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Categories of Federal Civil Service Employment: A Snapshot

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Categories of Federal Civil Service Employment: A Snapshot

According to the Office of Personnel Management (OPM), the federal workforce consists of an estimated two million civilian employees. Federal law categorizes these employees into three types of service—the competitive service, the excepted service, and the Senior Executive Service (SES)—that may be distinguished by different selection, compensation, and other standards. Title 5 of the U.S. Code (Title 5) contains most of the standards governing federal employment, and OPM is generally responsible for implementing these requirements.

The competitive service largely consists of all civil service positions in the executive branch, other than (1) positions excepted from the competitive service by statute; (2) positions appointed by the President and confirmed by the Senate; and (3) the SES. Traditionally, OPM has administered examinations for entrance into the competitive service. These examinations are meant to be “practical in character” and relate to “matters that fairly test the relative capacity and fitness of the applicants for the appointment sought.” Title 5 also authorizes OPM to prescribe rules allowing agencies to hire candidates directly under specified circumstances.

The excepted service includes designated civil service positions that are not in the competitive service or the SES and are not subject to competitive examination. OPM maintains authority to exempt a position from the competitive service when it determines that an appointment through competitive examination is not practicable, or the recruitment of students or recent graduates would be better achieved through alternate recruitment and assessment processes.

The pay structure for the competitive service and the excepted service is similar. Both services are typically paid in accordance with the General Schedule, a schedule of annual basic pay rates that consists of 15 grades, designated “GS-1” through “GS-15.” This fixed pay scale is generally designed to reflect, among other things, equal pay for substantially equal work within a local pay area. Additionally, the competitive service and the excepted service generally have similar notice and appeal rights for adverse personnel actions. For example, before a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less, the agency must provide at least 30 days’ advance written notice to the affected employee. The employee must also be given a reasonable time to respond to the notice and provide affidavits and other evidence to support the answer. Some adverse actions may also be appealed to the Merit Systems Protection Board (MSPB or Board), an independent, quasi-judicial agency that reviews and adjudicates specified personnel actions taken against qualifying federal employees.

The SES is a corps of some 7,000 high-level government administrators who manage major programs and projects within most federal agencies. In these leadership roles, SES members may serve as a link between top-level political appointees of an agency and career civil servants within the agency. The SES is governed by a regulatory structure separate from the competitive and excepted services. While SES members are primarily career appointees chosen through a merit-based competitive hiring process, others are noncareer, limited term or limited emergency appointees (commonly political appointees) selected by agency leadership. To shield certain SES roles from political influence, some SES positions (career reserved positions) must be filled with career appointees, and Title 5 limits the number of noncareer and limited term appointees that may serve in SES positions.

The SES pay structure is distinct from the rest of the civil service. Title 5 specifies that SES members are paid within a particular range based on an executive’s individual performance or contribution to agency performance (or both), as measured under a performance appraisal system. In addition, Title 5 articulates special conditions and procedures for removing, suspending, or taking other adverse actions against a member of the SES. For example, career SES appointees who have successfully completed a one-year probationary period may be removed or subject to adverse action only for specified reasons, including misconduct and substandard performance. Career appointees must receive advance written notice of these actions, and an opportunity to appeal the action. In comparison, noncareer, limited term, and limited emergency appointees are generally not subject to the same protections and may be removed from the SES at any time.

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Introduction

The federal government is the nation’s largest employer,¹ with over two million workers employed in the United States, U.S. Territories, and foreign countries.² A majority of these employees work in the competitive service of the executive branch.³ Applicants for competitive service positions compete with other applicants and are evaluated according to objective standards.⁴ The executive branch includes two other service classifications—the excepted service and the Senior Executive Service (SES)—with hiring and removal standards that diverge from those prescribed for the competitive service. Positions in the excepted service are specifically excepted from the competitive service by statute, by the President, or by the Office of Personnel Management (OPM).⁵ SES positions are also not in the competitive service.⁶ The SES includes senior managerial, supervisory, and policy positions that are subject to a different pay scale, as well as different hiring and removal standards.⁷ This report examines the three service classifications, and reviews some of the central features and notable differences among these classifications.

