHS must establish procedures for classifying jobs and may make such inquiries or investigations of the duties, responsibilities, and qualification requirements of jobs as it considers necessary for the purpose of this section.

(d) Classification decisions become effective on the date designated by the authorized agency official who makes the decision.

(e) DHS must establish a plan to periodically review the accuracy of classification decisions.

§ 9701.222 Reconsideration of classification decisions.

(a) An individual employee may request that DHS or OPM reconsider the pay system, occupational cluster, occupational series, or band assigned to his or her current official position of record at any time.

(b) DHS will, after coordination with OPM, establish implementing directives for reviewing requests for reconsideration, including nonreviewable issues, rights of representation, and the effective date of any corrective actions. OPM will, after consulting with DHS, establish separate policies and procedures for reviewing reconsideration requests.

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

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

Transitional Provisions

§ 9701.231 Conversion of positions and employees to the DHS classification system.

(a) This section describes the transitional provisions that apply when DHS positions and employees are converted to a classification system established under this subpart. Affected positions and employees may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.202. For the purpose of this section, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to positions and employees that become covered by the classification system as a result of a coverage determination made under § 9701.102(b) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing policies and procedures for converting the GS or prevailing rate grade of a position to a band and for converting SL/ST and SES positions to a band upon initial implementation of the DHS classification system. Such procedures must include provisions for converting an employee who is retaining a grade under 5 U.S.C. chapter 53, subchapter VI, immediately prior to conversion. As provided in § 9701.373, DHS must convert employees to the system without a reduction in their rate of pay (including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under § 9701.332, or special rate supplement under § 9701.333).

§ 9701.232 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions

under a classification system that is parallel to the classification system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new classification system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.231.

Subpart C—Pay and Pay Administration

General

§ 9701.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DHS employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53, as authorized by 5 U.S.C. 9701. These regulations are designed to provide DHS with the flexibility to allocate available funds strategically in support of DHS mission priorities and objectives. Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DHS.

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

(c) The pay system established under this subpart, working in conjunction with the performance management system established under subpart D of this part, is designed to incorporate the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in this subpart, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as specified in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay system established in this subpart;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under this subpart.

§ 9701.302 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b).

(b) The following employees are eligible for coverage under this subpart:

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

(2) Employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV;

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

(4) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9701.102(d).

§ 9701.303 Waivers.

(a) When a specified category of employees is covered by the pay system established under this subpart, the provisions of 5 U.S.C. chapter 53, and related regulations, are waived with respect to that category of employees, except as provided in § 9701.106 and paragraphs (b) through (f) of this section.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Section 5307, dealing with the aggregate limitation on pay;

(2) Sections 5311 through 5318, dealing with Executive Schedule positions;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DHS employees in health care positions covered by section 5371 in lieu of any DHS pay system established under this subpart or the following provisions of title 5, U.S. Code: Chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to ''chapter 51'' in section 5371 is deemed to include a classification system established under subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5373 is modified. The limit on rates of basic pay, including any applicable locality payment or supplement, for DHS employees who are not covered by this subpart and whose pay is set by administrative action (e.g., Coast Guard Academy faculty) is increased to the rate for level III of the Executive Schedule.

(d) Section 5379 is modified. DHS may, after coordination with OPM, establish and administer a student loan repayment program for DHS employees, except that DHS may not make loan payments for any noncareer appointees to the SES (as defined in 5 U.S.C. 3132(a)(7)) or for any employee occupying a position that is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character. Notwithstanding § 9701.302(a), any DHS employee otherwise covered by section 5379 is eligible for coverage under the provisions established under this paragraph, subject to a determination by the Secretary or designee under § 9701.102(b).

(e) In approving the coverage of employees who would otherwise be covered by a prevailing rate system established under 5 U.S.C. chapter 53, subchapter IV, DHS may limit the waiver so that affected employees remain entitled to environmental or other differentials established under 5 U.S.C. 5343(c)(4) and night shift differentials established under 5 U.S.C. 5343(f) if such employees are grouped in separate occupational clusters (established under subpart B of this part) that are limited to employees who would otherwise be covered by a prevailing rate system.

(f) Employees in SL/ST positions and SES members who are covered by a basic pay system established under this subpart are considered to be paid under 5 U.S.C. 5376 and 5382, respectively, for the purpose of applying 5 U.S.C. 5307(d).

§ 9701.304 Definitions.

In this part:

48 contiguous States means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Band means a work level or pay range within an occupational cluster.

Band rate range means the range of rates of basic pay (excluding any locality or special rate supplements) applicable to employees in a particular band, as described in § 9701.321. Each band rate range is defined by a minimum and maximum rate.

Basic pay means an employee's rate of pay before any deductions and exclusive of additional pay of any kind,

except as expressly provided by law or regulation. For the specific purposes prescribed in §§ 9701.332(c) and 9701.333, respectively, basic pay includes locality and special rate supplements.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Day means a calendar day.

Demotion means a reduction to a lower band within the same occupational cluster or a reduction to a lower band in a different occupational cluster under implementing directives issued by DHS pursuant to § 9701.355.

Locality rate supplement means a geographic-based addition to basic pay, as described in § 9701.332.

Modal rating means the rating of record that occurs most frequently in a particular pay pool.

Occupational cluster means a grouping of one or more associated or related occupations or positions. An occupational cluster may include one or more occupational series.

Promotion means an increase to a higher band within the same occupational cluster or an increase to a higher band in a different occupational cluster under implementing directives issued by DHS pursuant to § 9701.355.

Rating of record means a performance appraisal prepared—

(1) At the end of an appraisal period covering an employee's performance of assigned duties against performance expectations (as defined in § 9701.404) over the applicable period; or

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

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

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

Special rate supplement means an addition to basic pay for a particular category of employees to address staffing problems, as described in § 9701.333. A special rate supplement is paid in place of any lesser locality rate supplement that would otherwise apply.

Unacceptable performance means the failure to meet one or more performance expectations, as described in § 9701.406.

§ 9701.305 Bar on collective bargaining.

As provided in the definition of *conditions of employment* in § 9701.504, any pay program established under authority of this subpart is not subject to collective bargaining. This bar on collective bargaining applies to all aspects of the pay program, including but not limited to coverage decisions, the design of pay structures, the setting and adjustment of pay levels, pay administration rules and policies, and administrative procedures and arrangements.

Overview of Pay System

§ 9701.311 Major features.

Through the issuance of implementing directives, DHS will establish a pay system that governs the setting and adjusting of covered employees' rates of pay. The DHS pay system will include the following features:

(a) A structure of rate ranges linked to various bands for each occupational cluster, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of basic pay rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9701.321 and 9701.322;

(c) Policies regarding the setting and adjusting of supplements to basic pay based on local labor market conditions and other factors, as described in §§ 9701.331 through 9701.334;

(d) Policies regarding employees' eligibility for pay increases based on adjustments in rate ranges and supplements, as described in §§ 9701.323 through 9701.325 and 9701.335 through 9701.337;

(e) Policies regarding performance-based pay adjustments, as described in §§ 9701.341 through 9701.346;

(f) Policies on basic pay administration, including movement between occupational clusters, as described in §§ 9701.351 through 9701.356;

(g) Policies regarding special payments that are not basic pay, as described in §§ 9701.361 through 9701.363; and

(h) Linkages to employees' performance ratings of records, as described in subpart D of this part.

§ 9701.312 Maximum rates.

(a) DHS may not pay any employee an annual rate of basic pay in excess of the rate for level III of the Executive Schedule, except as provided in paragraph (b) of this section.

(b) DHS may establish the maximum annual rate of basic pay for members of the SES at the rate for level II of the Executive Schedule if DHS obtains the certification specified in 5 U.S.C. 5307(d).

§ 9701.313 Homeland Security Compensation Committee.

(a) DHS will establish a Homeland Security Compensation Committee to provide options and/or recommendations for consideration by the Secretary or designee on strategic compensation matters such as Departmental compensation policies and principles, the annual allocation of funds between market and performance pay adjustments, and the annual adjustment of rate ranges and locality and special rate supplements. The Compensation Committee will consider factors such as turnover, recruitment, and local labor market conditions in providing options and recommendations for consideration by the Secretary. The Secretary's or designee's determination with regard to those options and/or recommendations is final and not subject to further review.

(b) The Compensation Committee will be chaired by the DHS Undersecretary for Management. The Compensation Committee has 14 members, including 4 officials of labor organizations granted national consultation rights (NCR) in accordance with § 9701.518(d)(2). An OPM official will serve as an *ex officio* member of the Compensation Committee. DHS will provide technical staff to support the Compensation Committee.

(c) DHS will establish procedures governing the membership and operation of the Compensation Committee.

(d) An individual will be selected by the Chair to facilitate Compensation Committee meetings. The facilitator will be selected from a list of nominees developed jointly by representatives of the Department and NCR labor organizations, the latter acting as a single party, according to procedures and time limits established by implementing directives. Nominees must be known for their integrity, impartiality, and expertise in facilitation and compensation. If the Department and the labor organizations are unable to reach agreement on a joint list of nominees, they will enlist the services of the Federal Mediation and Conciliation Service (FMCS) to assist them. If the parties are unable to reach agreement with FMCS assistance, each

party will prepare a list of up to three nominees and provide those separate lists to FMCS; FMCS may add up to three additional nominees. From that combined list of nominees, the Department and the labor organizations, the latter acting as a single party, will alternately strike names from the list until five names remain; those five nominees will be submitted to the Chair for consideration. The Chair may request that the parties develop an additional list of nominees. If the representatives of the Department's NCR labor organizations, acting as a single party, do not participate in developing the list of nominees in accordance with this section, the Chair will select the facilitator.

(e) After considering the views of all Compensation Committee members, the Chair prepares and provides options and/or recommendations to the Secretary or designee. Members may present their views on the final recommendations in writing as part of the final recommendation package. The Secretary or designee will make the final decision and notify the Compensation Committee. This process is not subject to the requirements established by §§ 9701.512 (regarding conferring on procedures for the exercise of management rights), 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain, confer, and consult), or 9701.519 (regarding impasse procedures).

(f) The Secretary retains the right to make determinations regarding the annual allocation of funds between market and performance pay adjustments, the annual adjustment of rate ranges and locality and special rate supplements, or any other matter recommended by the Compensation Committee, and to make such determinations effective at any time.

§ 9701.314 DHS responsibilities.

DHS responsibilities in implementing this subpart include the following:

(a) Providing OPM with information regarding the implementation of the programs authorized under this subpart at OPM's request;

(b) Participating in any interagency pay coordination council or group established by OPM to ensure that DHS pay policies and plans are coordinated with other agencies; and

(c) Fulfilling all other responsibilities prescribed in this subpart.

Setting and Adjusting Rate Ranges

§ 9701.321 Structure of bands.

(a) DHS may, after coordination with OPM, establish ranges of basic pay for bands, with minimum and maximum rates set and adjusted as provided in § 9701.322. Rates must be expressed as annual rates.

(b) For each band within an occupational cluster, DHS will establish a common rate range that applies in all locations.

§ 9701.322 Setting and adjusting rate ranges.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust the rate ranges established under § 9701.321 on an annual basis. In determining the rate ranges, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted band rate ranges. Unless DHS determines that a different effective date is needed for operational reasons, these adjustments will become effective on or about the date of the annual General Schedule pay adjustment authorized by 5 U.S.C. 5303.

(c) DHS may establish different rate ranges and provide different rate range adjustments for different bands.

(d) DHS may adjust the minimum and maximum rates of a band by different percentages.

§ 9701.323 Eligibility for pay increase associated with a rate range adjustment.

(a) When a band rate range is adjusted under § 9701.322, employees covered by that band are eligible for an individual pay increase. An employee who meets or exceeds performance expectations (*i.e.,* has a rating of record above the unacceptable performance level for the most recently completed appraisal period) must receive an increase in basic pay equal to the percentage value of any increase in the minimum rate of the employee's band resulting from a rate range adjustment under § 9701.322. The pay increase takes effect at the same time as the corresponding rate range adjustment, except as provided in §§ 9701.324 and 9701.325. For an employee receiving a retained rate, the amount of the increase under this paragraph is determined under § 9701.356.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to receive an increase based on the rate range adjustment, as provided in paragraph (a) of this section.

(c) An employee whose rating of record is unacceptable is prohibited from receiving a pay increase as a result of a rate range adjustment, except as provided by §§ 9701.324 and 9701.325. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§ 9701.324 Treatment of employees whose rate of basic pay does not fall below the minimum rate of their band.

An employee who does not receive a pay increase under § 9701.323 because of an unacceptable rating of record and whose rate of basic pay does not fall below the minimum rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under § 9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§ 9701.325 Treatment of employees whose rate of basic pay falls below the minimum rate of their band.

(a) In the case of an employee who does not receive a pay increase under § 9701.323 because of an unacceptable rating of record and whose rate of basic pay falls below the minimum rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the rate range adjustment, issue a new rating of record under § 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the rate range adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a rate range adjustment, the employee becomes entitled to the minimum rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the rate range adjustment.

Locality and Special Rate Supplements

§ 9701.331 General.

