



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 302, 332, and 337

[Docket ID: OPM-2023-0015]

RIN: 3206-AN80

Reinvigorating Merit-Based Hiring Through Candidate Ranking in the Competitive and Excepted Service (Rule of Many)

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing this final rule to implement changes authorized by the National Defense Authorization Act (NDAA) for Fiscal Year 2019 governing the selection of candidates from competitive lists of eligibles. These changes are meant to encourage the use of rigorous, merit-based candidate rankings when hiring in the competitive and excepted service. They also provide expanded flexibility to agencies in the selection of candidates under delegated examining procedures. These changes also affect how agencies select candidates for excepted service appointments.

DATES: This rule will be effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Agencies must be in full compliance with this final rule not later than [INSERT DATE 180 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mike Gilmore by telephone at (202) 936-3261 or Katika Floyd by telephone at (202) 606-0960; by e-mail at employ@opm.gov; by fax at (202) 606-4430; or by TTY at (202) 418-3134.

SUPPLEMENTARY INFORMATION: The National Defense Authorization Act for Fiscal Year 2019 (the “Act”) authorized changes governing the selection of candidates from delegated examining certificates. Sec. 1107, Pub. L. 115-232, 132 Stat. 2002. It eliminated the “rule of

three” and authorized agencies to certify a “sufficient number” of names, not less than three, from the top of the appropriate register or list of eligible candidates, to be considered for selection, using a cut-off score or other mechanism established by OPM known as the “rule of many.” The Act also affected how agencies may make selections under 5 CFR Part 302, Employment in the Excepted Service.

On July 21, 2023, OPM issued a proposed rule at 88 FR 47059 to implement these provisions. First, OPM proposed to revise 5 CFR 332.404 to reflect the rule of many that the Act codified in 5 U.S.C. 3317(a). Instead of being required to select from among the top three candidates for each vacancy on a numerically ranked list, an official may select any eligible candidate on the certificate of eligibles.

The Act also codified at 5 U.S.C. 3318(e) the long-standing practice of applying the “three considerations rule.” Under numerical rating and ranking selection procedures, the three considerations rule found in 5 CFR 332.405 allows an appointing officer to remove a candidate from further consideration if they have considered that candidate three times for three separate appointments from the same or different certificates for the same position and makes a valid (legal) selection of another candidate each time. OPM proposed that, when making multiple selections from a certificate under the rule of many, starting with the fourth selection, the three considerations rule would allow one individual to be removed per selection.

Under the Act, these provisions also apply to the excepted service. Accordingly, OPM proposed conforming edits to 5 CFR part 302.

The 60-day comment period for the proposed rule lasted from July 21, 2023, to September 19, 2023. During that time, OPM received a total of 15 sets of comments from individuals, federal agencies, and organizations. In the first section below, we discuss comments that address topics related to the rule as a whole. In the sections that follow, we address comments related to specific aspects of this final rule.

General comments

Two organizations and an agency expressed general support for the proposed rule of many regulations. (OPM 2023-0015-0004, OPM-2023-0015-0010, and OPM-2023-0015-0012) OPM thanks them for their support. An individual expressed frustration that a lack of resources prevents agencies from providing meaningful comment on the rule but noted that the current hiring process is so cumbersome as to “not be[] worth the effort.” (OPM-2023-0015-0002) OPM will not address this comment because it is beyond the scope of the rulemaking.

An organization proposed the establishment of an Office of the Ombudsman with authority to investigate individual candidates' complaints against maladministration. It felt that this office could also provide a more transparent look into federal hiring decisions. (OPM-2023-0015-0015) OPM does not believe it is necessary to require agencies to establish an Office of the Ombudsman to investigate individual candidate complaints with respect to the application of the rule of many or the three considerations rule. OPM notes the three considerations rule applied to the rule of three process for decades and did not require an Office of the Ombudsman. Further, removal of a candidate from consideration under the three considerations rule must be documented and added to the examining case file, which must be audited by the Delegated Examining Unit in accordance with the agency’s Delegated Examining Agreement and the Delegated Examining Operations Handbook ¹. (DEOH). A candidate may ask a hiring agency about the status and disposition of the application submitted and the non-selection. Lastly, because this provision is discretionary on the part of hiring agencies, a requirement to establish an Office of the Ombudsman may be overly burdensome and discourage use of this flexibility.

An organization commented that OPM should use this rulemaking as an opportunity to promote skills-based hiring, assessments, and efficient processes. The organization added that the federal government will reap the most benefit from the rule of many when agencies have access to and use high-quality technical assessments to differentiate the best-qualified candidates

¹ Delegated Examining Operations Handbook, available at https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo_handbook.pdf.

and match them effectively to the core skills needed for open positions. The same organization also recommended OPM use this opportunity to remind agencies to tailor minimum qualifications based on position needs determined via a thorough job analysis and more strongly signal that regardless of the rating procedure used, agencies should focus on expanding adoption of technical assessments. (OPM-2023-0015-0004) Although these recommendations, which focus on the planning process, are beyond the scope of this rulemaking, which addresses the selection process, we acknowledge the sentiment and refer the commenter to Executive Order 14170, Reforming the Federal Hiring Process and Restoring Merit to Government Service (90 FR 8621); and the Merit Hiring Plan²; which require the use of skills-based assessments.

Comments regarding the rule of many

The “rule of many” is a numerical rating process in which applicants are assigned numerical scores (including veterans’ preference points, if applicable, for preference eligible veterans), listed in rank-order, and considered for selection. OPM proposed that an agency must use one of four methods to determine the number of applicants referred for selection. OPM also proposed a number of factors that agencies should consider in determining which method to use. The first method is to use a cut-off score based on the assessment(s) used and supported by job analysis data. For this method, test measurement experts knowledgeable about the assessment(s) used establish a minimum score to identify qualified applicants that are highly qualified and can be successful in the position. The second method is to use a cut-off score based on business necessity. The third method is to establish a set number of eligible applicants to refer from the top of the ranked list of applicants. The fourth method is to establish a percentage of the eligible applicants to refer from the top of the ranked list of applicants. OPM also proposed that an agency must use one of these methods to establish the number of applicants it will refer prior to announcing the vacancy and must document the mechanism used to allow for later review. OPM received comments and questions about several aspects of the rule of many.

² The Merit Hiring Plan is available at <https://www.chcoc.gov/content/merit-hiring-plan>.

One individual asked how the rule of many is different from category rating. (OPM-2023-0015-0003) Category rating differs in that applicants are not given a numerical score; instead, the agency assesses candidates against job-related criteria and then places them into two or more pre-defined categories. With category rating, veterans' preference is applied by listing preference eligibles ahead of non-preference eligible applicants in each category. Selections are made from the highest quality category. For both rule of many certificates and category rating certificates, 10 percent or more disabled veterans are placed at the top of the certificate (i.e., ahead of all other applicants under rule of many and in the highest quality category ahead of other applicants for category rating certificates), except for scientific and professional positions at the GS-9 grade level or above.