Competitive Service

The competitive service consists of all civil service positions in the executive branch, except the following:

- positions that are specifically excepted from the competitive service by or under statute;
- positions to which appointments are made by presidential nomination for confirmation by the Senate, unless the Senate otherwise directs; and
- positions in the SES.⁸

Appointment Process

The competitive service also includes non-executive branch positions and positions in the District of Columbia government that are specifically included in the competitive service by statute.⁹

¹ Off. of Disability and Employment Policy, Dep’t of Labor, Federal Employers, <https://www.dol.gov/odep/topics/federalemloyment.htm> (last visited Mar. 26, 2019).

² U.S. Off. of Personnel Mgmt., Fed. Workforce Data (Sept. 2018), <https://www.fedscope.opm.gov/employment.asp>.

³ See U.S. OFF. OF PERSONNEL MGMT., EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE & EFFECTIVENESS IN THE EXECUTIVE BRANCH at 8 (July 2018), <https://www.opm.gov/policy-data-oversight/hiring-information/excepted-service/excepted-service-study-report.pdf>.

⁴ See 5 C.F.R. § 332.404 (requiring an appointing officer to fill vacancies “with sole regard to merit and fitness”).

⁵ *Id.* § 213.101(a).

⁶ See 5 U.S.C. § 2102(a)(1)(C) (excluding SES positions from the definition of “competitive service”).

⁷ *Id.* § 3131.

⁸ *Id.* § 2102(a). The legislative branch includes employees in both the competitive service and the excepted service. Political appointees are generally in Schedule C of the excepted service. See U.S. GEN. ACCT. OFF., THE EXCEPTED SERVICE: A RESEARCH PROFILE 10, 24 n.14 (May 1997), <https://www.gao.gov/assets/80/79968.pdf>.

⁹ 5 U.S.C. § 2102(a).

OPM administers examinations for entrance into the competitive service.¹⁰ These examinations are meant to be “practical in character” and relate to “matters that fairly test the relative capacity and fitness of the applicants for the appointment sought[.]”¹¹ OPM identifies the relative weights for the subjects in an examination, and assigns numerical ratings on a 100-point scale.¹²

Applicants who meet the minimum requirements for entrance to an examination, such as citizenship and residence requirements, and are rated 70 or more in the examination are eligible for appointment in the competitive service.¹³ These individuals are placed on registers or lists of eligibles.¹⁴ When an agency seeks to fill a competitive service position, it requests a certificate of eligibles from OPM.¹⁵ This certificate is to include enough names from the top of the relevant register to allow an agency appointing official to consider at least three individuals for every position to be filled.¹⁶

The competitive service includes several types of appointments. An individual selected for a continuing position is generally appointed as a career-conditional employee subject to an initial one-year probationary period.¹⁷ After three continuous years of service in a career-conditional appointment, an employee will be converted to a career appointment.¹⁸ A term appointment is a nonpermanent appointment for a period of more than one year, but less than four years.¹⁹ An agency may make a term appointment when the need for an employee’s services is not permanent, but involves a special project, extraordinary workload, or reorganization.²⁰ A temporary appointment is a time-limited appointment for a period not to exceed one year.²¹ An agency may make a temporary appointment to fill a short-term position or meet an employment need that is scheduled to end within a specified timeframe.²²

Pay Structure

Employees in the competitive service are generally paid in accordance with the General Schedule, a schedule of annual basic pay rates that consists of 15 grades, designated “GS-1” through “GS-15.”²³ The grades include 10 steps that provide for increasing rates of pay. An employee who has not reached the maximum pay rate for his or her position is generally advanced to the next step at

¹⁰ 5 C.F.R. § 332.101(a).

¹¹ 5 U.S.C. § 3304(a)(1).

¹² 5 C.F.R. § 337.101(a).

¹³ *Id.* See also *id.* § 2.1(a)(ii) (identifying standards that applicants must meet to be admitted to or rated in examinations).

¹⁴ 5 U.S.C. § 3313.

¹⁵ *Id.* § 3317(a). OPM may also allow an agency to appoint a candidate without regard to the competition requirements if it determines that there is either a severe shortage of candidates or a critical hiring need. See *id.* § 3304(a)(3).