The basic pay ranges established under §§ 9701.321 through 9701.323 may be supplemented in appropriate circumstances by locality or special rate supplements, as described in §§ 9701.332 through 9701.335. These supplements are expressed as a percentage of basic pay and are set and adjusted as described in § 9701.334. As authorized by § 9701.356, DHS implementing directives will determine the extent to which §§ 9701.331 through 9701.337 apply to employees receiving a retained rate.

§ 9701.332 Locality rate supplements.

(a) For each band rate range, DHS may, after coordination with OPM, establish locality rate supplements that apply in specified locality pay areas. Locality rate supplements apply to employees whose official duty station is located in the given area. DHS may provide different locality rate supplements for different occupational clusters or for different bands within the same occupational cluster in the same locality pay area.

(b) For the purpose of establishing and modifying locality pay areas, 5 U.S.C. 5304 is not waived. A DHS decision to use the locality pay area boundaries established under 5 U.S.C. 5304 does not require separate DHS regulations. DHS may, after coordination with OPM and in accordance with the public notice and comment provisions of 5 U.S.C. 553, publish Departmental regulations (6 CFR Chapter I) in the **Federal Register** that establish and adjust different locality pay areas within the 48 contiguous States or establish and adjust new locality pay areas outside the 48 contiguous States. These regulations are subject to the continuing collaboration process described in § 9701.105. As provided by 5 U.S.C. 5304(f)(2)(B), judicial review of any DHS regulation regarding the establishment or adjustment of locality pay areas is limited to whether or not the regulation was promulgated in accordance with 5 U.S.C. 553.

(c) Locality rate supplements are considered basic pay for only the following purposes:

(1) Retirement under 5 U.S.C. chapter 83 or 84;

(2) Life insurance under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority;

(4) Severance pay under 5 U.S.C. 5595;

(5) Application of the maximum rate limitation set forth in § 9701.312;

(6) Determining the rate of basic pay upon conversion to the DHS pay system established under this subpart, consistent with § 9701.373(b);

(7) Other payments and adjustments authorized under this subpart as specified by DHS implementing directives;

(8) Other payments and adjustments under other statutory or regulatory authority that are basic pay for the purpose of locality-based comparability payments under 5 U.S.C. 5304; and

(9) Any provisions for which DHS locality rate supplements must be treated as basic pay by law.

§ 9701.333 Special rate supplements.

DHS will, after coordination with OPM, establish special rate supplements that provide higher pay levels for subcategories of employees within an occupational cluster if DHS determines that such supplements are warranted by current or anticipated recruitment and/or retention needs. In exercising this authority, DHS will issue necessary implementing directives. Any special rate supplement must be treated as basic pay for the same purposes as locality rate supplements, as described in § 9701.332(c), and for the purpose of computing cost-of-living allowances and post differentials in nonforeign areas under 5 U.S.C. 5941.

§ 9701.334 Setting and adjusting locality and special rate supplements.

(a) Within its sole and exclusive discretion, DHS may, after coordination with OPM, set and adjust locality and special rate supplements. In determining the amounts of the supplements, DHS and OPM may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) DHS may, after coordination with OPM, determine the effective date of newly set or adjusted locality and special rate supplements. Established supplements will be reviewed for possible adjustment on an annual basis in conjunction with rate range adjustments under § 9701.322.

§ 9701.335 Eligibility for pay increase associated with a supplement adjustment.

(a) When a locality or special rate supplement is adjusted under § 9701.334, an employee to whom the supplement applies is entitled to the pay increase resulting from that adjustment if the employee meets or exceeds performance expectations (i.e., has a rating of record above the unacceptable performance level for the most recently completed appraisal period). This includes an increase resulting from the initial establishment and setting of a special rate supplement. The pay increase takes effect at the same time as the applicable supplement is set or adjusted, except as provided in §§ 9701.336 and 9701.337.

(b) If an employee does not have a rating of record for the most recently completed appraisal period, he or she must be treated in the same manner as an employee who meets or exceeds performance expectations and is entitled to any pay increase associated with a supplement adjustment, as provided in paragraph (a) of this section.

(c) An employee who has an unacceptable rating of record is prohibited from receiving a pay increase as a result of an increase in an applicable locality or special rate supplement, except as provided by §§ 9701.336 and 9701.337. Because the employee's pay remains unchanged, failure to receive a pay increase is not considered an adverse action under subpart F of this part.

§ 9701.336 Treatment of employees whose pay does not fall below the minimum adjusted rate of their band.

An employee who does not receive a pay increase under § 9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) does not fall below the minimum adjusted rate of his or her band as a result of that rating will receive such an increase if he or she demonstrates performance that meets or exceeds performance expectations, as reflected by a new rating of record issued under § 9701.409(b). Such an increase will be made effective on the first day of the first pay period beginning on or after the date the new rating of record is issued.

§ 9701.337 Treatment of employees whose rate of pay falls below the minimum adjusted rate of their band.

(a) In the case of an employee who does not receive a pay increase under § 9701.335 because of an unacceptable rating of record and whose rate of basic pay (including a locality or special rate supplement) falls below the minimum adjusted rate of his or her band as a result of that rating, DHS must—

(1) If the employee demonstrates performance that meets or exceeds performance expectations within 90 days after the date of the locality or special rate supplement adjustment, issue a new rating of record under

§ 9701.409(b) and adjust the employee's pay prospectively by making the increase effective on the first day of the first pay period beginning on or after the date the new rating of record is issued; or

(2) Initiate action within 90 days after the date of the locality or special rate supplement adjustment to demote or remove the employee in accordance with the adverse action procedures established in subpart F of this part.

(b) If DHS fails to initiate a removal or demotion action under paragraph (a)(2) of this section within 90 days after the date of a locality or special rate supplement adjustment, the employee becomes entitled to the minimum adjusted rate of his or her band rate range on the first day of the first pay period beginning on or after the 90th day following the date of the locality or special rate supplement adjustment.

Performance-Based Pay

§ 9701.341 General.

Sections 9701.342 through 9701.346 describe various types of performance-based pay adjustments that are part of the pay system established under this subpart. Generally, these within-band pay increases are directly linked to an employee's rating of record (as assigned under the performance management system described in subpart D of this part). These provisions are designed to provide DHS with the flexibility to allocate available funds based on performance as a means of fostering a high-performance culture that supports mission accomplishment. While performance measures primarily focus on an employee's contributions (as an individual or as part of a team) in accomplishing work assignments and achieving mission results, performance also may be reflected in the acquisition and demonstration of required competencies.

§ 9701.342 Performance pay increases.

(a) *Overview.* (1) The DHS pay system provides employees in a Full Performance or higher band with increases in basic pay based on individual performance ratings of record as assigned under a performance management system established under subpart D of this part. The DHS pay system uses pay pool controls to allocate pay increases based on performance points that are directly linked to the employee's rating of record, as described in this section. Performance pay increases are a function of the amount of money in the performance pay pool, the relative point value placed on ratings, and the distribution of ratings within that performance pay pool.

(2) The rating of record used as the basis for a performance pay increase is the one assigned for the most recently completed appraisal period (subject to the requirements of subpart D of this part), except that if the supervisor or other rating official determines that an employee's current performance is inconsistent with that rating, the supervisor or other rating official may prepare a more current rating of record, consistent with § 9701.409(b). If an employee does not have a rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle for the purpose of determining the employee's performance pay increase.

(b) *Performance pay pools.* (1) DHS will establish pay pools for performance pay increases.

(2) Each pay pool covers a defined group of DHS employees, as determined by DHS.

(3) An authorized agency official(s) may determine the distribution of funds among pay pools and may adjust those amounts based on overall levels of organizational performance or contribution to the Department's mission.

(4) In allocating the monies to be budgeted for performance pay increases, the Secretary or designee must take into account the average value of within-grade and quality step increases under the General Schedule, as well as amounts that otherwise would have been spent on promotions among positions placed in the same band.

(c) *Performance point values.* (1) DHS will establish point values that correspond to the performance rating levels established under subpart D of this part, so that a point value is attached to each rating level. For example, in a four-level rating program, the point value pattern could be 4–2–1–0, where 4 points are assigned to the highest (outstanding) rating and 0 points to an unacceptable rating. Performance point values will determine performance pay increases.

(2) DHS will establish a point value pattern for each pay pool. Different pay pools may have different point value patterns.

(3) DHS must assign zero performance points to an unacceptable rating of record.

(d) *Performance payout.* (1) DHS will determine the value of a performance point, expressed as a percentage of an employee's rate of basic pay (exclusive of locality or special rate supplements under §§ 9701.332 and 9701.333) or as a fixed dollar amount.

(2) To determine an individual employee's performance payout, DHS will multiply the point value determined under paragraph (d)(1) of this section by the number of performance points assigned to the rating.

(3) To the extent that the adjustment does not cause the employee's rate of basic pay to exceed the maximum rate of the employee's band rate range, DHS will pay the performance payout as an adjustment in the employee's annual rate of basic pay. Any excess amount may be granted as a lump-sum payment, which may not be considered basic pay for any purpose.

(4) DHS may, after coordination with OPM, determine the effective date of adjustments in basic pay made under paragraph (d)(3) of this section.

(5) For an employee receiving a retained rate under § 9701.356, DHS will issue implementing directives to provide for granting a lump-sum performance payout that may not exceed the amount that may be received by an employee in the same pay pool with the same rating of record whose rate of pay is at the maximum rate of the same band.

(e) *Proration of performance payouts.* DHS will issue implementing directives regarding the proration of performance payouts for employees who, during the period between performance pay adjustments, are—

(1) Hired or promoted;

(2) In a leave-without-pay status (except as provided in paragraphs (f) and (g) of this section); or

(3) In other circumstances where proration is considered appropriate.

(f) *Adjustments for employees returning after performing honorable service in the uniformed services.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who leaves a DHS position to perform service in the uniformed services (as defined in 38 U.S.C. 4303 and 5 CFR 353.102) and returns through the exercise of a reemployment right provided by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (*e.g.,* 38 U.S.C. 4316). DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), as well as developmental pay adjustments under § 9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees

who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning from qualifying service in the uniformed services will receive the full amount of the performance pay increase associated with his or her rating of record.

(g) *Adjustments for employees returning to duty after being in workers' compensation status.* DHS will issue implementing directives regarding how it sets the rate of basic pay prospectively for an employee who returns to duty after a period of receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee). DHS will credit the employee with intervening rate range adjustments under § 9701.323(a), as well as developmental pay adjustments under § 9701.345 (as determined by DHS in accordance with its implementing directives), and performance pay adjustments under this section based on the employee's last DHS rating of record. For employees who have no such rating of record, DHS will use the modal rating received by other employees covered by the same pay pool during the most recent rating cycle. An employee returning to duty after receiving injury compensation will receive the full amount of the performance pay increase associated with his or her rating of record.

§ 9701.343 Within-band reductions.

Subject to the adverse action procedures set forth in subpart F of this part, DHS may reduce an employee's rate of basic pay within a band for unacceptable performance or conduct. A reduction under this section may not be more than 10 percent or cause an employee's rate of basic pay to fall below the minimum rate of the employee's band rate range. Such a reduction may be made effective at any time.

§ 9701.344 Special within-band increases.

DHS may issue implementing directives regarding special within-band basic pay increases for employees within a Full Performance or higher band established under § 9701.212 who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment or in other circumstances determined by DHS. Increases under this section are in addition to any performance pay increases made under § 9701.342 and may be made effective at any time. Special within-band increases may not be based on length of service.

§ 9701.345 Developmental pay adjustments.

DHS will issue implementing directives regarding pay adjustments within the Entry/Developmental band. These directives may require employees to meet certain standardized assessment or certification points as part of a formal training/developmental program. In administering Entry/Developmental band pay progression plans, DHS may link pay progression to the demonstration of required knowledge, skills, and abilities (KSAs)/competencies. DHS may set standard timeframes for progression through an Entry/Developmental band while allowing an employee to progress at a slower or faster rate based on his or her performance, demonstration of required competencies, and/or other factors.

§ 9701.346 Pay progression for new supervisors.

DHS will issue implementing directives requiring an employee newly appointed to or selected for a supervisory position to meet certain assessment or certification points as part of a formal training/developmental program. In administering performance pay increases for these employees under § 9701.342, DHS may take into account the employee's success in completing a formal training/developmental program, as well as his or her performance.

Pay Administration

§ 9701.351 Setting an employee's starting pay.

DHS will, after coordination with OPM, issue implementing directives regarding the starting rate of pay for an employee, including—

(a) An individual who is newly appointed or reappointed to the Federal service;

(b) An employee transferring to DHS from another Federal agency; and

(c) A DHS employee who moves from a noncovered position to a position already covered by this subpart.

§ 9701.352 Use of highest previous rate.

DHS will issue implementing directives regarding the discretionary use of an individual's highest previous rate of basic pay received as a Federal employee or as an employee of a Coast Guard nonappropriated fund instrumentality (NAFI) in setting pay upon reemployment, transfer, reassignment, promotion, demotion, placement in a different occupational cluster, or change in type of appointment. For this purpose, basic pay may include a locality-based payment or supplement under circumstances approved by DHS. If an employee in a Coast Guard NAFI position is converted to an appropriated fund position under the pay system established under this subpart, DHS must use the existing NAFI rate to set pay upon conversion.