An agency asked if agencies would have the choice of using the category rating process or the rule of many (OPM-2023-0015-0007). Under this final rule, agencies have the choice to use either category rating or the rule of many. In choosing which process to use, an agency should consider, among other things, the extent to which it needs to make finer distinctions among applicants based on their relative qualifications for the position being filled, the number of people being hired, the number of applicants the agency expects to apply for the position, etc.

An individual observed that Executive Order (E.O.) 13932 requires assessments that rely on more than a candidate's self-evaluations. The commenter asked OPM to clarify how this rule requires more than self-assessment questionnaires and HR résumé reviews to determine granular rankings. (OPM-2023-0015-0005) E.O. 13932, E.O. 14710, and the Merit Hiring Plan require that agencies improve the use of assessments when hiring by not relying solely on candidates' self-evaluations of their abilities. Instead, they must use objective assessment hurdles when considering candidates. Agencies must ensure that the assessment strategies and tools used when filling positions meet the requirements of E.O. 13932. OPM notes that agencies have been using a variety of assessments to comply with E.O. 13932 for years, and the assessments that are currently used by agencies may still be used under the rule of many. In addition, more recent

directives—specifically the Chance to Compete Act of 2024 (Pub. L. 118-188, enacted in 2024), E.O. 14710, and the Merit Hiring Plan—require greater usage of skills-based assessments and for agencies to transition away from use of self-assessments. As described previously, the rule of many provides four mechanisms (*see* §§ 302.401(a)(i)-(iv) and 332.402(b)(1)-(4)) that can be used in conjunction with assessments.

An individual noted that, as proposed, test measurement experts are needed to put together a job analysis containing a cut score that results in two categories. The commenter thought that HR professionals and subject matter experts should be utilized more to create cut scores for other assessments such as interviews and pass/fail tests. (OPM-2023-0015-0005) The commenter misunderstands the term job analysis. A job analysis is not a candidate assessment; rather, it is a process used to determine the knowledge, skills, and abilities that are needed to perform the tasks of a job and demonstrates a clear relationship between the two. Once the necessary knowledge, skills, and abilities have been identified, the type of assessment (e.g., interview or a pass/fail test) can then be developed to determine whether applicants do indeed possess them.

An organization thought that using an occupational questionnaire to determine an applicant's placement in a quality category on a category rating certificate results in job applicants being placed in inappropriate categories due to either a candidate's under- or over-estimation of his or her abilities. The organization proposed that OPM revise the category rating process to allow hiring managers to establish a cut-off, or minimum, score for the questionnaire assessment because it would broaden the list of viewable applications and better support hiring managers in selecting the best candidate. (OPM-2023-0015-0015) OPM is not adopting this suggestion. Occupational questionnaires may be used in the initial application process by an agency to determine whether an applicant is minimally qualified for a position. This does not require the use of a cut-off score. A cut-off score is used in connection with other assessment tools to establish quality categories into which candidates who have met the minimum

qualification requirements can be placed. Even if cut-off scores could be used in the manner suggested by the commenter, OPM notes that this approach would neither correct an applicant's mistaken perceptions about the federal hiring process nor prevent applicants from embellishing or falsifying their abilities.

An agency asked about what impact the rule of many would have on (1) the referral and consideration process for bargaining unit employees; and (2) its internal delegated examining certificate sharing policy. (OPM-2023-0015-0011) Agencies will have the discretion to determine the number of eligibles referred for selections made under competitive examination procedures. The rule does not treat bargaining unit employees who apply for positions under these procedures any differently than non-bargaining unit employees or any other applicant. However, there may be provisions in a collective bargaining agreement that provide specific procedures or arrangements agencies must follow when utilizing the competitive examination procedures under Part 332. Given the number of bargaining units in the federal government, OPM cannot assess specific impacts to bargaining unit employees. Agencies should contact their servicing labor relations specialist and office of general counsel for assistance. The internal delegated examining certificate sharing policy will remain the same under the new rule based on agency-established protocols.

An organization noted that, in the discussion of category rating in the Supplementary Information portion of the proposed rule, OPM did not mention the 2010 Presidential Memorandum entitled "Improving the Federal Recruitment and Hiring Process", which requires category rating be used in lieu of the rule of three when filling a job in the competitive service. (OPM-2023-0015-0004). Similarly, an organization stated that OPM should address how the rule of many would interact with the memo. It felt that, if multiple rating procedures are available, OPM should provide scenario descriptions and examples to agencies regarding ideal use cases for the rule of many or other rating procedures to ensure clarity on best practices. (OPM-2023-0015-0004) The National Defense Authorization Act of 2019 eliminated the rule of

three, mooted the requirement to use category rating in lieu of the rule of three. OPM appreciates the suggestion regarding the provision of examples and scenarios that would show agencies the ideal use of various rating procedures. As OPM explained in the proposed rule, numerical ranking is appropriate when a hiring agency needs to make granular distinctions between applicants; *i.e.*, an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than an applicant with a score of 96 or lower. Category rating is appropriate when the hiring agency does not need to make such fine distinctions among applicants as is made using numerical ranking procedures (*i.e.*, all applicants placed in a particular category are deemed equally qualified). Category rating gives selecting officials potentially more applicants to choose from because all applicants in a given category are equally qualified: hiring officials are not limited to selecting from only the three highest rated applicants.

Several commenters questioned what is considered to be a “sufficient number” of names to certify. (OPM-2023-0015-0014, OPM-2023-0015-0004) In particular, an organization felt that OPM’s sample direction to agencies to consider setting a limit to the number of candidates placed on a hiring certificate such as the top 10 people or 10% was unnecessarily limiting and that agencies should set a larger limit to maximize the number of positions that could be filled from a single certificate. (OPM-2023-0015-0004) The Act authorizes agencies to certify a “sufficient number” of names, not less than three, from the top of the appropriate register or list of eligible candidates, to be considered for selection, using a cut-off score or other mechanism established by OPM. The reference to “10” as in the “top 10 people or 10%” was one example of a “sufficient number” for what an agency may do and was not intended to limit the number an agency determines is sufficient. Agencies may use one of the following ways for determining the number of applicants referred for selection: (1) cut-off scores based upon the assessment(s) used, supported by job analysis data; (2) a cut-off score based on business necessity; (3) a set number of the highest ranked applicants; or (4) a percentage of the highest ranked applicants. Therefore, a sufficient number of names certified is the number of candidates under the chosen

methodology that allows an agency to consider *at least* three candidates for each vacancy. One commenter's examples of factors to consider (i.e., the position type and level, availability of qualified candidates, and balance with efficiency) when setting the number of applicants referred under either the third or the fourth method are a good starting point. (*See* OPM-2023-0015-0014.)