¹⁶ *Id.* § 3317(a).

¹⁷ 5 C.F.R. § 315.201(a). An employee’s appeal rights to the Merit Systems Protection Board (MSPB) are more limited during a probationary period. For example, an employee may appeal a termination not otherwise prohibited by law only if the action was based on partisan political reasons or marital status, or was not effected in accordance with certain procedural requirements. See 5 C.F.R. § 315.806.

¹⁸ *Id.* § 315.201(a).

¹⁹ *Id.* § 316.301(a).

²⁰ *Id.*

²¹ *Id.* § 316.401(c)(1).

²² *Id.* § 316.401(a).

²³ 5 U.S.C. § 5332(a)(2).

specified intervals.²⁴ General Schedule salaries are based on the principles that there is equal pay for substantially equal work within a local pay area, that any pay distinctions are based on work and performance, that federal pay rates are comparable with non-federal pay rates for the same level of work, and that any pay disparities between federal and non-federal employees should be eliminated.²⁵

Adverse Action Protections and Procedures

Employees in the competitive service who are not serving a probationary or trial period, or have completed one year of current continuous service in a position other than a temporary appointment limited to one year or less, maintain specified notice and appeal rights for adverse personnel actions.²⁶ Before an agency may suspend such a qualifying employee for 14 days or less, the employee must be given an advance written notice that identifies the specific reasons for the suspension.²⁷ The employee must also be provided a reasonable time to answer the notice and furnish affidavits and other evidence to support the answer.²⁸

Similar notice is required before an agency may subject a qualifying employee to other adverse personnel actions. Before a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of 30 days or less, the agency must provide at least 30 days' advance written notice to the employee.²⁹ The employee must also be given a reasonable time to respond to the notice and provide affidavits and other evidence to support the answer.³⁰ Unlike suspensions for 14 days or less, these adverse actions may be appealed to the Merit Systems Protection Board (MSPB or Board), an independent, quasi-judicial agency that reviews and adjudicates specified personnel actions taken against qualifying federal employees.³¹

In general, an agency must establish three factors to withstand an individual's challenge of his or her adverse personnel action.³² First, the agency must prove, by a preponderance of the evidence, that the charged conduct occurred.³³ Second, it must establish a nexus between that conduct and the efficiency of the civil service. Finally, the agency must show that the penalty imposed on the employee is reasonable. An agency's action may not be sustained if the appellant shows: (1) harmful error in applying the agency's procedures in arriving at its decision; (2) that the decision

²⁴ *Id.* § 5335(a).

²⁵ *Id.* § 5301.

²⁶ *See id.* §§ 7503(b), 7513. *See also id.* § 7511(a)(1)(A) (defining an "employee" in the competitive service for purposes of adverse actions that may be appealed to the MSPB).

²⁷ *Id.* § 7503(b)(1).

²⁸ *Id.* § 7503(b)(2). The employee is also entitled to be represented by an attorney or other representative, and a written decision at the earliest practicable date.

²⁹ *Id.* § 7513(b).

³⁰ *Id.* The employee is also entitled to be represented by an attorney or other representative, and a written decision at the earliest practicable date.

³¹ *See id.* § 7513(d) (identifying the powers and functions of the MSPB).

³² *See Pope v. U.S. Postal Serv.*, 114 F.3d 1144, 1147 (Fed. Cir. 1997) (discussing factors that must be established by an agency to sustain an adverse action).

³³ *Id.* *See also* 5 C.F.R. § 1201.4(q) (defining "preponderance of the evidence" as "[t]he 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").

was based on a prohibited personnel practice; or (3) that the decision was not in accordance with law.³⁴

Excepted Service

Appointment Process

About one-third of all federal workers are employed in the excepted service.³⁵ The excepted service consists of those civil service positions that are not in the competitive service or the SES.³⁶ Positions in the excepted service may be designated by statute or by OPM, and are not subject to competitive examination.³⁷ OPM will exempt a position from the competitive service when it determines that an appointment through competitive examination is not practicable, or the recruitment of certain students or recent graduates would be better achieved through alternate recruitment and assessment processes.³⁸ For example, OPM may determine that a position should be excepted from the competitive service because it is impracticable to examine the knowledge, skills, and abilities required for a position.³⁹