§ 9701.353 Setting pay upon promotion.

(a) Except as otherwise provided in this section, upon an employee's promotion, DHS must provide an increase in the employee's rate of basic pay equal to at least 8 percent. The rate of basic pay after promotion may not be less than the minimum rate of the higher band.

(b) DHS will issue implementing directives providing for an increase other than the amount specified in paragraph (a) of this section in the case of—

(1) An employee promoted from an Entry/Developmental band to a Full Performance band (consistent with the pay progression plan established for the Entry/Developmental band);

(2) An employee who was demoted and is then repromoted back to the higher band; or

(3) Employees in other circumstances specified by DHS implementing directives.

(c) An employee receiving a retained rate (*i.e.,* a rate above the maximum of the band) before promotion is entitled to a rate of basic pay after promotion that is at least 8 percent higher than the maximum rate of the employee's current band (except in circumstances specified by DHS implementing directives). The rate of basic pay after promotion may not be less than the minimum rate of the employee's new band rate range or the employee's existing retained rate of basic pay. If the maximum rate of the employee's new band rate range is less than the employee's existing rate of basic pay, the employee will continue to be entitled to the existing rate as a retained rate.

(d) DHS may determine the circumstances under which and the extent to which any locality or special rate supplements are treated as basic pay in applying the promotion increase rules in this section.

§ 9701.354 Setting pay upon demotion.

DHS will issue implementing directives regarding how to set an employee's pay when he or she is demoted. The directives must distinguish between demotions under adverse action procedures (as defined in subpart F of this part) and other demotions (*e.g.*, due to expiration of a

temporary promotion or canceling of a promotion during a new supervisor's probationary period). A reduction in basic pay upon demotion under adverse action procedures may not exceed 10 percent unless a larger reduction is needed to place the employee at the maximum rate of the lower band.

§ 9701.355 Setting pay upon movement to a different occupational cluster.

DHS will issue implementing directives regarding how to set an employee's pay when he or she moves voluntarily or involuntarily to a position in a different occupational cluster, including rules for determining whether such a movement is to a higher or lower band for the purpose of setting pay upon promotion or demotion under §§ 9701.353 and 9701.354, respectively.

§ 9701.356 Pay retention.

(a) Subject to the requirements of this section, DHS will, after coordination with OPM, issue implementing directives regarding the application of pay retention. Pay retention prevents a reduction in basic pay that would otherwise occur by preserving the former rate of basic pay within the employee's new band or by establishing a retained rate that exceeds the maximum rate of the new band.

(b) Pay retention must be based on the employee's rate of basic pay in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate must be compared to the range of rates of basic pay applicable to the employee's position.

(c) In applying § 9701.323 (regarding pay increases provided at the time of a rate range adjustment under § 9701.322), any increase in the rate of basic pay for an employee receiving a retained rate is equal to one-half of the percentage value of any increase in the minimum rate of the employee's band.

§ 9701.357 Miscellaneous.

(a) Except in the case of an employee who does not receive a pay increase under §§ 9701.323 or 9701.335 because of an unacceptable rating of record, an employee's rate of basic pay may not be less than the minimum rate of the employee's band (or the adjusted minimum rate of that band).

(b) Except as provided in § 9701.356, an employee's rate of basic pay may not exceed the maximum rate of the employee's band rate range.

(c) DHS must follow the rules for establishing pay periods and computing rates of pay in 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of pay must be converted to hourly rates of pay in computing payments received by covered employees.

(d) DHS will issue implementing directives regarding the movement of employees to or from a band with a rate range that is increased by a special rate supplement.

(e) For the purpose of applying the reduction-in-force provisions of 5 CFR part 351, DHS must establish representative rates for all band rate ranges.

(f) If a DHS employee moves from the pay system established under this subpart to a GS position within DHS having a higher level of duties and responsibilities, DHS may issue implementing directives that provide for a special increase prior to the employee's movement in recognition of the fact that the employee will not be eligible for a promotion increase under the GS system.

Special Payments

§ 9701.361 Special skills payments.

DHS will issue implementing directives regarding additional payments for specializations for which the incumbent is trained and ready to perform at all times. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special skills payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

§ 9701.362 Special assignment payments.

DHS will issue implementing directives regarding additional payments for employees serving on special assignments in positions placing significantly greater demands on the employee than other assignments within the employee's band. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special assignment payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention provisions or adverse action procedures.

§ 9701.363 Special staffing payments.

DHS will issue implementing directives regarding additional payments for employees serving in positions for which DHS is experiencing or anticipates significant recruitment and/or retention problems. DHS may determine the amount of the payments and the conditions for eligibility, including any performance or service agreement requirements. Payments may be made at the same time as basic pay or in periodic lump-sum payments. Special staffing payments are not basic pay for any purpose and may be terminated or reduced at any time without triggering pay retention or adverse action procedures.

Transitional Provisions

§ 9701.371 General.

(a) Sections 9701.371 through 9701.374 describe the transitional provisions that apply when DHS employees are converted to a pay system established under this subpart. An affected employee may convert from the GS system, a prevailing rate system, the SL/ST system, or the SES system, as provided in § 9701.302. For the purpose of this section and §§ 9701.372 through 9701.374, the terms ''convert,'' ''converted,'' ''converting,'' and ''conversion'' refer to employees who become covered by the pay system without a change in position (as a result of a coverage determination made under § 9701.102(b)) and exclude employees who are reassigned or transferred from a noncovered position to a position already covered by the DHS system.

(b) DHS will issue implementing directives prescribing the policies and procedures necessary to implement these transitional provisions.

§ 9701.372 Creating initial pay ranges.

(a) DHS must, after coordination with OPM, set the initial band rate ranges for the DHS pay system established under this subpart. The initial ranges will link to the ranges that apply to converted employees in their previously applicable pay system (taking into account any applicable special rates and locality payments or supplements).

(b) For employees who are law enforcement officers as defined in 5 U.S.C. 5541(3) and who were covered by the GS system immediately before conversion, the initial ranges must provide rates of basic pay that equal or exceed the rates of basic pay these officers received under the GS system (taking into account any applicable special rates and locality payments or supplements).

§ 9701.373 Conversion of employees to the DHS pay system.

(a) When a pay system is established under this subpart and applied to a category of employees, DHS must convert employees to the system without a reduction in their rate of pay

(including basic pay and any applicable locality payment under 5 U.S.C. 5304, special rate under 5 U.S.C. 5305, locality rate supplement under § 9701.332, or special rate supplement under § 9701.333).

(b) When an employee receiving a special rate under 5 U.S.C. 5305 before conversion is converted to an equal rate of pay under the DHS pay system that consists of a basic rate and a locality or special rate supplement, the conversion will not be considered as resulting in a reduction in basic pay for the purpose of applying subpart F of this part.

(c) If another personnel action (*e.g.*, promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, DHS must process the other action under the rules pertaining to the employee's former system before processing the conversion action.

(d) An employee on a temporary promotion at the time of conversion must be returned to his or her official position of record prior to processing the conversion. If the employee is temporarily promoted immediately after the conversion, pay must be set under the rules for promotion increases under the DHS system.

(e) The Secretary has discretion to make one-time pay adjustments for GS and prevailing rate employees when they are converted to the DHS pay system. DHS will issue implementing directives governing any such pay adjustment, including rules governing employee eligibility, pay computations, and the timing of any such pay adjustment.

(f) The Secretary has discretion to convert entry/developmental employees in noncompetitive career ladder paths to the pay progression plan established for the Entry/Developmental band to which the employee is assigned under the DHS pay system. DHS will issue implementing directives governing any such conversion, including rules governing employee eligibility, pay computations, and the timing of any such conversion. As provided in paragraph (a) of this section, DHS must convert employees without a reduction in their rate of pay.

§ 9701.374 Special transition rules for Federal Air Marshal Service.

Notwithstanding any other provision in this subpart, if DHS transfers Federal Air Marshal Service positions from the Transportation Security Administration (TSA) to another organization within DHS, DHS may cover those positions under a pay system that is parallel to the pay system that was applicable to the Federal Air Marshal Service within TSA. DHS may, after coordination with OPM, modify that system. DHS will issue implementing directives on converting Federal Air Marshal Service employees to any new pay system that may subsequently be established under this subpart, consistent with the conversion rules in § 9701.373.

Subpart D—Performance Management

§ 9701.401 Purpose.

(a) This subpart provides for the establishment in the Department of Homeland Security of at least one performance management system as authorized by 5 U.S.C. chapter 97.

(b) The performance management system established under this subpart, working in conjunction with the pay system established under subpart C of this part, is designed to promote and sustain a high-performance culture by incorporating the following features:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between elements of the pay system established in subpart C of this part, the employee performance appraisal system, and the Department's strategic plan;

(4) Employee involvement in the design and implementation of the system (as provided in § 9701.105);

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) Periodic performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, with specific timetables for review;

(7) Effective safeguards so that the management of the system is fair and equitable and based on employee performance; and

(8) A means for ensuring that adequate resources are allocated for the design, implementation, and administration of the performance management system that supports the pay system established under subpart C of this part.

§ 9701.402 Coverage.

(a) This subpart applies to eligible DHS employees in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (c) of this section.

(b) The following employees are eligible for coverage under this subpart:

(1) Employees who would otherwise be covered by 5 U.S.C. chapter 43; and

(2) Employees who were excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart, as determined under § 9701.102(b).

(c) This subpart does not apply to employees who are not expected to be employed longer than a minimum period (as defined in § 9701.404) during a single 12-month period.

§ 9701.403 Waivers.

When a specified category of employees is covered by the performance management system(s) established under this subpart, 5 U.S.C. chapter 43 is waived with respect to that category of employees.

§ 9701.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period means the period of time established under a performance management system for reviewing employee performance.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

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

Minimum period means the period of time established by DHS during which an employee must perform before receiving a rating of record.

Performance means accomplishment of work assignments or responsibilities.

Performance expectations means that which an employee is required to do, as described in § 9701.406, and may include observable or verifiable descriptions of quality, quantity, timeliness, and cost effectiveness.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by DHS implementing directives, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor

performance, and rating and rewarding performance.

Rating of record means a performance appraisal prepared—

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

(2) To support a pay determination, including one granted in accordance with subpart C of this part, a within-grade increase granted under 5 CFR 531.404, or a pay determination granted under other applicable rules.

Unacceptable performance means the failure to meet one or more performance expectations.

§ 9701.405 Performance management system requirements.

(a) DHS will issue implementing directives that establish one or more performance management systems for DHS employees, subject to the requirements set forth in this subpart.

(b) Each DHS performance management system must—

(1) Specify the employees covered by the system(s);

(2) Provide for the periodic appraisal of the performance of each employee, generally once a year, based on performance expectations.

(3) Specify the minimum period during which an employee must perform before receiving a rating of record;

(4) Hold supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(5) Include procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance; and

(6) Specify the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers are responsible for—

(1) Clearly communicating performance expectations and holding employees responsible for accomplishing them;

(2) Making meaningful distinctions among employees based on performance;

(3) Fostering and rewarding excellent performance; and

(4) Addressing poor performance.

§ 9701.406 Setting and communicating performance expectations.

(a) Performance expectations must align with and support the DHS mission and its strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance. Such expectations include those general performance expectations that apply to all employees, such as standard operating procedures, handbooks, or other operating instructions and requirements associated with the employee's job, unit, or function.

(b) Supervisors and managers must communicate performance expectations, including those that may affect an employee's retention in the job. Performance expectations need not be in writing, but must be communicated to the employee prior to holding the employee accountable for them. However, notwithstanding this requirement, employees are always accountable for demonstrating appropriate standards of conduct, behavior, and professionalism, such as civility and respect for others.

(c) Performance expectations may take the form of—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, administrative manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee;

(3) A particular work assignment, including expectations regarding the quality, quantity, accuracy, timeliness, and/or other expected characteristics of the completed assignment;

(4) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make; or

(5) Any other means, as long as it is reasonable to assume that the employee will understand the performance that is expected.

(d) Supervisors must involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

§ 9701.407 Monitoring performance and providing feedback.

In applying the requirements of the performance management system and its implementing directives and policies, supervisors must—

(a) Monitor the performance of their employees and the organization; and

(b) Provide timely periodic feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period.

§ 9701.408 Developing performance and addressing poor performance.

(a) Subject to budgetary and other organizational constraints, a supervisor must—

(1) Provide employees with the proper tools and technology to do the job; and

(2) Develop employees to enhance their ability to perform.

(b) If during the appraisal period a supervisor determines that an employee's performance is unacceptable, the supervisor must—

(1) Consider the range of options available to address the performance deficiency, which include but are not limited to remedial training, an improvement period, a reassignment, an oral warning, a letter of counseling, a written reprimand, and/or an adverse action (as defined in subpart F of this part); and

(2) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(c) As specified in subpart G of this part, employees may appeal adverse actions based on unacceptable performance.