An agency stated that the proposed rule's continued requirement that veterans receive preference over all other candidates is fundamentally antithetical to a fair and equitable hiring process. It suggested language be added to the proposed rule that could help refocus veterans' preference from an automatic advantage to one factor in a holistic assessment that gives due consideration to veterans without disadvantaging other qualified candidates. (OPM-2023-0015-0008) Congress has codified veterans' preference in Title 5, United States Code. OPM's implementation of veterans' preference in this rule is consistent with those statutes. OPM notes, however, that the commenter's characterization of veterans' preference is not accurate. Only qualified preference eligibles with a compensable service-connected disability of at least 10-percent are moved to the top of a certificate irrespective of rating or other qualifications. Veterans' preference does not give all veterans preference over all other candidates.

An organization suggested that the proposed rule be modified to include a separation of functions in the selection process. They suggested that the persons in the selection process who have discretion to set the number of applicants interviewed should be restricted from knowing the identity or demographics of the applicant pool for the position at the time they exercise that discretion; and the persons who are scoring applicants for consideration for interview should be restricted from knowing how many applicants will be interviewed for the position at the time that the applications are being scored. Further, they suggested that this could be achieved either by requiring the number of applicants interviewed to be established prior to the close of the vacancy announcement or by shielding the decision-maker who sets the number of interviews from information regarding the identity or assortment of applicants for the position. In the

commenter's view, this would help eliminate rigging of the selection process, promote efficiency in the hiring process, and lessen litigation over abuse of the wide discretion that is given by the proposed rule. (OPM-2023-0015-0006)

Under the proposed rule, the hiring agency is required to determine the number of applicants referred for selection before announcing the vacancy and must identify the methodology (i.e., a cut-off score, set number, or percentage of highest ranked eligible applicants) in the job opportunity announcement. OPM does not believe that requiring additional process for every hiring action is an appropriate method to address intentional violations of the Merit System Principles and other federal requirements. Accordingly, OPM is not making any changes to this proposed mechanism in the final rule. OPM's Merit System Accountability and Compliance (MSAC) office conducts audits of federal agencies to whom OPM has granted delegated examining authority. The purpose of these audits is to ensure that the agencies are not violating federal laws and regulations; and, if any violations are found, they are rectified.

An individual, referring to veterans' preference for certain disabled veterans, asked why OPM is applying category rating floating principles to the rule of many numerical ranking procedure (OPM-2023-0015-0005). OPM is not applying category rating floating principles to the rule of many. (It is also important to note that the floating principles does not apply when filling professional and scientific positions at the GS-9 level or higher.) When a numerical ranking procedure is used disabled veterans who have a compensable service-connected disability of 10 percent or more are to be listed first on the list of eligibles. On the other hand, when category rating is used, qualified preference eligibles who have a compensable service-connected disability of 10 percent or more are to be listed in the highest quality category and within each quality category, preference eligibles are to be listed ahead of non-preference eligibles. Both methods use the same floating principles, just in different contexts and pursuant to different statutory directives. See 5 U.S.C. 3313(1) and 5 U.S.C. 3319(b).

An agency asked for an example of what constitutes a business need. (OPM-2023-0015-0014) A business need is something that an agency must have in order to fulfill its mission. For example, a cut-off score based on a business necessity may be a score set to keep the processing of the expected number of applicants manageable when the agency is using costly or labor-intensive assessments such as a structured interview. The cut-off score in this example accounts for resource limitations the agency/Delegated Examining Unit (DEU) may have at the time the position is being filled.

The agency also noted that the procedures that must be followed under the rule of three are discussed in an appendix of the DEOH. It asked if the appendix would be updated to reflect the rule of many or if a section on the rule of many would be added to the body of the DEOH (OPM-2023-0015-0014). OPM is updating the DEOH to reflect this final rule.

The same agency asked which level within an agency is responsible for determining which rating procedure to use. OPM defers to agency Chief Human Capital Officers to determine at what level within the agency to authorize decisions regarding which selection procedure to use for a given hiring action.

Comments regarding the three considerations rule

The Act codifies at 5 U.S.C. 3318(e) the long-standing practice under 5 CFR 332.405 of applying the three considerations rule under numerical rating and ranking selection procedures, whereby, if an appointing officer considers a candidate three times for three separate appointments from the same or different certificates for the same position (i.e., the same title, series, and grade) and makes a valid (legal) selection of another candidate each time, the appointing officer may remove that candidate from further consideration. OPM proposed that, to constitute a bona fide consideration allowing removal of a candidate from further consideration, a hiring manager would have to interview each candidate considered. OPM also proposed that only one candidate could be removed at a time for each selection starting with the fourth selection under the three considerations rule.

An agency asked for clarification on when the three considerations rule would apply in situations such as when using category rating, a standing register (open continuous) announcement, or case examining. (OPM-2023-0015-0007) The three considerations rule applies to the rule of many, not to category rating. The Act did not apply this provision to category rating. When using the rule of many, agencies may use the three considerations rule for either standing register (i.e., open continuous) announcements or case examining.

OPM received four comments specifically about the interview requirement. An organization thought that it is unclear what is driving the need to add the interview requirement to the three considerations rule. It expressed the view that this requirement is overly burdensome when agencies are filling multiple positions at the same time from one certificate. (OPM-2023-0015-0004) Two individuals also questioned the need to require an interview, expressing concern that the requirement reduced agency flexibility. (OPM-2023-0015-0009; OPM-2023-0015-0016) Another individual asked OPM to state whether the requirement for hiring managers to conduct additional interviews after a certificate has been generated before applying the three considerations rule was required under the rule of three. They noted that the cost section of the rule does not add extra time for hiring managers to conduct additional post-certificate-generation interviews before the three considerations rule can be applied. (OPM-2023-0015-0005)

After reviewing the comments, OPM has reconsidered the need for agencies to interview candidates before invoking the three considerations rule. OPM is removing from the final rule the proposed requirement to interview candidates before removing individuals from consideration under the three considerations rule. The agency may remove one or several applicants with each selection up to the total number of selections to be made. OPM is modifying § 332.405(c) accordingly. OPM notes that under both the rule of three and the rule of many, any interview would occur after the certificate has been generated and referred to the hiring manager.