Positions in the excepted service are categorized into four schedules. Schedule A includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants.⁴⁰ Attorneys, chaplains, and short-term positions for which there is a critical hiring need are examples of schedule A positions.⁴¹

Schedule B also includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants.⁴² Unlike Schedule A positions, however, these positions require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level.⁴³ Individuals appointed to schedule B positions engage in a variety of activities, including policy analysis, teaching, and technical assistance.⁴⁴

³⁴ 5 U.S.C. § 7701(c)(2). *See also* 5 C.F.R. § 1201.4(r) (defining “harmful error” as “[e]rror by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error”).

³⁵ *See* EXCEPTED SERVICE HIRING AUTHORITIES, *supra* note 2 at 8.

³⁶ 5 U.S.C. § 2103(a).

³⁷ *See, e.g.*, 10 U.S.C. § 1601(a) (“The Secretary of Defense may—(1) establish, as positions in the excepted service, such defense intelligence positions in the Department of Defense as the Secretary determines necessary to carry out the intelligence functions of the Department, including—(A) Intelligence Senior Level positions designated under section 1607 of this title; and (B) positions in the Defense Intelligence Senior Executive Service. . .”).

³⁸ 5 C.F.R. § 213.102(b).

³⁹ *See id.* § 213.102(c)(1).

⁴⁰ *Id.* § 6.2.

⁴¹ *Id.* § 213.3102.

⁴² *Id.* § 6.2.

⁴³ *Id.* § 213.3201(a). OPM has directed agencies to establish these qualification standards. *See id.* § 302.202 (“Before making an appointment to a position covered by this part, each agency shall establish qualification standards such as those relating to experience and training, citizenship, minimum age, physical condition, etc., which shall relate to the duties performed.”).

⁴⁴ *See* Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions, 83 Fed. Reg. 19,340, 19,348 (May 2, 2018).

Positions in schedule C are policy-determining or involve a close and confidential working relationship with the head of an agency or other key appointed officials.⁴⁵ These positions include most political appointees below the cabinet and subcabinet levels.⁴⁶ An agency's senior advisor and special assistant positions are typically in schedule C.⁴⁷

Finally, schedule D includes positions that are not of a confidential or policy-determining character for which competitive examination makes it difficult to recruit a sufficient number of certain students or recent graduates.⁴⁸ Examples of schedule D positions include those involving science, technology, engineering, or mathematics (STEM) occupations and positions in the Presidential Management Fellows Program.⁴⁹ Schedule D positions generally require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level.⁵⁰

Pay Structure

Like employees in the competitive service, excepted service employees are generally paid in accordance with the General Schedule.⁵¹

Adverse Action Protections and Procedures

In addition, excepted service employees maintain the same notice and appeal rights for adverse personnel actions.⁵² Some employees in the excepted service, however, must satisfy different durational requirements before these rights become available. So-called “preference eligibles” in an executive agency, the Postal Service, or the Postal Rate Commission must complete one year of current continuous service to avail themselves of the relevant notice and appeal rights.⁵³ The term “preference eligible” refers to specified military veterans and some of their family members, such as an unmarried widow, and the wife or husband of a service-connected disabled veteran.⁵⁴ Employees in the excepted service who are not preference eligibles and (1) are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or (2) have completed two years of current or continuous service in the same or similar position, have the same notice and appeal rights as qualifying employees in the competitive service.⁵⁵

⁴⁵ 5 C.F.R. § 213.3301.

⁴⁶ See General Accounting Office, *supra* note 8.

⁴⁷ See Excepted Service, *supra* note 43 at 19,350-65.

⁴⁸ 5 C.F.R. § 213.3401.

⁴⁹ See *id.* § 213.3402(b), (c).

⁵⁰ *Id.* § 213.3401.

⁵¹ See, e.g., Excepted Service, *supra* note 43.

⁵² See 5 U.S.C. § 7513(d).

⁵³ See *id.* § 7511(a)(1)(B) (identifying specified preference eligibles in the excepted service who may appeal adverse actions to the MSPB).

⁵⁴ See *id.* § 2108(3).