§ 9701.409 Rating and rewarding performance.

(a)(1) Except as provided in paragraphs (a)(2) and (3) of this section, each DHS performance management system must establish a single summary rating level of unacceptable performance, a summary rating level of fully successful performance (or equivalent), and at least one summary rating level above fully successful performance.

(2) For employees in an Entry/Developmental band, the DHS performance management system(s) may establish two summary rating levels, i.e., an unacceptable rating level and a rating level of fully successful (or equivalent).

(3) At his or her sole and exclusive discretion, the Secretary or designee may under extraordinary circumstances establish a performance management system with two summary rating levels, i.e., an unacceptable level and a higher rating level, for employees not in an Entry/Developmental band.

(b) A supervisor or other rating official must prepare and issue a rating of record after the completion of the appraisal period. An additional rating of record may be issued to reflect a substantial change in the employee's performance when appropriate. A rating of record will be used as a basis for determining—

(1) An increase in basic pay under § 9701.324;

(2) A locality or special rate supplement increase under § 9701.336;

(3) A performance pay increase determination under § 9701.342(a);

(4) A within-grade increase determination under 5 CFR 531.404, prior to conversion to the pay system established under subpart C of this part;

(5) A pay determination under any other applicable pay rules;

(6) Awards under any legal authority, including 5 U.S.C. chapter 45, 5 CFR part 451, and a Departmental or organizational awards program;

(7) Eligibility for promotion; or

(8) Such other action that DHS considers appropriate, as specified in the implementing directives.

(c) A rating of record must assess an employee's performance with respect to his or her performance expectations and/or relative contributions and is considered final when issued to the employee with all appropriate reviews and signatures.

(d) DHS may not impose a forced distribution or quota on any rating level or levels.

(e) A rating of record issued under this subpart is an official rating of record for the purpose of any provision of title 5, Code of Federal Regulations, for which an official rating of record is required.

(f) DHS may not lower the rating of record of an employee on an approved absence from work, including the absence of a disabled veteran to seek medical treatment, as provided in Executive Order 5396.

(g) A rating of record may be grieved by a non-bargaining unit employee (or a bargaining unit employee when no negotiated procedure exists) through an administrative grievance procedure established by DHS. A bargaining unit employee may grieve a rating of record through a negotiated grievance procedure, as provided in subpart E of this part. An arbitrator hearing a grievance is subject to the standards of review set forth in § 9701.521(g)(2). Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h) A supervisor or other rating official may prepare an additional performance appraisal for the purposes specified in the applicable performance management system (e.g., transfers and details) at any time after the completion of the minimum period. Such an appraisal is not a rating of record.

(i) DHS implementing directives will establish policies and procedures for crediting performance in a reduction in force, including policies for assigning additional retention credit based on performance. Such policies must comply with 5 U.S.C. chapter 35 and 5 CFR 351.504.

§ 9701.410 DHS responsibilities.

In carrying out its performance management system(s), DHS must—

(a) Transfer ratings between subordinate organizations and to other Federal departments or agencies;

(b) Evaluate its performance management system(s) for effectiveness and compliance with this subpart, DHS implementing directives and policies, and the provisions of 5 U.S.C. chapter 23 that set forth the merit system principles and prohibited personnel practices;

(c) Provide OPM with a copy of the implementing directives, policies, and procedures that implement this subpart; and

(d) Comply with 29 CFR 1614.102(a)(5), which requires agencies to review, evaluate, and control managerial and supervisory performance to ensure enforcement of the policy of equal opportunity.

Subpart E—Labor-Management Relations

§ 9701.501 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(b) relating to the Department's labor-management relations system. The Department was created in recognition of the paramount interest in safeguarding the American people, without compromising statutorily protected employee rights. For this reason Congress stressed that personnel systems established by the Department and OPM must be flexible and contemporary, enabling the Department to rapidly respond to threats to our Nation. The labor-management relations regulations in this subpart are designed to meet these compelling concerns and must be interpreted with the Department's mission foremost in mind. The regulations also recognize the rights of DHS employees to organize and bargain collectively, subject to any exclusion from coverage or limitation on negotiability established by law, including these regulations, applicable Executive orders, and any other legal authority.

§ 9701.502 Rule of construction.

In interpreting this subpart, the rule of construction in § 9701.106(a)(2) must be applied.

§ 9701.503 Waivers.

When a specified category of employees is covered by the labor-management relations system established under this subpart, the provisions of 5 U.S.C. 7101 through 7135 are waived with respect to that category of employees, except as otherwise specified in this part (including § 9701.106).

§ 9701.504 Definitions.

In this subpart:

Authority means the Federal Labor Relations Authority described in 5 U.S.C. 7104(a).

Collective bargaining means the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees in an appropriate unit in the Department to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

Collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of this subpart.

Component means any organizational subdivision of the Department.

Conditions of employment means personnel policies, practices, and matters affecting working conditions-whether established by rule, regulation, or otherwise—except that such term does not include policies, practices, and matters relating to—

(1) Political activities prohibited under 5 U.S.C. chapter 73, subchapter III;

(2) The classification of any position, including any classification determinations under subpart B of this part;

(3) The pay of any position, including any determinations regarding pay or adjustments thereto under subpart C of this part; or

(4) Any matters specifically provided for by Federal statute.

Confidential employee means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

Day means a calendar day.

Dues means dues, fees, and assessments.

Exclusive representative means any labor organization which is recognized as the exclusive representative of employees in an appropriate unit consistent with the Department's organizational structure, pursuant to 5 U.S.C. 7111 or as otherwise provided by § 9701.514.

Grievance means any complaint—

(1) By any employee concerning any matter relating to the conditions of employment of the employee;

(2) By any labor organization concerning any matter relating to the conditions of employment of any employee; or

(3) By any employee, labor organization, or the Department concerning—

(i) The effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation issued for the purpose of affecting conditions of employment.

HSLRB means the Homeland Security Labor Relations Board.

Labor organization means an organization composed in whole or in part of Federal employees, in which employees participate and pay dues, and which has as a purpose the dealing with the Department concerning grievances and conditions of employment, but does not include—

(1) An organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(2) An organization which advocates the overthrow of the constitutional form of government of the United States;

(3) An organization sponsored by the Department; or

(4) An organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

Management official means an individual employed by the Department in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the Department or who has the authority to recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment.

Professional employee has the meaning given that term in 5 U.S.C. 7103(a)(15).

Supervisor means an individual employed by the Department having authority in the interest of the Department to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment.

§ 9701.505 Coverage.

(a) *Employees covered.* This subpart applies to eligible DHS employees, subject to a determination by the Secretary or designee under § 9701.102(b), except as provided in paragraph (b) of this section. DHS employees who would otherwise be covered by 5 U.S.C. chapter 71 are eligible for coverage under this subpart. In addition, this subpart applies to an employee whose employment has ceased because of an unfair labor practice under § 9701.517 of this subpart and who has not obtained any other regular and substantially equivalent employment.

(b) *Employees excluded.* This subpart does not apply to—

(1) An alien or noncitizen of the United States who occupies a position outside the United States;

(2) A member of the uniformed services as defined in 5 U.S.C. 2101(3);

(3) A supervisor or a management official;

(4) Any person who participates in a strike in violation of 5 U.S.C. 7311;

(5) Employees of the United States Secret Service, including the United States Secret Service Uniformed Division;

(6) Employees of the Transportation Security Administration; or

(7) Any employee excluded pursuant to § 9701.514 or any other legal authority.

§ 9701.506 Impact on existing agreements.

(a) Any provision of a collective bargaining agreement that is inconsistent with this part and/or its implementing directives is unenforceable on the effective date of coverage under the applicable subpart or directive. In accordance with procedures and time limits established by the HSLRB under § 9701.509, an exclusive representative may appeal to the HSLRB the Department's determination that a provision is unenforceable. Provisions that are identified by the Department as unenforceable remain unenforceable unless held otherwise by the HSLRB on appeal. The Secretary or designee, in his or her sole and exclusive discretion, may continue all or part of a particular provision(s) with respect to a specific category or categories of employees and may cancel such continued provisions at any time; such determinations are not precedential.

(b) Upon request by an exclusive representative, the parties will have 60 days after the effective date of coverage under the applicable subpart and/or implementing directive to bring into conformance those remaining negotiable terms directly affected by the terms rendered unenforceable by the applicable subpart and/or implementing directive. If the parties fail to reach agreement by that date, they may utilize the negotiation impasse provisions of § 9701.519 to resolve the matter. Agreements reached under this section are subject to approval under § 9701.515(d). Nothing in this paragraph will delay the effective date of an implementing directive.

§ 9701.507 Employee rights.

Each employee has the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee must be protected in the exercise of such right. Except as otherwise provided under this subpart, such right includes the right—

(a) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities; and

(b) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this subpart.

§ 9701.508 Homeland Security Labor Relations Board.

(a) *Composition.* (1) The Homeland Security Labor Relations Board is composed of at least three members who will be appointed by the Secretary for terms of 3 years, except that the

appointments of the initial HSLRB members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for an additional term. The Secretary, in his or her sole and exclusive discretion, may appoint additional members to the HSLRB; in so doing, he or she will make such appointments to ensure that the HSLRB consists of an odd number of members.

(2) Members of the HSLRB must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in labor relations, law enforcement, or national/homeland or other related security matters. At least one member of the Board must have experience in labor relations. Members must be able to acquire and maintain an appropriate security clearance. Members may be removed by the Secretary on the same grounds as an FLRA member.

(3) An individual chosen to fill a vacancy on the HSLRB will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the HSLRB.

(c) *Appointment procedures for non-Chair HSLRB members.* (1) The appointments of the two non-Chair HSLRB members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint HSLRB members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

(d) *Appointment of additional non-Chair HSLRB members.* If the Secretary determines that additional members are needed, he or she may, subject to the criteria set forth in paragraph (a)(2) of this section, appoint the additional members according to the procedures established by paragraph (c) of this section.

(e) *Filling a HSLRB vacancy.* A HSLRB vacancy will be filled according to the procedure in effect at the time of the appointment.

(f) *Procedures of the HSLRB.* (1) The HSLRB will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases. To the extent practicable, the HSLRB will use a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses. The HSLRB may, pursuant to its regulations, use a combination of mediation, factfinding, and any other appropriate dispute resolution method to resolve all such disputes at the earliest practicable time and with a minimum of process. Such proceedings will be conducted by the HSLRB, a HSLRB member, or employee of the HSLRB. Individual HSLRB members may decide a particular dispute. However, at the motion of a party upon its initial request for HSLRB assistance or upon the HSLRB's own motion at any time, the full HSLRB (or, where the Secretary appoints more than three members, a three-person panel of the HSLRB) may decide a particular dispute involving a matter of first impression or a major policy.

(2) In cases where the full HSLRB acts, a vote of the majority of the HSLRB (or a three-person panel of the HSLRB) will be dispositive. A vacancy on the HSLRB does not impair the right of the remaining members to exercise all of the powers of the HSLRB. The vote of the Chair will be dispositive in the event of a tie.

(g) *Finality of HSLRB decisions.* Decisions of the HSLRB are final and binding. However, in cases involving unfair labor practices and/or negotiability disputes decided by a single member, a party may seek review of that decision with the full HSLRB, according to rules prescribed by the HSLRB. In such cases the initial decision is stayed pending the final decision by the full HSLRB.

(h) *Review of a HSLRB decision.* (1) In order to obtain judicial review of a HSLRB decision, a party must request a review of the record of a HSLRB decision by the Authority by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after the Authority's receipt of the request for a review of the record, any response must be filed. A party may each submit, and the Authority may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. The Authority will establish, in conjunction with the HSLRB, standards for the sufficiency of the record and other procedures, including notice to the parties. The Authority must defer to findings of fact and interpretations of this part made by the HSLRB and sustain the HSLRB's decision unless the requesting party shows that the HSLRB's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Based on error in applying the HSLRB's procedures that resulted in substantial prejudice to a party affecting the outcome; or

(iii) Unsupported by substantial evidence.

(2) The Authority must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review. This 30-day time limit is mandatory, except that the Authority may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (h)(2) of this section is permitted.

(4) If the Authority does not issue a final decision within the mandatory time limit established by paragraph (h) of this section, the Authority will be considered to have denied the request for review of the HSLRB's decision, which will constitute a final decision of the Authority and is subject to judicial review in accordance with 5 U.S.C. 7123.

§ 9701.509 Powers and duties of the HSLRB.