An agency requested that OPM clarify when formal pass over procedures must be followed when using the three considerations rule. (OPM-2023-0015-0014). The provisions for passing over a preference eligible veteran and the provisions for removing a candidate from further consideration under the three considerations rule are separate provisions. Pass overs are established in statute at 5 U.S.C. 3312 and 3318, and those procedures only apply to preference eligible veterans. The three considerations rule is specified at 5 U.S.C. 3318(e) and applies to any applicant (including a preference eligible veteran). Pass over procedures are required if an agency wants to “pass over” the preference eligible veteran in favor of a lower ranked non-veteran. A hiring agency may invoke pass over procedures if the agency determines the preference eligible veteran lacks the qualifications to successfully perform the duties of the position being filled. The three considerations rule can be invoked beginning with the fourth selection from a certificate of eligibles to remove any applicant from further consideration for whom the hiring manager can document a lack of a specific skill(s) or attribute(s) needed to perform the position being filled. In other words, an agency should use pass over procedures to remove a preference eligible veteran who does not meet the full qualifications for the position (i.e., should not have been certified as eligible). In contrast, an agency may remove a preference eligible veteran – or any other candidate – after having given that candidate bona fide consideration for three separate appointments for the same position and making a different, valid selection in each instance. Pass over procedures are not required for a preference eligible veteran who has been removed from further consideration under the three considerations rule because the agency is not “passing over” the preference eligible veteran; the veteran has already been removed from further consideration and is no longer eligible for selection.

A commenter noted the proposed rule states that, after three considerations, the preference eligible is removed from consideration. The commenter thought that there should be a way under the three considerations rule to leave all preference eligible applicants on the hiring certificate and not have veterans’ preference apply to them after they have been considered three

times. In their view, this would eliminate the advantage that non-preference eligibles have that allows them to remain on the hiring certificate after having been considered three times. (OPM-2023-0015-0005) OPM lacks authority to waive veterans' preference after three considerations as described by the commenter. Veterans' preference rules require application of the statutory preference to each veteran on the hiring certificate unless and until the veteran is removed from further consideration through either pass over procedures or application of the three considerations rule.

An individual stated that OPM is discouraging agencies from using the three considerations rule by proposing that pass over procedures should be used when warranted and that the three considerations rule should be used when a pass over is not justified. (OPM-2023-0015-0005) OPM has made a number of changes to the three considerations rule in this final rule to address the concerns raised by the commenter, including allowing removal from consideration of more than one candidate at a time. Nonetheless, there are circumstances when a pass over is required, and there is a time when the three considerations rule can be utilized. Each hiring certificate is unique; the manner in which it is worked determines whether a pass over is required or the three considerations rule can be applied. As a reminder, the three considerations rule may be used to remove any eligible from consideration, and a pass over is required only when a hiring manager wishes to select a non-preference eligible instead of a preference eligible listed higher on the certificate.

An agency asked how an applicant's three bona fide considerations would be tracked. (OPM-2023-0015-0011) Three considerations tracking will remain the same under the new rule based on agency-established protocols.

An individual suggested three ways that OPM could improve the three considerations rule. (OPM-2023-0015-0009) The first suggestion was allowing certificates which resulted in no selections to be included under the three considerations rule. OPM's long-standing practice under 5 CFR 332.405 as described in the DEOH has provided a necessary safeguard to ensure

that any eligible candidate (including a preference eligible) who has been deemed to be within reach on a certificate of eligibles by the hiring agency is not subject to capricious or otherwise baseless removal by hiring managers. However, in this final rule, we have redefined bona fide consideration in the final rule for purposes of 5 CFR 332.405 to require documentation to demonstrate that the candidate's application was reviewed, and the candidate received three considerations. Accordingly, OPM agrees that, in some cases, certificates that do not result in a selection can be included under the three considerations rule. OPM will revise the DEOH to provide more specific guidance regarding certificates that result from a centralized registers versus those that result from a single-recruitment action.

The second suggestion was that OPM should provide guidance about how to use the three considerations rule for different certificates for the same position (i.e., the same title, series, and grade). The commenter specifically requested guidance regarding how a certificate preparer should account for past considerations on certificates for the same position. (OPM-2023-0015-0009) OPM will address specific examples of using the three considerations rule in our supplemental guidance. The three considerations rule (§ 332.405) accommodates situations in which prior bona fide considerations may have been given by one or more hiring managers from the same or a different certificate. When more than one hiring manager is involved, a hiring manager must provide documentation showing that the candidate's application has been reviewed and considered at least three times. That documentation may include information, support, or rationale from another hiring manager. The third suggestion was that OPM should allow three times considered candidates to be indicated as optional rather than removed from the certificate, marked appropriately, and not counted when calculating the set number or top percentage of candidates to include on the certificate. (OPM-2023-0015-0009) OPM is not adopting this suggestion. The three considerations rule provides for removal of applicants from further consideration under certain conditions (see 5 CFR 332.405). As noted previously, three times

considered candidates will still be listed on a certificate. A hiring official who wishes to consider one of these candidates should not invoke the three considerations rule removal option.

Two individuals expressed the view that OPM should not make the three considerations rule more restrictive by allowing only one removal per selection. (OPM-2023-0015-0009; OPM-2023-0015-0016) OPM agrees that permitting only one applicant to be removed from further consideration at a time under the three considerations rule is not required by the statutory text. OPM has modified the final provision pertaining to the three considerations rule in § 332.405 to provide agencies with greater flexibility for removing applicants beginning with the fourth selection from the certificate. OPM is providing agencies with flexibility to remove more than one candidate at a time so long as the number removed does not exceed the number of selections remaining. For example, an agency that is making 10 selections from a certificate of 30 eligibles may use the three considerations rule to remove up to a total of 7 eligibles from the certificate. Consistent with the longstanding three considerations rule, agencies may apply the procedures of § 332.405 without use of pass over procedures. Agencies should continue to pursue pass over procedures when warranted and consider using the three considerations provisions when agencies are filling multiple positions and, although considered, the eligibles do not possess the desired skills or attributes needed for the positions being filled.

Comments regarding shared certificates

An individual thought that it should be made clear in the rule that the agency creating the rule of many certificate should be allowed to consider all positions being filled by the job opening, even if some of the positions, in the case of a shared certificate, are being filled by other agencies. The commenter gave the example of a host agency that expects 15 vacancies to be filled off a single announcement shared by 10 agencies. The agency should be able to request up to 40 applicants on their rule of many certificates, and not only 10 applicants even if their own agency is only hiring 3 candidates. The commenter noted that the rule states these certificates may be shared with other agencies under the Competitive Service Act already but should be clear

that the number of participating agency vacancies can be a factor in determining the number of candidates to be listed on the rule of many certificate (OPM-2023-0015-0005).