⁵⁵ See *id.* § 7511(a)(1)(C) (identifying non-preference eligibles in the excepted service who may appeal adverse actions to the MSPB).

Senior Executive Service

The SES is a cadre of high-level government administrators who manage major programs and projects within most federal agencies.⁵⁶ While they are considered federal employees within the civil service system, the SES is governed by a regulatory structure separate from the competitive and excepted services. As defined in statute, SES positions are generally managerial or supervisory positions that are classified above the GS-15 grade (or certain equivalent positions) and need not be appointed by the President and confirmed by the Senate.⁵⁷ In these leadership roles, SES members may serve as intermediaries between top-level political appointees of an agency who seek to carry out the objectives of a particular President and career civil servants with institutional experience relating to relevant issues.⁵⁸ According to a 2018 report, there are currently more than 7,000 permanent SES positions.⁵⁹

Positions and Appointment Process

There are two types of SES positions: (1) career reserved and (2) general.⁶⁰ Career reserved positions must be filled with career appointees to shield certain SES roles from political influence.⁶¹ Generally, agency heads are to determine whether a particular SES position warrants a career reserved designation, to “ensure impartiality, or the public’s confidence in the impartiality, of the Government.”⁶² OPM regulations reflect the types of SES roles in which this designation is appropriate, including those involving adjudication and appeals, auditing, and law enforcement duties.⁶³ General positions may be filled by career appointees, as well as other noncareer and limited term (i.e., political) appointees.⁶⁴

⁵⁶ See *id.* §§ 3131-3136.

⁵⁷ *Id.* § 3131(a)(2). Title 5 of the U.S. Code excludes certain agencies from the SES requirements, such as the Government Accountability Office, the Securities and Exchange Commission, and the Federal Election Commission. *Id.* § 3131(a)(1). Certain federal positions may not be classified as SES, including Foreign Service and administrative law judge positions. *Id.* § 3131(a)(2). Agencies may also apply for an exclusion from SES coverage. *Id.* § 3131(a)(1)(A), (c).

⁵⁸ See, e.g., JACK RABIN, W. BARTLEY HILDRETH, AND GERALD J. MILLER, *HANDBOOK OF PUBLIC ADMINISTRATION* 1139 (2d ed. 1998) (“These senior executives were to be positioned at the interface of political appointees and the permanent bureaucracy and were to facilitate action on legitimate immediate objectives of the former and protect the long-term interests of the latter.”).

⁵⁹ See 2018 FEDERAL PERSONNEL GUIDE 218 (Seth Supran ed. 2018).

⁶⁰ 5 C.F.R. § 214.401. According to a 2016 estimate, about half of the SES positions are designated career reserved, and half are general. SENATE COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, 110TH CONG., U.S. GOVT. POLICY AND SUPPORTING POSITIONS, 110th Cong., 217 (Comm. Print 2016).

⁶¹ See 5 U.S.C. § 3132(a)(8), (b). A “career appointee” means “an individual in a Senior Executive Service position whose appointment to the position or previous appointment to another Senior Executive Service position was based on approval by the Office of Personnel Management of the executive qualifications of such individual.” *Id.* § 3132(a)(4).

⁶² See *id.* § 3132(b); 5 C.F.R. § 214.402. Certain positions that, among other things, were in the competitive service before the enactment of the Civil Service Reform Act of 1978, and that entail certain managerial responsibilities are designated as career reserved SES positions. 5 U.S.C. § 3132(b)(3).

⁶³ 5 C.F.R. § 214.402. OPM regulations clarify that career reserved positions are those whose principal duties “involve day-to-day operations, without responsibility for or substantial involvement in the determination or public advocacy of the major controversial policies of the Administration or agency.” *Id.*

⁶⁴ See 5 U.S.C. § 3132(a)(9).