(a) The HSLRB may, to the extent provided in this subpart and in accordance with regulations prescribed by the HSLRB—

(1) Resolve issues relating to the scope of bargaining and the duty to bargain in good faith under § 9701.518 and conduct hearings and resolve complaints of unfair labor practices concerning—

(i) The duty to bargain in good faith; and

(ii) Strikes, work stoppages, slowdowns, and picketing, or condoning such activity by failing to take action to prevent or stop such activity;

(2) Resolve disputes concerning requests for information under § 9701.515(b)(5) and (c);

(3) Resolve exceptions to arbitration awards involving the exercise of management rights, as defined in

§ 9701.511, and the duty to bargain, as defined in § 9701.518. The HSLRB must conduct any review of an arbitral award in accordance with the same standards set forth in 5 U.S.C. 7122(a), which is not waived for the purpose of this subpart but which is modified to apply to this section and to read ''HSLRB'' wherever the term ''Authority'' appears;

(4) Resolve negotiation impasses in accordance with § 9701.519;

(5) Conduct *de novo* review of legal conclusions involving all matters within the HSLRB's jurisdiction;

(6) Have discretion to evaluate the evidence presented in the record and reach its own independent conclusions with respect to the matters at issue; and

(7) Assume jurisdiction over any matter concerning Department employees that has been submitted to FLRA pursuant to § 9701.510, if the HSLRB determines that the matter affects homeland security.

(b) The HSLRB may issue binding Department-wide opinions, which may be appealed as if they were decisions of the HSLRB in accordance with § 9701.508(h).

(c) In issuing opinions under paragraph (b) of this section, the HSLRB may elect to consult with the Authority.

(d)(1) In any matter filed with the HSLRB, if the responding party believes that the HSLRB lacks jurisdiction, that party must timely raise the issue with the HSLRB and simultaneously file a copy of its response with the Authority in accordance with regulations established by the HSLRB. The HSLRB's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(2) If a matter involves one or more issues that are appropriately before the HSLRB and one or more issues that are appropriately before the Authority, the matter must be filed with the HSLRB in accordance with its procedures. The HSLRB will have primary jurisdiction over the matter. The HSLRB will decide those issues within its jurisdiction and will promptly transfer the matter to the Authority for resolution of any remaining issues.

§ 9701.510 Powers and duties of the Federal Labor Relations Authority.

(a) The Federal Labor Relations Authority may, to the extent provided in this subpart and in accordance with regulations prescribed by the Authority, make the following determinations with respect to the Department:

(1) Determine the appropriateness of units pursuant to the provisions of § 9701.514;

(2) Supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of 5 U.S.C. 7111 relating to the according of exclusive recognition to labor organizations, which are not waived for the purpose of this subpart but which are modified to apply to this section;

(3) Conduct hearings and resolve complaints of unfair labor practices under § 9701.517(a)(1) through (4) and (b)(1) through (4), and in accordance with the provisions of 5 U.S.C. 7118, which is not waived for this purpose but which is modified to apply to this section;

(4) Resolve exceptions to arbitrators' awards otherwise in its jurisdiction and not involving the exercise of management rights under § 9701.511, the duty to bargain, as defined in § 9701.518, and matters under § 9701.521(f); and

(5) Review HSLRB decisions and issue final decisions pursuant to § 9701.508(h).

(b) In any matter filed with the Authority, if the responding party believes that the Authority lacks jurisdiction, that party must timely raise the issue with the Authority and simultaneously file a copy of its response with the HSLRB in accordance with regulations established by the Authority. The Authority must promptly transfer the case to the HSLRB, which will determine whether the matter is within the HSLRB's jurisdiction. If the HSLRB determines that the matter is not within its jurisdiction, the HSLRB will return the matter to the Authority for appropriate action. The HSLRB's determination with regard to its jurisdiction in a particular matter is final and not subject to review by the Authority.

(c) Judicial review of any Authority decision is as prescribed in 5 U.S.C. 7123, which is not waived.

§ 9701.511 Management rights.

(a) Subject to paragraphs (b), (c), and (d) of this section, nothing in this subpart may affect the authority of any management official or supervisor of the Department—

(1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;

(2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign and deploy employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and

(3) To lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

(b) Management is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section.

(c) Notwithstanding paragraph (b) of this section, management will confer with an exclusive representative over the procedures it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section, in accordance with the process set forth in § 9701.512.

(d) If an obligation exists under § 9701.518 to bargain, confer, or consult regarding the exercise of any authority under paragraph (a) of this section, management must provide notice to the exclusive representative concurrently with the exercise of that authority and an opportunity to present its views and recommendations regarding the exercise of such authority under paragraph (a) of this section. However, nothing in this section prevents management from exercising its discretion to provide notice as far in advance of the exercise of that authority as appropriate. Further, nothing in paragraph (d) of this section establishes an independent right to bargain, confer, or consult.

(e) To the extent otherwise required by § 9701.518 and at the request of an exclusive representative, the parties will bargain at the level of recognition (unless otherwise delegated below that level, at their sole and exclusive discretion) over—

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(2)(i) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(1) or (2) of this section, provided that the effects of such exercise have a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed or have exceeded 60 days. Appropriate arrangements within the duty to bargain include proposals on matters such as—

(A) Personal hardships and safety measures; and

(B) Reimbursement of out-of-pocket expenses incurred by employees as the direct result of the exercise of authorities under this section, to the extent such reimbursement is in accordance with applicable law and governing regulations.

(ii) Appropriate arrangements within the duty to bargain do not include proposals on matters such as—

(A) The routine assignment to specific duties, shifts, or work on a regular or overtime basis; and

(B) Compensation for expenses not actually incurred, or pay or credit for work not actually performed.

(f) Nothing in this section will delay or prevent the Department from exercising its authority. Any agreements reached with respect to paragraph (e)(2) of this section will not be precedential or binding on subsequent acts, or retroactively applied, except at the Department's sole, exclusive, and unreviewable discretion.

§ 9701.512 Conferring on procedures for the exercise of management rights.

(a) As provided by § 9701.511(c), management, at the level of recognition, will confer with an appropriate exclusive representative to consider its views and recommendations with regard to procedures that management will observe in exercising its rights under § 9701.511(a)(1) and (2). This process is not subject to the requirements established by §§ 9701.517(a)(5) (regarding enforcement of the duty to consult or negotiate), 9701.518 (regarding the duty to bargain and consult), and 9701.519 (regarding impasse procedures). Nothing in this section requires that the parties reach agreement on any covered matter. The parties may, upon mutual agreement, provide for the Federal Mediation and Conciliation Service or another third party to assist in this process. Neither the HSLRB nor the Authority may intervene in this process.

(b) The parties will meet at reasonable times and places but for no longer than 30 days, including any voluntary third party assistance, unless the parties mutually agree to extend this period.

(c) Nothing in the process established under this section will delay the exercise of a management right under § 9701.511(a)(1) and (2).

(d) Management retains the sole, exclusive, and unreviewable discretion to determine the procedures that it will observe in exercising the authorities set forth in § 9701.511(a)(1) and (2) and to deviate from such procedures, as necessary.

§ 9701.513 Exclusive recognition of labor organizations.

The Department must accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit as determined by the Authority, who cast valid ballots in the election.

§ 9701.514 Determination of appropriate units for labor organization representation.

(a) The Authority will determine the appropriateness of any unit. The Authority must determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this subpart, the appropriate unit should be established on a Department, plant, installation, functional, or other basis and will determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the Department, consistent with the Department's mission and organizational structure.

(b) A unit may not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor may a unit be determined to be appropriate if it includes—

(1) Except as provided under 5 U.S.C. 7135(a)(2), which is not waived for the purpose of this subpart, any management official or supervisor;

(2) A confidential employee;

(3) An employee engaged in personnel work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subpart;

(5) Both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) Any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) Any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by the Department whose duties directly affect the internal security of the Department, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Pursuant to 6 U.S.C. 412(b)(2), a unit to which continued recognition was provided upon transfer to DHS may not include an employee whose primary duty has materially changed to consist of intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

(d) Any employee who is engaged in administering any provision of law or this subpart relating to labor-management relations may not be represented by a labor organization—

(1) Which represents other individuals to whom such provision applies; or

(2) Which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(e) Two or more units in the Department for which a labor organization is the exclusive representative may, upon petition by the Department or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority will certify the labor organization as the exclusive representative of the new larger unit.

§ 9701.515 Representation rights and duties.

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit must be given the opportunity to be represented at—

(i) Any formal discussion between Department representative(s) and bargaining unit employees, the purpose of which is to discuss and/or announce new or substantially changed personnel policies, practices, or working conditions. This right does not apply to meetings between Department

representative(s) and bargaining unit employees for the purpose of discussing operational matters where any discussion of personnel policies, practices or working conditions—

(A) Constitutes a reiteration or application of existing personnel policies, practices, or working conditions;

(B) Is incidental or otherwise peripheral to the announced purpose of the meeting; or

(C) Does not result in an announcement of a change to, or a promise to change, an existing personnel policy(s), practice(s), or working condition(s);

(ii) Any discussion between one or more Department representatives and one or more bargaining unit employees concerning any grievance;

(iii) Any examination of a bargaining unit employee by a representative of the Department in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests such representation; or

(iv) Any discussion between a representative of the Department and a bargaining unit employee in connection with a formal complaint of discrimination only if the employee, at his or her sole discretion, requests such representation.

(3) Notwithstanding any other provision of this paragraph, if the Supreme Court determines that the definition of ''grievance'' in 5 U.S.C. 7103(a)(9) includes a formal complaint of discrimination filed by a bargaining unit employee, the definition of *grievance* in § 9701.504, and its application to this section, will be interpreted and applied consistent with that decision.

(4) The Department must annually inform its employees of their rights under paragraph (a)(2)(iii) of this section.

(5) Except in the case of grievance procedures negotiated under this subpart, the rights of an exclusive representative under this section may not be construed to preclude an employee from—

(i) Being represented by an attorney or other representative of the employee's own choosing, other than the exclusive representative, in any other grievance or appeal action; or

(ii) Exercising other grievance or appellate rights established by law, rule, or regulation.

(b) The duty of the Department or appropriate component(s) of the Department and an exclusive representative to negotiate in good faith under paragraph (a) of this section includes the obligation—

(1) To approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) To be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on conditions of employment;

(3) To meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) If agreement is reached, to execute on the request of any party to the negotiation, a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement; and

(5) In the case of the Department or appropriate component(s) of the Department, to furnish information to an exclusive representative, or its authorized representative, when—

(i) Such information exists, is normally maintained, and is reasonably available;

(ii) The exclusive representative has requested such information and demonstrated a particularized need for the information in order to perform its representational functions in grievance proceedings or in negotiations; and

(iii) Disclosure is not prohibited by law.

(c) Disclosure of information in paragraph (b)(5) of this section does not include the following:

(1) Disclosure prohibited by law or regulations, including, but not limited to, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders;

(2) Disclosure of information if adequate alternative means exist for obtaining the requested information, or if proper discussion, understanding, or negotiation of a particular subject within the scope of collective bargaining is possible without recourse to the information;

(3) Internal Departmental guidance, counsel, advice, or training for managers and supervisors relating to collective bargaining;

(4) Any disclosure that would compromise the Department's mission, security, or employee safety; and

(5) Home addresses, telephone numbers, email addresses, or any other information not related to an employee's work.

(d)(1) An agreement between the Department or appropriate component(s) of the Department and the exclusive representative is subject to approval by the Secretary or designee.

(2) The Secretary or designee must approve the agreement within 30 days after the date the agreement is executed if the agreement is in accordance with the provisions of these regulations and any other applicable law, rule, or regulation.

(3) If the Secretary or designee does not approve or disapprove the agreement within the 30-day period specified in paragraph (d)(2) of this section, the agreement must take effect and is binding on the Department or component(s), as appropriate, and the exclusive representative, but only if consistent with law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders.

(4) A local agreement subject to a national or other controlling agreement at a higher level may be approved under the procedures of the controlling agreement or, if none, under Departmental regulations. Bargaining will be at the level of recognition except where delegated.

(5) Provisions in existing collective bargaining agreements are unenforceable if an authorized agency official determines that they are contrary to law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives (as provided by § 9701.506) and other policies and regulations, or Executive orders.

§ 9701.516 Allotments to representatives.

(a) If the Department has received from an employee in an appropriate unit a written assignment which authorizes the Department to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the Department must honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment must be made at no cost to the exclusive representative or the employee. Except as provided under paragraph (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under paragraph (a) of this section for the deduction of dues with respect to any employee terminates when—

(1) The agreement between the Department or Department component and the exclusive representative involved ceases to be applicable to the employee; or

(2) The employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (c)(2) of this section, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in the Department have membership in the labor organization, the Authority must investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the Department has a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(i) The provisions of paragraph (c)(1) of this section do not apply in the case of any appropriate unit for which there is an exclusive representative.

(ii) Any agreement under paragraph (c)(1) of this section between a labor organization and the Department or Department component with respect to an appropriate unit becomes null and void upon the certification of an exclusive representative of the unit.

§ 9701.517 Unfair labor practices.

(a) For the purpose of this subpart, it is an unfair labor practice for the Department—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) To sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities on an impartial basis to other labor organizations having equivalent status;

(4) To discipline or otherwise discriminate against an employee because the employee has filed a complaint or petition, or has given any information or testimony under this subpart;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with a labor organization, as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse procedures and impasse decisions, as required by this subpart; or

(7) To fail or refuse otherwise to comply with any provision of this subpart.