The commenter misinterprets how the rule of many and the Competitive Service Act are used together. Before issuing a job opportunity announcement, the hiring agency must choose the methodology it will use to certify a sufficient number of candidates to allow it to consider at least three candidates for each vacancy. It is required to identify that methodology in the job opportunity announcement. If it plans to share the certificate of eligibles with other agencies, the Competitive Service Act requires it to indicate this in the announcement. OPM strongly encourages agencies to share certificates to the extent possible. Doing so can help reduce an agency's time-to-hire in accordance with section 2(b)(iv) of E.O. 14170 and the Merit Hiring Plan. At the time the announcement is made, the agency likely will not have information available about the number of selections that may be made after the certificate is sent to other agencies. Once the hiring agency has issued a certificate of eligibles, it can share the certificate with the other agencies. Each agency works the certificate separately from one another. The hiring agency is free to amend the certificate if it determines it needs to consider more applicants. OPM also notes that receiving agencies may not consider candidates on the shared certificate until the receiving agency has considered the candidates on their own certificates. There is nothing in the regulations that would preclude the agency from using information about how the shared certificate may be used at other agencies when choosing the methodology. However, we note that it is unlikely that the agency will have sufficient information to do so.

An organization asked whether an agency can simultaneously share a rule of many certificate and a supplemental certificate with other agencies when the original certificate does not have a large number of candidates (OPM-2023-0015-0004). An agency can only share the original certificate in its original form so that the original ordering of the certificate can be retained. If the certificate is shared, the supplemental certificate option should not be used by the

original hiring agency to generate additional candidates for the agencies which will share the certificate.

OPM also received comments requesting clarification regarding the operation of the three considerations rule with shared certificates. (OPM-2023-0015-0004; OPM-2023-0015-0005) The three considerations rule does not apply to shared certificates. A shared certificate is shared between agencies, not between multiple hiring managers at one or more agencies. See 5 CFR 332.408 for more information on the shared certificate process. Each agency considers candidates on a shared certificate independently of the actions of any other agency with which the certificate is shared, including the original agency. The first agency will consider candidates and make selections. The certificate is then shared with the next agency after the first agency has completed its audit, including the resolutions of any objections or pass overs to preference eligibles. The receiving agency must first consider its own employees for the position being filled before it may select an individual from a shared certificate. Accordingly, the actions of a hiring manager at one agency (e.g., applying the three considerations rule) will not affect the ability of hiring managers at the other agencies to make a selection from the certificate.

Changes to the Final Rule

Based on the comments we received pertaining to the three considerations rule, OPM is modifying the provisions in § 332.405 as follows.

OPM is modifying the proposed rule in response to comments and suggestions discussed in the previous section. Specifically, OPM is adopting provisions pertaining to the three considerations rule in § 332.405 to provide agencies with greater flexibility for removing applicants beginning with the fourth selection. OPM is offering a method which provides agencies with more flexibility when applying the three considerations rule. This method allows an agency to remove more than one candidate at a time so long as the number removed does not exceed the number of selections remaining. For example, an agency that is making 10 selections

from a certificate of 30 eligibles may use the three considerations rule to remove up to a total of 7 eligibles from the certificate.

Example of using the three considerations rule

If an agency is filling 10 positions and has a certificate with 30 eligible candidates, then beginning with the fourth selection the agency may remove up to 7 individuals (either preference eligibles or non-preference eligibles) who have received bona fide considerations in accordance with § 332.405. The following example goes through the steps an agency may take when applying the three-considerations rule. In this example, the agency issued the following certificate of eligibles based on a cut-score of 95. The agency expects to make 10 selections from this certificate and conducts interviews with all 30 eligibles.

The Veterans Preference Codes used in the following charts are:

CPS – 30 percent or more disabled veteran

CP – at least 10 percent disabled, but less than 30 percent, disabled veteran

XP – other disabled veteran and those with derived preference

TP – 5-point preference

SSP – 0-point sole survivorship preference

NV - non-veteran/non-preference

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected (1)
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected (2)
5.	98.0 TP	Selected (3)
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected (4)
9.	96.0 TP	Declined
10.	96.0 TP	Declined

11.	96.0 TP	Declined
12.	96.0 TP	Selected (5)
13.	96.0 TP	Selected (6)
14.	96.0 NV	Selected (7)
15.	96.0 NV	Selected (8)
16.	96.0 NV	Selected (9)
17.	96.0 NV	Declined
18.	96.0 NV	Removed - 3 considerations (3 of 7)
19.	95.0 TP	Removed - 3 considerations (6 of 7)
20.	95.0 TP	Removed - 3 considerations (7 of 7)
21.	95.0 TP	Removed - 3 considerations (4 of 7)
22.	95.0 TP	Selected (10)
23.	95.0 TP	Removed - 3 considerations (5 of 7)
24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

Any of the veterans' preference eligibles referred on the certificate may be selected. In this example, eligibles 2 and 6 decline the position. In the first three rounds of selections, the agency selects eligibles 1, 4, and 5.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	
8.	97.0 NV	
9.	96.0 TP	
10.	96.0 TP	
11.	96.0 TP	
12.	96.0 TP	
13.	96.0 TP	
14.	96.0 NV	

15.	96.0 NV	
16.	96.0 NV	
17.	96.0 NV	
18.	96.0 NV	
19.	95.0 TP	
20.	95.0 TP	
21.	95.0 TP	
22.	95.0 TP	
23.	95.0 TP	
24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

The agency has now considered all eligibles in each of its earlier selection decisions, that is, three times. The agency has 7 positions remaining to fill; it may remove up to a total of 7 eligibles from the certificate when making the remaining selections. The agency must document that each candidate's application was reviewed. The agency must also document that a candidate received three considerations prior to removal. Eligibles 3 and 7 are removed from consideration, and the hiring manager documents the reason(s) to remove the candidates. At this point, the agency may consider eligible 8 or any of the veterans' preference eligibles remaining. The agency selects eligible 8 for the fourth selection.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected
9.	96.0 TP	
10.	96.0 TP	
11.	96.0 TP	

12.	96.0 TP	
13.	96.0 TP	
14.	96.0 NV	
15.	96.0 NV	
16.	96.0 NV	
17.	96.0 NV	
18.	96.0 NV	
19.	95.0 TP	
20.	95.0 TP	
21.	95.0 TP	
22.	95.0 TP	
23.	95.0 TP	
24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

For the fifth selection, the agency may select any of the veterans' preference candidates.

Candidates 9, 10, and 11 declined selections. The agency selects candidate 12.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected
9.	96.0 TP	Declined
10.	96.0 TP	Declined
11.	96.0 TP	Declined
12.	96.0 TP	Selected
13.	96.0 TP	
14.	96.0 NV	
15.	96.0 NV	
16.	96.0 NV	
17.	96.0 NV	
18.	96.0 NV	
19.	95.0 TP	
20.	95.0 TP	
21.	95.0 TP	

22.	95.0 TP	
23.	95.0 TP	
24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

For the sixth selection, the agency may select any of the veterans' preference eligibles.