There are four types of SES appointments: career, noncareer, limited term, and limited emergency appointees. The SES mainly consists of “career appointees” chosen through a merit-based competitive hiring process.⁶⁵ As part of this process, each agency must maintain a recruitment program for career appointees, as well as at least one executive board that reviews qualifications and makes recommendations regarding SES candidates.⁶⁶ An OPM-convened Qualification Review Board (QRB) must certify the executive and managerial qualifications of a selected candidate before a career appointment may be made to an SES position.⁶⁷

Unlike career appointees, noncareer appointees are not subject to the competitive selection process, but agency heads must determine that these appointees meet the qualifications of the SES position.⁶⁸ While noncareer appointees are not QRB-certified, OPM must approve these appointees.⁶⁹ Limited term and limited emergency appointees make up a small subset of the SES, and their terms are non-renewable.⁷⁰ These appointments are used when a position is needed for a specified period (such as to manage a special project), or a position is established to meet a “bona fide, unanticipated, urgent need.”⁷¹ Limited term and limited emergency appointments are also subject to OPM approval.⁷² To restrict the politicization of the SES, Title 5 of the U.S. Code (Title 5) limits the number of noncareer and limited term appointees who may serve in SES positions.⁷³

Pay Structure and Performance Appraisal

The SES pay structure is also distinct from the rest of the civil service.⁷⁴ Title 5 specifies that the pay rate of each senior executive is based on the executive’s individual performance or contribution to agency performance (or both), as measured under a “rigorous” performance appraisal system.⁷⁵ Each federal agency must maintain at least one of these appraisal systems,

⁶⁵ See *id.* § 3393. According to OPM, almost 93 percent of SES employees are career appointees. U.S. OFF. OF PERSONNEL MGMT., SENIOR EXECUTIVE SERVICE REPORT at 3 (Apr. 2018), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2017.pdf>.

⁶⁶ See 5 U.S.C. § 3393(b).

⁶⁷ See *id.* § 3393(c); 5 C.F.R. § 317.502(a).

⁶⁸ 5 U.S.C. § 3394(a).

⁶⁹ *Id.* § 3394(b).

⁷⁰ See *id.* § 3132(a)(5)-(6). In FY 2017, OPM reported that limited term appointments consisted of about one percent of all SES positions (about 80 SES members). See OPM Senior Executive Service Report, *supra* note 64.

⁷¹ See 5 U.S.C. § 3132(a)(5)-(6). Limited term appointments may not exceed a period of 3 years, and limited emergency appointments may not exceed 18 months. See also U.S. OFF. OF PERSONNEL MGMT., GUIDE TO THE SENIOR EXECUTIVE SERVICE at 3 (Mar. 2017), <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf>.

⁷² 5 U.S.C. § 3394(b).

⁷³ Limitations on the number of noncareer, limited term, and limited emergency appointments apply both agency and government-wide. For example, in general, a maximum of 10 percent of all SES positions in all agencies may be filled with noncareer appointees, subject to adjustment by OPM for unanticipated needs. See *id.* § 3134(b)-(c). Within a particular agency, the total number of SES positions generally cannot exceed 25 percent of all SES employed in that agency. *Id.* § 3134(d). The total number of limited emergency appointees and limited term appointees in all agencies may not exceed 5 percent of the total number of SES positions in the federal government. *Id.* § 3134(e). In addition, no more than 30 percent of total SES positions may at any time be filled by individuals who did not have 5 years of current continuous service in the civil service immediately preceding their initial appointment to the SES, unless the President certifies to Congress that the limitation would hinder government efficiency. *Id.* § 3392(b).

⁷⁴ For a discussion of the evolution of the SES pay structure, see CRS Report R41801, *The Senior Executive Service: Background and Options for Reform*, by Maeve P. Carey.

⁷⁵ See 5 U.S.C. § 5382(a).

subject to OPM standards, review, and approval.⁷⁶ Performance appraisals of SES members may consider factors such as improvements in efficiency, productivity, and quality of work or service, cost efficiency, and performance timeliness.⁷⁷ In response to earlier concerns that SES appraisal systems were flawed because most executives received the highest rating, Title 5 tasks OPM, in collaboration with the Office of Management and Budget, with the establishment and maintenance of a government-wide performance appraisal system certification process, in an effort to ensure that an agency's appraisal systems for SES employees make "meaningful distinctions based on relative performance."⁷⁸

Title 5 also sets out different pay rates for the SES, with a minimum rate of basic pay equal to 120 percent of the rate for GS-15, step 1, and a maximum rate of basic pay equal to the rate for Level III of the Executive Schedule.⁷⁹ But SES members' annual aggregate pay (that includes additional compensation such as bonuses, awards,⁸⁰ and other payments in addition to basic pay) is capped at the rate for Level I of the Executive Schedule.⁸¹ If a senior executive's total compensation exceeds the aggregate limitation, the executive receives the overage in the following calendar year.⁸² To encourage federal agencies to establish and maintain an OPM-certified performance appraisal system, Title 5 allows for a higher range of SES pay for agencies that have these certified systems.⁸³

⁷⁶ *See id.* § 4312(a)-(c).