(b) For the purpose of this subpart, it is an unfair labor practice for a labor organization—

(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this subpart;

(2) To cause or attempt to cause the Department to discriminate against any employee in the exercise by the employee of any right under this subpart;

(3) To coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) To discriminate against an employee with regard to the terms and conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) To refuse, as determined by the HSLRB, to consult or negotiate in good faith with the Department as required by this subpart;

(6) To fail or refuse, as determined by the HSLRB, to cooperate in impasse procedures and impasse decisions as required by this subpart;

(7)(i) To call, or participate in, a strike, work stoppage, or slowdown, or picketing of the Department in a labor-management dispute if such picketing interferes with an agency's operations; or

(ii) To condone any activity described in paragraph (b)(7)(i) of this section by failing to take action to prevent or stop such activity; or

(8) To otherwise fail or refuse to comply with any provision of this subpart.

(c) Notwithstanding paragraph (b)(7) of this section, informational picketing which does not interfere with the Department's operations will not be considered an unfair labor practice.

(d) For the purpose of this subpart, it is an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by the labor organization, except for failure to meet reasonable occupational standards uniformly required for admission or to tender dues uniformly required as a condition of acquiring and retaining membership. This does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this subpart.

(e) The HSLRB will not consider any unfair labor practice allegation filed more than 6 months after the alleged unfair labor practice occurred, unless the HSLRB determines, pursuant to its regulations, that there is good cause for the late filing.

(f) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except where an employee has an option of using the negotiated grievance procedure or an appeals procedure in connection with an adverse action under subpart F of this part, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(g) The expression of any personal view, argument, opinion, or the making of any statement which publicizes the fact of a representational election and encourages employees to exercise their right to vote in such an election, corrects the record with respect to any false or misleading statement made by any person, or informs employees of the Government's policy relating to labor-management relations and representation, may not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions—

(1) Constitute an unfair labor practice under any provision of this subpart; or

(2) Constitute grounds for the setting aside of any election conducted under any provision of this subpart.

§ 9701.518 Duty to bargain, confer, and consult.

(a) The Department or appropriate component(s) of the Department and any exclusive representative in any appropriate unit in the Department, through appropriate representatives, must meet and negotiate in good faith as provided by this subpart for the purpose of arriving at a collective bargaining agreement. In addition, the Department or appropriate component(s) of the Department and the exclusive representative may determine appropriate techniques, consistent with the operational rules of the HSLRB, to assist in any negotiation.

(b) If bargaining over an initial collective bargaining agreement or any successor agreement is not completed within 90 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the

matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(c) If the parties bargain during the term of an existing collective bargaining agreement over a proposed change that is otherwise negotiable, and no agreement is reached within 30 days after such bargaining begins, the parties may mutually agree to continue bargaining or mutually agree to refer the matter to an independent mediator/arbitrator for resolution. Alternatively, either party may refer the matter to the HSLRB for resolution in accordance with procedures established by the HSLRB. Either party may refer the matter to the Federal Mediation Conciliation Service (FMCS) for assistance at any time.

(d)(1) Management may not bargain over any matters that are inconsistent with law or the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, or Executive orders.

(2) In promulgating Departmental policies and regulations that deal with otherwise negotiable subjects, the Department will utilize the process set forth in § 9701.512, except that the Department will confer with those labor organizations that request and have been accorded national consultation rights (NCR) established pursuant to 5 U.S.C. 7113, which is not waived for these purposes, and consult with those organizations on other appropriate matters.

(3) Management has no obligation to bargain over a change to a condition of employment unless the change is otherwise negotiable pursuant to these regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(4) Management has no obligation to confer or consult as required by this section unless the change is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change.

(5) Nothing in paragraphs (b) or (c) of this section prevents or delays management from exercising the rights enumerated in § 9701.511.

(e) If a management official involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the HSLRB in accordance with procedures established by the HSLRB.

§ 9701.519 Negotiation impasses.

(a) If the Department and exclusive representative are unable to reach an agreement under §§ 9701.515 or 9701.518, either party may submit the disputed issues to the HSLRB for resolution.

(b) If the parties do not arrive at a settlement after assistance by the HSLRB, the HSLRB may take whatever action is necessary and not inconsistent with this subpart to resolve the impasse.

(c) Pursuant to §§ 9701.508 and 9701.525, the HSLRB's regulations will provide for a single, integrated process to address all matters associated with a negotiations dispute, including unfair labor practices, negotiability disputes, and bargaining impasses.

(d) Notice of any final action of the HSLRB under this section must be promptly served upon the parties. The action will be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 9701.520 Standards of conduct for labor organizations.

Standards of conduct for labor organizations are those prescribed under 5 U.S.C. 7120, which is not waived.

§ 9701.521 Grievance procedures.

(a)(1) Except as provided in paragraph (a)(2) of this section, any collective bargaining agreement must provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in paragraphs (d), (f), and (g) of this section, the procedures must be the exclusive administrative procedures for grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in paragraph (a) of this section must be fair and simple, provide for expeditious processing, and include procedures that—

(i) Assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) Assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) Provide that any grievance not satisfactorily settled under the negotiated grievance procedure is subject to binding arbitration, which may be invoked by either the exclusive representative or the Department.

(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (b)(1)(iii) of this section must, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in 5 U.S.C. 1221(c) with respect to the Merit Systems Protection Board and order the Department to take any disciplinary action identified under 5 U.S.C. 1215(a)(3) that is otherwise within the authority of the Department to take.

(3) Any employee who is the subject of any disciplinary action ordered under paragraph (b)(2) of this section may appeal such action to the same extent and in the same manner as if the Department had taken the disciplinary action absent arbitration.

(c) The preceding paragraphs of this section do not apply with respect to any matter concerning—

(1) Any claimed violation of 5 U.S.C. chapter 73, subchapter III (relating to prohibited political activities);

(2) Retirement, life insurance, or health insurance;

(3) A suspension or removal under § 9701.613;

(4) A mandatory removal under § 9701.607;

(5) Any examination, certification, or appointment; and

(6) Any subject not within the definition of *grievance* in § 9701.504 (*e.g.*, the classification or pay of any position), except for any other adverse action under subpart F of this part which is not otherwise excluded by paragraph (c) of this section.

(d) To the extent not already excluded by existing collective bargaining agreements, the exclusions contained in paragraph (c) of this section apply upon the effective date of this subpart, as determined under § 9701.102(b).

(e)(1) An aggrieved employee affected by a prohibited personnel practice under 5 U.S.C. 2302(b)(1) which also falls under the coverage of the negotiated grievance procedure may raise the matter under the applicable statutory procedures, or the negotiated procedure, but not both.

(2) An employee is deemed to have exercised his or her option under paragraph (e)(1) of this section to raise the matter under the applicable statutory procedures, or the negotiated procedure, at such time as the employee

timely initiates an action under the applicable statutory or regulatory procedure or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(f)(1) For matters covered by subpart G of this part (except for mandatory removal offenses under § 9701.707), an aggrieved employee may raise the matter under the appeals procedure of § 9701.706 or under the negotiated grievance procedure, but not both. An employee will be deemed to have exercised his or her option under this section when the employee timely files an appeal under the applicable appellate procedures or a grievance in accordance with the provisions of the parties' negotiated grievance procedure, whichever occurs first.

(2) An arbitrator hearing a matter appealable under subpart G of this part is bound by the applicable provisions of this part.

(3) Section 7121(f) of title 5, United States Code, is not waived, but is modified to provide that—

(i) Matters covered by subpart G are deemed to be matters covered by 5 U.S.C. 4303 and 7512 for the purpose of obtaining judicial review; and

(ii) Judicial review under 5 U.S.C. 7703 will apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by MSPB under § 9701.706, including the preponderance of the evidence standard.

(4) In order to ensure consistency, the Department and representatives of those labor organizations granted national consultation rights may establish a mutually acceptable panel of arbitrators who have been trained and qualified to hear adverse action grievances under this part.

(g)(1) An employee may grieve a performance rating of record that has not been appealed in connection with an action under subpart G of this part. Once an employee raises a performance rating issue in an appeal under subpart G of this part, any pending grievance or arbitration will be dismissed with prejudice.

(2) An arbitrator may cancel a performance rating upon a finding that management applied the employee's established performance expectations in violation of applicable law, Department rule or regulation, or provision of collective bargaining agreement in a manner prejudicial to the grievant. An arbitrator who has properly canceled an employee's appraisal may order management to change the grievant's rating only when the arbitrator is able to determine the rating that management would have given but for the violation. When an arbitrator is unable to determine what the employee's rating would have been but for the violation, the arbitrator must remand the case to management for re-evaluation. Except as otherwise provided by law, an arbitrator may not conduct an independent evaluation of the employee's performance or otherwise substitute his or her judgment for that of the supervisor.

(h)(1) This paragraph applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which paragraph (e) of this section applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (h)(1) of this section may elect not more than one of the procedures described in paragraph (h)(3) of this section with respect thereto. A determination as to whether a particular procedure for seeking a remedy has been elected must be made as set forth under paragraph (h)(4) of this section.

(3) The procedures for seeking remedies described in this paragraph are as follows:

(i) An appeal under subpart G of this part;

(ii) A negotiated grievance under this section; and

(iii) Corrective action under 5 U.S.C. chapter 12, subchapters II and III.

(4) For the purpose of this paragraph, an employee is considered to have elected one of the following, whichever election occurs first:

(i) The procedure described in paragraph (h)(3)(i) of this section if such employee has timely filed a notice of appeal under the applicable appellate procedures;

(ii) The procedure described in paragraph (h)(3)(ii) of this section if such employee has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(iii) The procedure described in paragraph (h)(3)(iii) of this section if such employee has sought corrective action from the Office of Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1).

§ 9701.522 Exceptions to arbitration awards.

(a)(1) In the case of awards involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party to arbitration under this subpart may file with the HSLRB an exception to any arbitrator's award. The HSLRB may take such action and make such recommendations concerning the award as is consistent with this subpart.

(2) In the case of awards not involving the exercise of management rights or the duty to bargain under §§ 9701.511 and 9701.518, either party may file exceptions to an arbitration award with the Authority pursuant to 5 U.S.C. 7122 (which is not waived for the purpose of this subpart but which is modified to apply to arbitration awards under this section) and the Authority's regulations.

(3) Notwithstanding paragraph (a)(2) of this section, exceptions to awards relating to a matter described in § 9701.521(f) may not be filed with the Authority.

(b) If no exception to an arbitrator's award is filed under paragraph (a) of this section during the 30-day period beginning on the date of such award, the award is final and binding. Either party must take the actions required by an arbitrator's final award. The award may include the payment of back pay (as provided under 5 U.S.C. 5596 and 5 CFR part 550, subpart H).

(c) Nothing in this section prevents the HSLRB from determining its own jurisdiction without regard to whether any party has raised a jurisdictional issue.

§ 9701.523 Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this subpart must be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this section may not exceed the number of individuals designated as representing the Department for such purposes.

(b) Any activities performed by any employee relating to the internal business of the labor organization, including but not limited to the solicitation of membership, elections of labor organization officials, and collection of dues, must be performed during the time the employee is in a nonduty status.

(c) Except as provided in paragraph (a) of this section, the Authority or the HSLRB, as appropriate, will determine whether an employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority or the HSLRB will be authorized official time for such purpose during the time the employee would otherwise be in a duty status.

(d) Except as provided in the preceding paragraphs of this section, any employee representing an exclusive representative or, in connection with any other matter covered by this subpart, any employee in an appropriate unit represented by an exclusive representative, must be granted official time in any amount the Department and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

§ 9701.524 Compilation and publication of data.

(a) The HSLRB must maintain a file of its proceedings and copies of all available agreements and arbitration decisions and publish the texts of its impasse resolution decisions and the actions taken under § 9701.519.

(b) All files maintained under paragraph (a) of this section must be open to inspection and reproduction in accordance with 5 U.S.C. 552 and 552a. The HSLRB will establish rules in consultation with the Department for maintaining and making available for inspection sensitive information.

§ 9701.525 Regulations of the HSLRB.

The Department may issue initial interim rules for the operation of the HSLRB and will consult with labor organizations granted national consultation rights on the rules. The HSLRB will prescribe and publish rules for its operation in the **Federal Register**.

§ 9701.526 Continuation of existing laws, recognitions, agreements, and procedures.

(a) Except as otherwise provided by § 9701.506, nothing contained in this subpart precludes the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or an agreement that is otherwise consistent with law and the regulations in this part between the Department or a component thereof and an exclusive representative of its employees, which is entered into before the effective date of this subpart, as determined under § 9701.102(b).

(b) Policies, regulations, and procedures established under, and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838 or any other Executive order, as in effect on the effective date of this subpart (as determined under § 9701.102(b)), will remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this subpart or by implementing directives or decisions issued pursuant to this subpart.

§ 9701.527 Savings provision.

This subpart does not apply to grievances or other administrative proceedings already pending on the date of coverage of this subpart, as determined under § 9701.102(b). Any remedy that applies after the date of coverage under any provision of this part and that is in conflict with applicable provisions of this part is not enforceable.

Subpart F—Adverse Actions

General

§ 9701.601 Purpose.

This subpart contains regulations prescribing the requirements when employees are furloughed for 30 days or less, suspended, demoted, reduced in pay, or removed. DHS may issue implementing directives to carry out the provisions of this subpart.