The agency selects candidate 13. The agency has determined that candidates 18, 21, and 23 have been considered 3 times and documents the hiring manager's reason(s) to remove the candidates.

Candidates 18, 21, and 23 are removed from consideration.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected
9.	96.0 TP	Declined
10.	96.0 TP	Declined
11.	96.0 TP	Declined
12.	96.0 TP	Selected
13.	96.0 TP	Selected
14.	96.0 NV	
15.	96.0 NV	
16.	96.0 NV	
17.	96.0 NV	
18.	96.0 NV	Removed - 3 considerations (3 of 7)
19.	95.0 TP	
20.	95.0 TP	
21.	95.0 TP	Removed - 3 considerations (4 of 7)
22.	95.0 TP	
23.	95.0 TP	Removed - 3 considerations (5 of 7)
24.	95.0 TP	

25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

For selection seven, the agency may select eligibles 14, 15, 16, 17, or any of the remaining veterans' preference eligibles. Candidate 17 declines selection. The agency selects candidate 14. Candidates 19 and 20 have been considered 3 times, and the hiring manager documents the reason(s) to remove the candidates. Candidates 19 and 20 are removed from consideration. At this point the agency has removed 7 eligibles from the certificate using the three considerations rule. For the remaining three selections the agency may not remove any additional eligibles based on the three considerations rule.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected
9.	96.0 TP	Declined
10.	96.0 TP	Declined
11.	96.0 TP	Declined
12.	96.0 TP	Selected
13.	96.0 TP	Selected
14.	96.0 NV	Selected
15.	96.0 NV	
16.	96.0 NV	
17.	96.0 NV	Declined
18.	96.0 NV	Removed - 3 considerations (3 of 7)
19.	95.0 TP	Removed - 3 considerations (6 of 7)
20.	95.0 TP	Removed - 3 considerations (7 of 7)
21.	95.0 TP	Removed - 3 considerations (4 of 7)

22.	95.0 TP	
23.	95.0 TP	Removed - 3 considerations (5 of 7)
24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

For selections eight, nine, and ten, the agency may select candidates 15 or 16 and any of the remaining veterans' preference eligibles. The agency selects candidates 15, 16, and 22.

Below is the complete certificate of eligibles.

Certificate of Eligibles		
Candidate	Score/VP	Action
1.	98.0 CP	Selected
2.	98.0 CPS	Declined
3.	98.0 TP	Removed - 3 considerations (1 of 7)
4.	98.0 TP	Selected
5.	98.0 TP	Selected
6.	97.0 TP	Declined
7.	97.0 NV	Removed - 3 considerations (2 of 7)
8.	97.0 NV	Selected
9.	96.0 TP	Declined
10.	96.0 TP	Declined
11.	96.0 TP	Declined
12.	96.0 TP	Selected
13.	96.0 TP	Selected
14.	96.0 NV	Selected
15.	96.0 NV	Selected
16.	96.0 NV	Selected
17.	96.0 NV	Declined
18.	96.0 NV	Removed - 3 considerations (3 of 7)
19.	95.0 TP	Removed - 3 considerations (6 of 7)
20.	95.0 TP	Removed - 3 considerations (7 of 7)
21.	95.0 TP	Removed - 3 considerations (4 of 7)
22.	95.0 TP	Selected
23.	95.0 TP	Removed - 3 considerations (5 of 7)

24.	95.0 TP	
25.	95.0 NV	
26.	95.0 NV	
27.	95.0 NV	
28.	95.0 NV	
29.	95.0 NV	
30.	95.0 NV	

The Act also codified a long-standing practice of applying the “three considerations rule” in 5 U.S.C. 3318(e). Under numerical rating and ranking selection procedures, the longstanding practice, found in 5 CFR 332.405, allows an appointing officer to remove a candidate from further consideration if they have considered that candidate three times for three separate appointments from the same or different certificates for the same position and the appointing officer makes a valid (legal) selection of another candidate each time. The rule outlines the requirements for being able to remove candidates from further consideration. Additionally, the rule provides specific requirements for ensuring candidates receive bona fide consideration before being removed from consideration. Current regulations only provide the authority to remove candidates from consideration and do not provide any requirements regarding how an agency should do so. Implementing instructions are currently found only in OPM’s DEOH.

We have redefined bona fide consideration in the final rule for purposes of the three considerations rule to require documentation from the hiring manager to demonstrate that the candidate’s application was reviewed, and the candidate received three considerations in place of the interview requirement. This change reduces the regulatory burden on agencies, while still ensuring candidates receive full and fair consideration.

We have conforming changes to the provisions in Part 302 for hiring in the excepted service.

Finally, OPM is revising the Authority citations for parts 332 and 337 to comply with 1 CFR part 21, subpart B, without substantive change. The Authority citation for part 302 is

revised to comply with 1 CFR part 21, subpart B, and corrected to remove citations inadvertently added in an unrelated final rule at 89 FR 102675.

Regulatory Analysis

Statement of Need

The longstanding rule of three in numerical rating and ranking required that, for each selection, consideration was limited to the top three candidates on the ranked certificate of eligibles. Many people perceived this process as unnecessarily restrictive for hiring managers, and some argued that it resulted in the selection of candidates that may not be the best suited to a particular position. Hiring managers often opted not to select any candidate, wasting candidates' and agency resources. The Act authorized OPM to modify the rules governing the selection of candidates from competitive lists of eligibles and eliminated the "rule of three." The Act, instead, authorizes agencies to certify a "sufficient number" of names, not less than three, from the top of the appropriate register, or list of eligibles, to be considered for selection, using a cut-off score or other mechanism established by OPM. The Act also affects how agencies make selections under 5 CFR Part 302 procedures for excepted service appointments. This rule implements those statutory changes. OPM has long permitted agencies to apply a "three considerations rule" by which an agency could remove an eligible candidate from further consideration after having considered the candidate for three separate appointments for the same position. The Act codified this practice; however, current regulations only provide the authority to remove candidates and do not provide any requirements regarding how an agency should do so. This has led to agencies needing assistance in ensuring that adequate consideration is given before candidates are removed from consideration.