⁷⁷ *Id.* § 4313.

⁷⁸ *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2297-98, § 1322 (2002), codified at 5 U.S.C. § 5307(d); 5 C.F.R. §§ 430.401-5 C.F.R. § 430.405. *See also* U.S. OFF. OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOV'T, FY 2004 at 38 (Feb. 3, 2003), <https://www.govinfo.gov/content/pkg/BUDGET-2004-BUD/pdf/BUDGET-2004-BUD.pdf> ("Consider the Office of Personnel Management (OPM) Director Kay James' effort to make senior government executives more accountable. She learned that in 2000, federal agencies gave 85 percent of their senior executives the highest possible performance rating—an assertion that virtually everyone in Washington is way above average. Despite James' urging agencies to begin distinguishing the best performers from others, almost nothing changed.").

⁷⁹ *See* 5 U.S.C. § 5382(a); 5 C.F.R. § 534.403. The Executive Schedule is a five-level pay schedule that applies to positions outside the SES. *See* 5 U.S.C. § 5311. And unlike other federal employees, the SES does not receive locality pay. *Id.* § 5304(h).

⁸⁰ *See id.* § 5384 (addressing criteria and caps for performance awards in the SES).

⁸¹ *Id.* § 5307(a). Level I of the Executive Schedule applies to many of the heads of executive branch agencies, including Cabinet departments, the Director of the Office of Management and Budget, and the Commissioner of Social Security. *See id.* § 5312.

⁸² *See id.* § 5307(b).

⁸³ For any agency certified as having a performance appraisal system that, as designed and applied, makes meaningful distinctions based on relative performance, the maximum rate of basic pay is capped at the rate for Level II of the Executive Schedule. *See id.* § 5313. Agencies with certified SES performance appraisal systems can apply a higher aggregate limitation on pay—up to the Vice President's salary. *See id.* 5307(d). OPM also has made recent changes to the performance appraisal certification process. *See* Memorandum from Margaret M. Weichert, Acting Director, U.S. Off. of Personnel Mgmt. (Nov. 14, 2018), <https://chcoc.gov/content/senior-executive-service-ses-and-senior-level-sl-and-scientific-and-professional-st-1>.

Adverse Action Protections and Procedures

Title 5 also articulates conditions and procedures for removing, suspending, or taking other adverse actions against a member of the SES. Career SES appointees who have successfully completed a one-year probationary period may be removed or subject to adverse action only for specified reasons.⁸⁴ For example, an SES career appointee may be removed from the civil service or suspended for more than 14 days only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.⁸⁵ SES members must receive advance written notice about the action and opportunity to provide an answer or receive hearing, subject to exception.⁸⁶ The senior executive may also appeal the employment action to the MSPB.⁸⁷

A career appointee receiving a single unsatisfactory performance rating may be reassigned or transferred within the SES or removed from the SES.⁸⁸ A career SES member who receives two unsatisfactory ratings in any period of five consecutive years, or twice in any period of three consecutive years receives less than fully successful ratings, must be removed from the SES.⁸⁹ Affected SES career appointees must receive advance written notice of these actions. While these appointees may not appeal these actions to the MSPB, they may request an informal hearing before the Board.⁹⁰ SES career appointees are also generally entitled to be placed in a civil service position at GS-15 or above (or an equivalent position).⁹¹

In comparison, noncareer, limited term, and limited emergency appointees are generally not subject to the same removal protections and may be removed from the SES at any time.⁹² The procedures for removal of noncareer and limited term appointees are largely not addressed in federal statute, and the terms and procedures for their removal are mainly at the discretion of the agency head.⁹³

⁸⁴ An individual's initial appointment as an SES career appointee becomes final following a one-year probationary period. *See* 5 U.S.C. § 3393(d). The requirements regarding removal and adverse actions against probationers are less extensive than for those who have completed the probationary period. *See, e.g., id.* § 3592(a) (governing removal during probationary year). However, career appointees appointed from a civil service position held under a career or career-conditional appointment who are removed from the SES during the probationary period are entitled to be placed in a GS-15 position in any agency, subject to specified conditions and exceptions. *See id.* § 3594(a)-(c).