§ 9701.602 Waivers.

When a specified category of employees is covered by the adverse action provisions established under this subpart, 5 U.S.C. 7501 through 7514 and 7531 through 7533 are waived with respect to that category of employees. The provisions in 5 U.S.C. 7521 and 7541 through 7543 are not waived.

§ 9701.603 Definitions.

In this subpart:

Adverse action means a furlough for 30 days or less, a suspension, a demotion, a reduction in pay, or a removal.

Band means a work level or pay range within an occupational cluster.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics required by a position.

Current continuous service means a period of service immediately preceding an adverse action in the same or similar positions without any break in Federal civilian employment.

Day means a calendar day.

Demotion means a reduction in grade, a reduction to a lower band within the same occupational cluster, or a reduction to a lower band in a different occupational cluster under rules prescribed by DHS pursuant to § 9701.355.

Furlough means the placement of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons.

Grade means a level of work under a position classification or job grading system.

Indefinite suspension means the placement of an employee in a temporary status without duties and pay pending investigation, inquiry, or further Department action. An indefinite suspension continues for an indeterminate period of time and usually ends with either the employee returning to duty or the completion of any subsequent administrative action.

Initial service period (ISP) means the 1 to 2 years employees must serve after selection (on or after the date this subpart becomes applicable, as determined under § 9701.102(b)) for a designated DHS position in the competitive service for the purpose of providing an employee the opportunity to demonstrate competencies in a specific occupation.

Mandatory removal offense (MRO) means an offense that the Secretary determines, in his or her sole, exclusive, and unreviewable discretion, has a direct and substantial adverse impact on the Department's homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

Pay means the rate of basic pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind. For the purpose of this subpart, pay does not include locality-based comparability payments under 5 U.S.C. 5304, locality or special rate supplements under subpart C of this part, or other similar payments.

Probationary period has the meaning given that term in 5 CFR 315.801.

Removal means the involuntary separation of an employee from the Department.

Similar positions means positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbent could be moved from one position to another without significant training or undue interruption to the work.

Suspension means the temporary placement of an employee, for disciplinary reasons, in a nonduty/nonpay status.

Trial period has the meaning given that term in 5 CFR 316.304.

§ 9701.604 Coverage.

(a) *Actions covered.* This subpart covers furloughs of 30 days or less, suspensions, demotions, reductions in pay (including reductions in pay within a band), and removals.

(b) *Actions excluded.* This subpart does not cover—

(1) Any adverse action taken against an employee during a probationary, trial, or initial service period, except for an adverse action taken against a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) The demotion of a supervisor or manager under 5 U.S.C. 3321;

(3) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent band and pay, if the employee was informed that the promotion was to be of limited duration;

(4) A reduction-in-force action under 5 U.S.C. 3502;

(5) An action under 5 U.S.C. 1215;

(6) An action against an administrative law judge under 5 U.S.C. 7521;

(7) A voluntary action by an employee;

(8) An action taken or directed by OPM based on suitability under 5 CFR part 731;

(9) Termination of appointment on the expiration date specified as a basic condition of employment at the time the appointment was made;

(10) Cancellation of a promotion to a position not classified prior to the promotion;

(11) Placement of an employee serving on an intermittent or seasonal basis in a temporary non-duty, non-pay status in accordance with conditions established at the time of appointment;

(12) Reduction of an employee's rate of basic pay from a rate that is contrary to law or regulation;

(13) An action taken under a provision of statute, other than one codified in title 5, U.S. Code, which excludes the action from 5 U.S.C. chapter 75 or this subpart;

(14) A classification determination, including a classification determination under subpart B of this part; and

(15) An action that entitles an employee to grade retention under 5 CFR part 536 and an action to terminate this entitlement.

(c) *Employees covered.* Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to DHS employees, except as excluded by paragraph (d) of this section.

(d) *Employees excluded.* This subpart does not apply to—

(1) An employee in the competitive service who is serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period;

(2) A preference eligible employee in the excepted service who has not completed 1 year of current continuous service in the same or similar positions in an Executive agency or in the United States Postal Service or Postal Rate Commission;

(3) An employee in the excepted service (other than a preference eligible) who has not completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment of 2 years or less;

(4) A non-preference eligible employee who is serving a time-limited appointment (including a term appointment) of 2 years or less;

(5) Members of the Senior Executive Service;

(6) Administrative law judges;

(7) Employees who are terminated in accordance with terms specified as conditions of employment at the time the appointment was made;

(8) Employees whose appointments are made by and with the advice and consent of the Senate;

(9) Employees whose positions have been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by—

(i) The President, for a position that the President has excepted from the competitive service;

(ii) OPM, for a position that OPM has excepted from the competitive service; or

(iii) The President or the Secretary for a position excepted from the competitive service by statute;

(10) An employee whose appointment is made by the President;

(11) An employee who is receiving an annuity from the Civil Service Retirement and Disability Fund or the Foreign Service Retirement and Disability Fund based on the service of such employee;

(12) An employee who is an alien or non-citizen occupying a position outside the United States, as described in 5 U.S.C. 5102(c)(11);

(13) Members of the Homeland Security Labor Relations Board or the Mandatory Removal Panel;

(14) Employees against whom an adverse personnel action is taken or imposed under any statute or regulation other than this subpart (e.g., Transportation Security Administration employees); and

(15) Employees appointed and serving under a Schedule B excepted service appointment subject to conversion to career status pursuant to Executive Order 11203.

§ 9701.605 Initial service period.

(a) DHS may establish an initial service period of 1 to 2 years for certain designated occupations in order for employees in such occupations to demonstrate appropriate competencies. DHS will establish standard policies for determining the applicability and the length of the ISP for specific occupations.

(b) Employees must complete an ISP after selection for a designated DHS position in the competitive service before obtaining coverage under this subpart. All relevant prior Federal civilian service (including non-appropriated fund service), as determined by appropriate standards established by DHS, counts toward completion of this requirement.

(c) An employee who is removed during a probationary, trial, or initial service period must be removed in accordance with 5 CFR 315.804 or 315.805, except for a preference eligible employee in the competitive service who has completed the first year of an ISP.

Requirements for Furlough of 30 Days or Less, Suspension, Demotion, Reduction in Pay, or Removal

§ 9701.606 Standard for action.

The Department may take an adverse action under this subpart only for such cause as will promote the efficiency of the service. The standards for mandatory removal offenses and actions taken under the national security provisions are set forth in §§ 9701.607 and 9701.613, respectively.

§ 9701.607 Mandatory removal offenses.

(a) The Secretary has the sole, exclusive, and unreviewable discretion to identify offenses that have a direct and substantial adverse impact on the Department's homeland security mission. Such offenses will be identified in advance as part of the Department's implementing directives, publicized via notice in the **Federal Register,** and made known to all employees on an annual basis.

(b) When a mandatory removal action is proposed under this section, employees will have the right to advance notice, an opportunity to respond, a written decision, and a review by the Mandatory Removal Panel as set forth in subpart G of this part.

(c) Prior to the issuance of a notice to the employee in question, the Secretary or designee will review and approve a proposed notice of removal on the grounds that the employee has committed a mandatory removal offense.

(d) The Secretary has the sole, exclusive, and unreviewable discretion to mitigate the removal penalty.

(e) Nothing in this section limits the discretion of the Department or any component thereof to remove employees for offenses other than those identified by the Secretary as mandatory removal offenses.

(f) Nothing in this subpart limits the discretion of the Department or any component thereof to remove an employee based on the revocation of that employee's security clearance.

§ 9701.608 Procedures.

An employee against whom an adverse action is proposed is entitled to the following:

(a) A proposal notice under § 9701.609;

(b) An opportunity to reply under § 9701.610; and

(c) A decision notice under § 9701.611.

§ 9701.609 Proposal notice.

(a) *Notice period.* The Department must provide at least 15 days advance written notice of a proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must provide at least 5 days advance written notice.

(b) *Contents of notice.* (1) The proposal notice must inform the employee of the factual basis for the proposed action in sufficient detail to permit the employee to reply to the notice, and inform the employee of his or her right to review the Department's evidence supporting the proposed action. The Department may not use evidence that cannot be disclosed to the employee, his or her representative, or designated physician pursuant to 5 CFR 297.204.

(2) When some but not all employees in a given competitive level are being furloughed, the proposal notice must state the basis for selecting a particular employee for furlough, as well as the reasons for the furlough. The notice is not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

(c) *Duty status during notice period.* An employee will remain in a duty status in his or her regular position during the notice period. However, when the Department determines that the employee's continued presence in the workplace during the notice period may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the Department may elect one or a combination of the following alternatives:

(1) Assign the employee to duties where the Department determines the employee is no longer a threat to safety, the Department's mission, or Government property;

(2) Allow the employee to take leave, or place him or her in an appropriate leave status (annual leave, sick leave, or leave without pay) or absence without leave if the employee has absented himself or herself from the worksite without approved leave; or

(3) Place the employee in a paid, non-duty status for such time as is necessary to effect the action.

§ 9701.610 Opportunity to reply.

(a) The Department must give employees at least 10 days, which must run concurrently with the notice period, to reply orally and/or in writing to a notice of proposed adverse action. However, if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, the Department must give the employee at least 5 days, which must run concurrently with the notice period, to reply orally and/or in writing.

(b) The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses.

(c) During the opportunity to reply, the Department must give the employee a reasonable amount of official time to review the Department's supporting evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) The Department must designate an official to receive the employee's written and/or oral response. The official must have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or other representative of the employee's choice and at the employee's expense, subject to paragraph (f) of this section. The employee must provide the Department with a written designation of his or her representative.

(f) The Department may disallow as an employee's representative—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes the Department to consider any medical condition that may be relevant to the proposed adverse action must provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) When considering an employee's medical documentation, the Department may require or offer a medical examination pursuant to 5 CFR part 339, subpart C.

(3) When considering an employee's medical condition, the Department is not required to withdraw or delay a proposed adverse action. However, the Department must—

(i) Allow the employee to provide medical documentation during the opportunity to reply;

(ii) Comply with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules; and

(iii) Comply with 5 CFR 831.1205 when issuing a decision to remove.

§ 9701.611 Decision notice.

(a) In arriving at its decision on a proposed adverse action, the Department may not consider any reasons for the action other than those specified in the proposal notice.

(b) The Department must consider any response from the employee and the employee's representative, if the response is provided to the official designated under § 9701.610(d) during the opportunity to reply, and any medical documentation furnished under § 9701.610(g).

(c) The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts E or G of this part.

(d) The Department must deliver the notice to the employee on or before the effective date of the action.

§ 9701.612 Departmental record.

(a) *Document retention.* The Department must keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record must include the following:

(1) A copy of the proposal notice;

(2) The employee's written response, if any, to the proposal;

(3) A summary of the employee's oral response, if any;

(4) A copy of the decision notice; and

(5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department must make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board or the MRP.

National Security

§ 9701.613 Suspension and removal.

(a) Notwithstanding other provisions of law or regulation, the Secretary may suspend an employee without pay when she or he considers suspension in the interests of national security. To the extent that the Secretary determines that the interests of national security permit, the suspended employee must be notified of the reasons for the suspension. Within 30 days after the notification, the suspended employee is entitled to submit to the official designated by the Secretary statements or affidavits to show why he or she should be restored to duty.

(b) Subject to paragraph (c) of this section, the Secretary may remove an employee suspended under this section when, after investigation and review as the Secretary considers necessary, the Secretary determines that removal is necessary or advisable in the interests of national security. The determination of the Secretary is final.

(c) An employee suspended under this section who has a permanent or indefinite appointment, has completed his or her initial service period, probationary period, or trial period, and is a citizen of the United States is entitled, after suspension and before removal, to—

(1) A written statement of the charges against the employee within 30 days after suspension, which may be amended within 30 days thereafter, and which must be stated as specifically as security considerations permit;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(3) A hearing, at the request of the employee, by a Department authority duly constituted for this purpose;

(4) A review of his or her case by the Secretary or designee, before a decision adverse to the employee is made final; and

(5) A written decision from the Secretary.

Savings Provision

§ 9701.614 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

Subpart G—Appeals

§ 9701.701 Purpose.

This subpart contains the regulations implementing the provisions of 5 U.S.C. 9701(a) through (c) and (f) concerning the Department's appeals system for certain adverse actions covered under subpart F of this part. These provisions require that the new appeals regulations provide Department employees fair treatment, are consistent with the protections of due process and, to the maximum extent practicable, provide for the expeditious handling of appeals.

§ 9701.702 Waivers.

When a specified category of employees is covered by an appeals system established under this subpart, the provisions of 5 U.S.C. 7701 are waived with respect to that category of employees to the extent they are inconsistent with the provisions of this subpart. The provisions of 5 U.S.C. 7702 are modified as provided in § 9701.709 to use ''MSPB or MRP'' wherever the terms ''Merit Systems Protection Board'' or ''Board'' occur. The appellate procedures specified herein supersede those of MSPB to the extent MSPB regulations are inconsistent with this subpart. MSPB must follow the provisions in this subpart until conforming regulations are issued by MSPB.