Regulatory Alternatives

Congress directed OPM to engage in rulemaking, so no regulatory action was not a viable option. OPM considered several options to implement various provisions of the Act. In the NPRM, OPM proposed requiring a one-for-one mechanism when applying the three

considerations rule. That is, a hiring manager could only remove one eligible candidate for each candidate selected. After consideration of comments received, OPM concluded that this mechanism imposed restrictions on the hiring process that were not intended by Congress. OPM also considered not imposing any restrictions on the number of eligible candidates removed, but analysis for various scenarios showed that doing so would effectively provide a regulatory end-around statutory veterans' preference provisions. Accordingly, OPM concluded that some limitations on removal of eligible candidates were necessary to ensure that both the three considerations rule and the veterans' preference provisions are given effect.

In the NPRM, OPM proposed to define a bona fide consideration to require, at a minimum, an interview. OPM's goal was to ensure that there was some regulatory criterion to demonstrate consideration. Based on comments received, OPM reconsidered whether an interview was the only – or best – way to demonstrate consideration. OPM concluded that agencies could demonstrate a bona fide consideration in a number of different ways – one of which might be by interviewing each candidate. To reduce regulatory burden on agencies, while still ensuring candidates receive full and fair consideration, OPM adopted a mechanism that provides agencies flexibility but will yield demonstrable, auditable evidence of consideration of any eligible candidate removed from the certificate.

Impact

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

The final rule also replaces rule of three procedures in excepted service hiring and allows agencies instead to use one of the same mechanisms described under competitive examining procedures to determine a “sufficient number” of names to certify for consideration. The NDAA also amended 5 U.S.C. 3320 to allow agencies to apply 5 U.S.C. 3319, category rating, when making excepted service appointments in the same or similar manner as in the competitive service. OPM's final rule revises the procedures for accepting, rating, and arranging applications for excepted service in 5 CFR part 302 to include the option of using the category rating procedures similar to those adopted in 5 CFR part 332.

Federal HR practitioners will need to be educated on this new numeric ranking and selection method. Therefore, OPM is providing a 60-day delayed effective date to allow time for training. Agencies will have 180 days to come into compliance with the new method.

Costs

This final rule, once in effect, will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. OPM will provide guidance on implementing this final rule in the form of frequently asked questions and updates to the DEOH and Delegated Examining Training. Many Federal HR practitioners may be unfamiliar with the rule of three because of the mandate to use category rating in the May 11, 2010, Presidential Memorandum -- Improving the Federal Recruitment and Hiring Process. Therefore, Federal HR practitioners will need to be educated on the basics of using this new numeric ranking and selection method.

OPM estimates that this rulemaking will require individuals employed by these agencies to modify policies and procedures to implement the rulemaking and train human resources (HR) practitioners and hiring managers on its use. For this cost analysis, OPM assumed an average salary rate of Federal employees performing this work using the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate and \$77.38 hourly locality rate). We assumed that the total dollar value of labor, which includes wages, benefits,

and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$154.76 per hour.

To comply with the regulatory changes in the final rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, doing so will require an average of 300 hours of work by employees per agency with an average hourly cost of \$154.76. This work would result in estimated costs in that first year of implementation of about \$46,428 per agency, and about \$3,714,240 in total governmentwide.

Some agencies may incur additional costs to ensure they have staff with the necessary assessment measurement expertise to use these proposed procedures. Numerical ranking is appropriate when a hiring agency needs to make finer, more granular distinctions between candidates, i.e., an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than a candidate with a score of 96 or lower. Therefore, using these procedures will require assessment tools that make those meaningful distinctions and measurement experts to understand their use to establish appropriate cut-off scores. For this cost estimate, we assumed the average salary rate of Federal employees performing this work is the rate in 2025 for GS-14, step 5, from the Washington, DC, locality pay table (\$161,486 annual locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$154.76 per hour. We estimate that for each assessment an agency creates it will take a minimum of 100 work hours. The number of assessments that may need to be created will be tied to the agency's hiring goals. For the purposes of this estimate we assume that each agency will create at least 5 assessments each year for an annual cost of up to \$ 77,380 and up to \$ 6,190,400 governmentwide.

We do not believe this rulemaking will substantially increase the ongoing administrative costs to agencies (including the administrative costs of using these new procedures and training new staff) because the rulemaking is replacing existing procedures and processes. OPM notes

that agencies may incur higher costs to develop or purchase more rigorous assessments to use in determining cut-off scores under rule of many procedures. Alternatively, agencies may experience cost savings by identifying and selecting highly qualified candidates more quickly through expanded choices and may recognize cost savings by eliminating the need to re-advertise and re-work hiring actions when selections were not made. OPM offers assessments that agencies may use in determining cut-off scores. Please visit <https://www.opm.gov/services-for-agencies/assessment-evaluation/> for more information.

Benefits

This final rule is part of a larger OPM effort to improve the hiring process. OPM expects that this rule will help agencies make meaningful distinctions among candidates in terms of their relative qualifications for the position being filled, while at the same time expanding the range of candidates from which a hiring manager may make a selection as compared to the more restrictive rule of three (i.e., a hiring manager is not limited to choosing from among only the three highest candidates). OPM expects that this rule will reduce agency demand for direct hiring authority and will promote alignment with Merit System Principles (MSP). This final rule emphasizes recruiting candidates based on relative ability, knowledge, and skills (MSP 1). OPM anticipates this final rule will lead to a more balanced and diverse Federal workforce by providing a wider base of candidates from which agencies may choose.

Procedural Issues and Regulatory Review

Severability

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

Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for rules that have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rulemaking does not reach that threshold but has otherwise been designated as a “significant regulatory action” under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. This rule is not an E.O. 14192 regulatory action because it does not impose any more than de minimis regulatory costs.

Regulatory Flexibility Act

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

Federalism

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This rule meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$206 million. This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

OMB's Office of Information and Regulatory Affairs has determined this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

Paperwork Reduction Act

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

5 CFR Part 302

Administrative practice and procedure, Authority delegations, Government contracts, Government employees, Investigations.

5 CFR Parts 332 and 337

Government employees.

U.S. Office of Personnel Management.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR Parts 302, 332, and 337 as follows:

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

1. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151. E.O. 10577, 19 FR 7521, 3 CFR 1954-1958 Comp., p. 218. Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95-454, 92 Stat. 1111. Sec. 302.501 also issued under 5 U.S.C. ch. 77. Sec. 302.107 also issued under 5 U.S.C. 9201-9206; sec. 1122(b)(1), Pub. L. 116-92, 133 Stat. 1607. Secs. 302.108 and 302.203 also issued under E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243.

Subpart B—Eligibility Standards

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

§ 302.201 Persons entitled to veteran preference.

* * * * *

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

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

§ 302.302 Examination of applicants.