⁸⁵ *Id.* § 7543(a).

⁸⁶ *Id.* § 7543(b)-(c).

⁸⁷ *Id.* § 7543(d). 5 C.F.R. §§ 752.601-606. *See also generally* notes 31-33 and accompanying text.

⁸⁸ 5 U.S.C. § 4314(b)(3).

⁸⁹ *Id.* § 4314(b)(4).

⁹⁰ *Id.* § 3592(a)(2).

⁹¹ *See id.* § 3594(b). There are other circumstances under which a senior executive may be subject to removal or other adverse action. *See, e.g., id.* § 7532 (suspension and removal for national security reasons); *id.* § 3595 (removal in cases of reductions in force). Additionally, the Office of Special Counsel is an independent federal agency that protects employees, former employees, and applicants for employment from prohibited personnel practices. *Id.* § 1212(a). If the Office determines that disciplinary action should be taken against a senior executive or other federal employee for committing prohibited personnel practices or other violations, the Special Counsel may present a complaint to the MSPB and seek removal or other penalties. *See id.* § 1215.

⁹² *Id.* § 3592(c).

⁹³ Certain limited term and limited emergency appointees who held a career appointment or other similar appointment just before the limited appointment receive some of the same removal protections as career appointees. *See, e.g., id.* § 752.601(c)(2).

In response to concerns about performance and accountability of SES members employed by the Department of Veterans Affairs (VA), Congress recently created special removal requirements that apply to these positions.⁹⁴ In 2017, Congress passed the Department of Veterans Affairs Accountability and Whistleblower Protection Act, which amended an existing provision concerning removal procedures for these covered senior executives.⁹⁵ Under the 2017 Act, the VA Secretary has discretion to suspend, demote, remove, or take other actions against SES career appointees or other high-level executives if the Secretary determines that the individual's misconduct or performance warrants such action.⁹⁶ To address SES job performance issues more expeditiously, SES employees at the VA Department are entitled to abbreviated notice and appeals rights, as compared to the removal procedures in place in other federal agencies.⁹⁷

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⁹⁴ See generally *Fact Check: An End of Year Review of Accountability at the Department of Veterans Affairs*, Hearing Before the House Comm. on Veterans' Affairs, 114th Cong. (Dec. 9, 2015).

⁹⁵ Dep't of Veterans Aff. Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat 868-69 § 201 (2017), codified at 38 U.S.C. § 713. The Act amended a provision in the Veterans' Access, Choice, and Accountability Act of 2014, which made it easier to take an adverse employment action against an SES member at the VA Department. Pub. L. No. 113-146, § 707, 128 Stat. 1754, 1798 (2014), codified at 38 U.S.C. § 713 (2014). Among other things, the provision permitted an MSPB administrative judge, an employee of the Board, to render a final decision regarding a VA SES personnel action that not be appealed to the full Board. *Id.* In *Helman v. Department of Veterans Affairs*, the Federal Circuit held that this grant contravened the Appointments Clause of the Constitution, as it "vest[ed] in an administrative judge . . . final and unreviewable discretion to affirm or overturn the decision of a cabinet-level official . . . a 'significant' duty that can only be performed by officers of the United States." *Helman v. Dep't of Veterans Aff.*, 856 F.3d 920, 929 (Fed. Cir. 2017). The 2017 Act amended this provision and currently allows a career senior executive who is disciplined by the Secretary of VA to grieve a penalty under a grievance process within the Department of Veterans Affairs rather than appeal to the MSPB. A decision from this internal grievance process may be subject to judicial review. See 38 U.S.C. 713(b)(5).

⁹⁶ *Id.* § 713(a)(1).

⁹⁷ *Id.* § 713(b).