§ 9701.703 Definitions.

In this subpart:

Adjudicating official means an administrative law judge, administrative judge, or other employee designated by MSPB to decide an appeal.

Day means calendar day.

Harmful error means error by the Department in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, *i.e.*, that it caused substantial harm or prejudice to his or her rights.

Mandatory removal offense (MRO) means an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's homeland security mission.

Mandatory Removal Panel (MRP) means the three-person panel composed of officials appointed by the Secretary for fixed terms to decide appeals of removals based on a mandatory removal offense.

MSPB means the Merit Systems Protection Board.

Petition for review means a request for review of an initial decision of an adjudicating official.

Preponderance of the evidence means the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

§ 9701.704 Coverage.

(a) Subject to a determination by the Secretary or designee under § 9701.102(b), this subpart applies to employees who appeal furloughs of 30 days or less, demotions, reductions in pay, suspensions of 15 days or more, or removals, provided such employees are covered by § 9701.604.

(b) Appeals of suspensions shorter than 15 days and other lesser disciplinary measures are not covered under this subpart but may be grieved through a negotiated grievance procedure or an administrative grievance procedure, whichever is applicable.

(c) The appeal rights in 5 CFR 315.806 apply to the removal of an employee while serving a probationary, trial, or initial service period, except for a preference eligible employee in the competitive service who has completed the first year of an initial service period.

(d) Actions taken under § 9701.613 are not appealable to MSPB.

§ 9701.705 Alternative dispute resolution.

The Department and OPM recognize the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based negotiation to address employee-employer disputes arising in the workplace, including those which may involve disciplinary actions. Such methods can result in more efficient and more effective outcomes than traditional, adversarial methods of dispute resolution. The Department will use alternative dispute resolution methods where appropriate. Such methods will be subject to collective bargaining to the extent permitted by subpart E of this part.

§ 9701.706 MSPB appellate procedures.

(a) A covered Department employee may appeal an adverse action identified under § 9701.704(a) to MSPB. Such an employee has a right to be represented

by an attorney or other representative, and to a hearing if material facts are in dispute. However, separate procedures apply when the action is taken because of a mandatory removal offense or is in the interest of national security. (*See* §§ 9701.707 and 9701.613, respectively.)

(b) MSPB may decide any case appealed to it or may refer the case to an administrative law judge appointed under 5 U.S.C. 3105 or other employee of MSPB designated by MSPB to decide such cases. MSPB or an adjudicating official must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

(c)(1) If an employee is the prevailing party in an appeal under this section, the employee must be granted the relief provided in the decision upon issuance of the decision, subject to paragraph (c)(3) of this section, and such relief remains in effect pending the outcome of any petition for review unless—

(i) An adjudicating official determines that the granting of such relief is not appropriate; or

(ii) The relief granted in the decision provides that the employee will return or be present at the place of employment pending the outcome of any petition for review, and the Department, subject to paragraph (c)(2) of this section, determines in its sole, exclusive, and unreviewable discretion, that the return or presence of the employee is unduly disruptive to the work environment.

(2) If the Department makes a determination under paragraph (c)(1)(ii) of this section that prevents the return or presence of an employee at the place of employment, such employee must receive pay, compensation, and all other benefits as terms and conditions of employment pending the outcome of any petition for review.

(3) Nothing in the provisions of this section may be construed to require that any award of back pay or attorney fees be paid before the decision is final.

(d) The decision of the Department must be sustained under paragraph (b) of this section if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(1) Harmful error in the application of Department procedures in arriving at the decision;

(2) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) That the decision was not in accordance with law.

(e) The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(f) Except as provided in § 9701.709, any decision under paragraph (b) of this section is final unless a party to the appeal or the Director of OPM petitions MSPB for review within 30 days after receipt of the decision or MSPB reopens and reconsiders a case on its own motion. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) If MSPB or an adjudicating official is of the opinion that consolidation or joinder could result in more expeditious processing of appeals and would not adversely affect any party, MSPB or an adjudicating official may—

(1) Consolidate appeals filed by two or more appellants; or

(2) Join two or more appeals filed by the same appellant and hear and decide them concurrently.

(h)(1) Except as provided in paragraph (h)(2) of this section or as otherwise provided by law, MSPB or an adjudicating official may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and MSPB or an adjudicating official determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(2) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(i)(1) MSPB or an adjudicating official may not require settlement discussions in connection with any appealed action under this section. If either party decides that settlement is not desirable, the matter will proceed to adjudication.

(2) Where the parties agree to engage in settlement discussions before MSPB or an adjudicating official, these discussions will be conducted by an official specifically designated by MSPB for that sole purpose. Nothing prohibits the parties from engaging in settlement discussions on their own.

(j) If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

(k) The following provisions modify MSPB's appellate procedures applicable to appeals under this subpart:

(1) All appeals, including class appeals, will be filed no later than 20 days after the effective date of the action being appealed, or no later than 20 days after the date of service of the Department's decision, whichever is later.

(2) Either party may file a motion for representative disqualification at any time during the proceedings.

(3) The parties may seek discovery regarding any matter that is relevant to any of their claims or defenses. However, by motion, either party may seek to limit such discovery because the burden or expense of providing the material outweighs its benefit, or because the material sought is privileged, not relevant, unreasonably cumulative or duplicative, or can be secured from some other source that is more convenient, less burdensome, or less expensive.

(i) Prior to filing a motion to limit discovery, the parties must confer and attempt to resolve any pending objection(s).

(ii) Neither party may submit more than one set of interrogatories, one set of requests for production of documents, and one set of requests for admissions. The number of interrogatories or requests for production or admissions may not exceed 25 per pleading, including subparts; in addition, neither party may conduct/compel more than 2 depositions.

(iii) Either party may file a motion requesting additional discovery. Such motion may be granted only if the party has shown necessity and good cause to warrant such additional discovery.

(4) Requests for case suspensions must be submitted jointly.

(5) When there are no material facts in dispute, the adjudicating official must render summary judgment on the law without a hearing. However, when material facts are in dispute and a hearing is held, a transcript must be kept.

(6) Given the Department's need to maintain an exceptionally high degree of order and discipline in the workplace, an arbitrator, adjudicating official, or MSPB may not modify the penalty imposed by the Department

unless such penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it relates to the sustained charge(s). When a penalty is mitigated, the maximum justifiable penalty must be applied.

(7) An initial decision must be made no later than 90 days after the date on which the appeal is filed. If that initial decision is appealed to MSPB, MSPB must render its decision no later than 90 days after the close of the record before MSPB on petition for review.

(8) If the Director seeks reconsideration of a final MSPB order, MSPB must render its decision no later than 60 days after receipt of the opposition to OPM's petition in support of such reconsideration. MSPB must state the reasons for its decision so that the Director can determine whether to seek judicial review and to facilitate expeditious judicial review.

(9) MSPB, in conjunction with the Department and OPM, will develop and issue voluntary expedited appeals procedures for Department cases.

(l) Failure of MSPB to meet the deadlines imposed by paragraphs (k)(7) and (k)(8) of this section in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(m) Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision is as prescribed under 5 U.S.C. 7703.

§ 9701.707 Appeals of mandatory removal actions.

(a) *General.* Appeals of mandatory removal actions are governed by procedures set forth in this section. An employee may appeal such actions to the Mandatory Removal Panel (MRP) established under § 9701.708.

(b) *Procedures.* (1) The MRP will establish procedures for the fair, impartial, and expeditious assignment and disposition of cases, consistent with the requirements set forth in § 9701.706(k), as applicable, and for such other matters as may be necessary to ensure the operation of the MRP.

(2) The MRP will conduct a hearing, for which a transcript will be kept, to resolve any factual disputes and other relevant matters. All members will hear a particular appeal and will decide it based on a majority vote of the members. If only two members are serving, the vote of the Chair will be dispositive in the event of a tie.

(3) The appellant has the right to be represented by an attorney or other representative.

(4) The only action available to the MRP is to sustain or overturn a mandatory removal. The MRP does not have authority to mitigate the penalty. Only the Secretary may mitigate the penalty in these cases after the MRP has rendered its decision.

(5) The decision of the Department must be sustained if it is supported by a preponderance of the evidence, unless the employee shows by a preponderance of the evidence—

(i) Harmful error in the application of Department procedures in arriving at the decision;

(ii) That the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(iii) That the decision was not in accordance with law.

(6)(i) Except as provided in paragraph (b)(6)(ii) of this section or as otherwise provided by law, the MRP may require payment by the Department of reasonable attorney fees incurred by an employee if the employee is the prevailing party and the Panel reviewing the initial appeal determines that payment by the Department is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the Department or any case in which the Department's action was clearly without merit.

(ii) If the employee is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of reasonable attorney fees must be in accordance with the standards prescribed in § 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(7) The MRP must issue a written decision (including dissenting opinions, where appropriate) in each case and serve each party and OPM with a copy. These decisions are final and binding.

(8) Failure of the MRP to meet applicable deadlines imposed under § 9701.706(k) in a case will not prejudice any party to the case and will not form the basis for any legal action by any party.

(c) *MSPB review.* (1) In order to obtain judicial review of an MRP decision, an employee, the Department, or OPM must request a review of the record of an MRP decision by MSPB by filing such a request in writing within 15 days after the issuance of the decision. Within 15 days after MSPB's receipt of the request for a review of the record, any response or OPM intervention must be filed. A party, or OPM, may each submit, and MSPB may grant for good cause shown, a request for a single extension of time not to exceed a maximum of 15 additional days. MSPB will establish, in conjunction with the MRP, standards for the sufficiency of the record and other procedures, including notice to the parties and OPM. MSPB must accept the findings of fact and interpretations of this part made by the MRP and sustain the MRP's decision unless the employee shows that the MRP's decision was—

(i) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

(2) MSPB must complete its review of the record and issue a final decision within 30 days after receiving the party's timely response to such request for review or OPM's intervention brief, whichever is filed later. This 30-day time limit is mandatory, except that MSPB may extend its time for review by a maximum of 15 additional days if it determines that—

(i) The case is unusually complex; or

(ii) An extension is necessary to prevent any prejudice to the parties that would otherwise result.

(3) No extension beyond that provided by paragraph (c)(2) of this section is permitted.

(4) If MSPB does not issue a final decision within the mandatory time limit established by paragraph (c) of this section, MSPB will be considered to have denied the request for review of the MRP's decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703.

(d) *Subsequent action.* (1) If either the MRP or MSPB sustains an employee's appeal based on a finding that the employee did not commit an MRO, the Department is not precluded from subsequently proposing an adverse action (other than an MRO) based on the same record evidence. Such a proposal must be issued—

(i) In accordance with applicable law and regulation, including the procedures set forth in § 9701.609; and

(ii) Normally within 15 days after the date of MSPB's decision, unless the Department establishes good cause for exceeding this time limit.

(2) Nothing in this section precludes the Department from taking a subsequent action against an employee based, in part, on additional evidence that was not part of the record in the initial proceeding before the MRP.

(e) *Judicial review.* Except as otherwise provided by 5 U.S.C. 7702 with respect to cases involving allegations of discrimination, judicial review of any final MSPB order or decision on an MRO is as prescribed under 5 U.S.C. 7703.

(f) *OPM intervention.* (1) The Director may, as a matter of right at any time in the proceeding before the MRP or MSPB, intervene or otherwise participate in any proceeding under this section in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

(2) Except as provided in § 9701.709, any decision under paragraph (c) of this section is final unless the Director petitions MSPB for review within 30 days after receipt of the decision. The Director may petition MSPB for review only if he or she believes the decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. MSPB, for good cause shown, may extend the filing period.

(g) *Appeal rights of retirees.* If an employee has been removed under subpart F of this part, neither the employee's status under any retirement system established by Federal statute nor any election made by the employee under any such system will affect the employee's appeal rights.

§ 9701.708 Mandatory Removal Panel.

(a) *Composition.* (1) The Mandatory Review Panel is a standing panel composed of three members who will be appointed by the Secretary for terms of 3 years, except that the appointments of the initial MRP members will be for terms of 2, 3, and 4 years, respectively. The Secretary may extend the term of any member beyond 3 years when necessary to provide for an orderly transition and/or appoint the member for an additional term.

(2) Members of the MRP must be independent, distinguished citizens of the United States who are well known for their integrity and impartiality. Members must have expertise in either labor or employee relations or law enforcement/homeland security matters. At least one member of the Board must have experience in labor relations. Members may be removed by the Secretary on the same grounds as an MSPB member.

(3) An individual chosen to fill a vacancy on the MRP will be appointed for the unexpired term of the member who is replaced.

(b) *Appointment of the Chair.* The Secretary, at his or her sole and exclusive discretion, will appoint one member to serve as Chair of the MRP.

(c) *Appointment procedures for non-Chair MRP members.* (1) The appointments of the two non-Chair MRP members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint MRP members may not be delayed or otherwise affected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

§ 9701.709 Actions involving discrimination.

Section 7702 of title 5, U.S. Code, is modified to read ''MSPB or MRP'' wherever the terms ''Merit Systems Protection Board'' or ''Board'' are used.

§ 9701.710 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.

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