(a) *Eligibility.* An evaluation of the qualifications of applicants for positions covered by this part may be conducted at any time before an appointment is made. The evaluation may involve only determination of eligibility or ineligibility or may include qualitative rating of candidates. If the evaluation involves only basic eligibility, candidates will not receive numerical scores or be placed in quality categories and will be referred in accordance with the procedures described in § 302.304(b)(5). If qualitative ranking is desired, numerical scores or placement in

quality categories may be assigned in accordance with paragraph (b) of this section. Each agency shall make a part of the records the reasons for its decision to use ranked or unranked referral and, for ranked actions, the rating factors used. This information about the type of referral used and any rating factors used for ranked actions shall be made available to an applicant on his/her request.

(b) *Rating*—(1) *Numerical rating*. Numerical scores will be assigned on a scale of 100. Each applicant who meets the qualification requirements for the position established under § 302.202 will be assigned a rating of 70 or more and will be eligible for appointment. Candidates scoring 70 or more will receive additional points for veteran preference as provided in § 302.201. Numerical ratings are not required when all qualified applicants will be offered immediate appointment. When there are an excessive number of applicants, numerical ratings are required only for a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable period of time. The agency must, however, adopt procedures to ensure the consideration of preference eligibles in the order in which they would have been considered if all applicants had been assigned numerical ratings. An agency shall furnish on an applicant's request a notice of the rating assigned to that applicant.

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

* * * * *

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

§ 302.303 Maintenance of employment lists.

(d) * * *

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

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

§ 302.304 Order of consideration.

* * * * *

(b) *Consideration of other candidates.* Except as provided in paragraphs (b)(4), (5) and (6) of this section, an agency shall consider applicants on the reemployment and/or regular employment list who have been assigned eligible ratings for a given position in Order A, Order B, or Order C, as described in paragraphs (b)(1) through (3) of this section. Order A must be used when the agency has not established a reemployment list.

* * *

(6) *Category rating.* In accordance with 5 CFR part 337, subpart C, list qualified preference eligibles ahead of non-preference eligibles within the same quality category in which they were assigned. Move qualified preference eligibles with a compensable service-connected disability of 30-percent or more (CPS) and those with a compensable service-connected disability of at least 10-percent but less than 30-percent (CP) from the quality category in which they would otherwise be placed to the highest quality category. (This movement of preference eligibles with service- connected disabilities is not done when filling scientific or professional positions at the GS–9 level or higher). Consider eligible candidates in the following order:

(i) Candidates on the reemployment list;

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

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

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

§ 302.401 Selection and appointment.

(a) *Selection*—(1) *Unranked lists*. When making an appointment from a priority reemployment, reemployment, or regular list on which candidates have not received numerical scores, an agency must make its selection from among the qualified preference eligibles, as long as at least three candidates remain in that group. When fewer than three preference eligibles remain, consideration may be expanded to include the non-preference eligibles in accordance with paragraph (b) of this section, passing over a preference applicant.

(2) *Numerical lists*. When making an appointment from a list on which candidates have received numerical scores, an agency must use one of the methodologies identified below to determine the number of applicants referred for selection. A selecting official may select any eligible candidate referred for selection. However, a selecting official may not pass over a preference eligible to select a lower standing non-preference eligible unless the agency has complied with the pass-over procedures in paragraph (b) of this section. The selection mechanism must be determined before soliciting for applications and be made available to applicants upon their request. The mechanism used must be clearly documented in the recruitment file and available for reconstruction or third-party review. The agency may determine, based on the position to be filled, which of the following mechanisms will best meet the hiring needs of the agency and result in at least three names for consideration for appointment in the order provided in § 302.304. In selecting an appropriate mechanism, agencies should consider the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

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

(ii) The agency may use a cut-off score based on business necessity (e.g., a cut-off score based on the agency's need to keep processing of the expected number of applicants manageable because of its use of a costly or labor-intensive assessment tool such as a structured interview);

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

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

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

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

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

(ii) Consider an applicant who has previously been considered three times in accordance with § 332.405 or a preference eligible if consideration of his/her name for the position has been discontinued as provided in paragraph (b) of this section.

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**PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE
EXAMINATION**

7. The authority citation for part 332 is revised to read as follows:

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

8. Revise § 332.402 to read as follows:

§ 332.402 Referring candidates for appointment.

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

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

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

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

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

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

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

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

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

(c) The agency must determine the mechanism before announcing the vacancy, and the job opportunity announcement must state the mechanism to be used.

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

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

(f) In instances when a certificate of eligibles results in fewer than three eligible and available candidates per vacancy and an agency needs to issue a supplemental certification, OPM or a DEU must have decided, before announcing the vacancy, how to expand the group of candidates in accordance with the guidance in the Delegated Examining Operations Handbook.

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

9. Revise § 332.404 to read as follows:

§ 332.404 Order of selection from certificates.

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

10. Revise § 332.405 to read as follows:

§332.405 Three considerations for appointment.

An appointing officer is not required to consider an eligible candidate who has been given bona fide consideration by one or more hiring managers for three separate appointments from the same or different certificates for the same position (i.e., the same title, series, and grade).

(a) *Bona fide consideration.* To use this provision:

(1) The hiring manager must review and consider the candidate's application material;

(2) The hiring manager must sign a written statement documenting the candidate received three considerations and recommending the candidate be removed from further consideration for the position(s) being filled due to a documented lack of a specific skills(s) or attribute(s) needed to perform the work of the position being filled (When more than one hiring manager is involved, a hiring manager may include information or evidence from another hiring manager.);

(3) The Human Resources Director (at the servicing personnel office level) must approve the request to remove the candidate from further consideration; and

(4) The agency must provide written notification to any candidate removed under this section upon request by the candidate.

(b) *Document the case file.* The agency must document in the case file the three valid selections that were made, and the Human Resources Director's concurrence to remove any candidate from further consideration in accordance with paragraph (a) of this section.

(c) *Selection consideration.* An agency may use the three considerations provision to remove one or more candidates from further consideration starting with the fourth selection (which may be from the same or different certificates for the same position (i.e., the same title, series, and grade)). The number removed may not exceed the remaining number of positions to be filled as long as bona fide consideration has been given and documented as required by this section.

(d) *Inapplicability of the Three Considerations Rule.* The three considerations rule does not apply to shared certificates.

PART 337—EXAMINING SYSTEM

11. The authority citation for part 337 is revised to read as follows:

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

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

Subpart C—Category Rating

13. Revise § 337.304 to read as follows:

§ 337.304 Veterans' preference.

In this subpart:

- (a) Veterans' preference must be applied as prescribed in 5 U.S.C. 3319(b) and (c)(7);
- (b) Veterans' preference points as prescribed in § 337.101 are not applied in category rating; and
- (c) Sections 3319(b) and 3319(c)(7) of title 5 U.S.C. constitute veterans' preference requirements for purposes of 5 U.S.C. 2302(b)(11)(A) and (B).

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