



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 535 and 752

[Docket ID: OPM-2026-0232]

RIN 3206-AP02

Critical Position Pay Authority

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) proposes to amend its regulations governing the critical position pay authority to establish level I of the Executive Schedule as the default maximum critical pay rate, with higher rates subject to written approval by the Director of OPM; eliminate non-statutory caps and approval criteria; address the use of service agreements; clarify reductions or terminations of critical position pay are not adverse actions or subject to grievance or appeal rights; and clarify the treatment of critical pay rates as basic pay. This proposed rule simplifies and better aligns OPM's regulations with governing law and delegated authority.

DATES: Send comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments using the Federal Rulemaking Portal:

<https://www.regulations.gov>. Follow the instructions for submitting comments.

The general policy for comments from members of the public is to make them available for public viewing at <https://www.regulations.gov> without change, including any personal identifiers or contact information. However, OPM retains discretion to redact personal or sensitive information from comments before they are posted.

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Kristen Foy by telephone at (202) 606-2858 or by email at paypolicy@opm.gov.

SUPPLEMENTARY INFORMATION

I. Background

Section 5377 of title 5, United States Code, authorizes critical position pay as a pay-setting flexibility for positions requiring expertise of an extremely high level in a scientific, technical, professional, or administrative field and that are critical to an agency's successful accomplishment of an important mission. Under this authority, the Office of Personnel Management (OPM), in consultation with the Office of Management and Budget (OMB), may grant authority to the head of an agency to fix the rate of basic pay for one or more positions designated as critical positions. By law, critical pay may be granted or exercised only to the extent necessary to recruit or retain an individual exceptionally well qualified for the position. The critical pay rate fixed by an agency may not be less than the rate of basic pay (including any locality-based comparability payments) which would otherwise be payable for the position. OPM, in consultation with OMB, may approve critical pay authority for no more than 800 positions at any time, of which not more than 30 may be under the Executive Schedule.

Consistent with this statute, 5 CFR part 535 establishes the regulatory framework governing the request, use, and administration of the critical position pay authority. Section 535.103 describes the circumstances under which an agency head may exercise critical position pay authority and sets the limitations on pay rates that may be established. Under current regulations, 5 CFR 535.103(a) provides that, subject to approval by OPM in consultation with OMB, an agency head may set the rate of basic pay for a critical position up to the following limits: the rate payable for level II of the Executive Schedule (EX-II) in most cases, the rate

payable for EX-I when there are “exceptional circumstances,” or above the rate for EX-I in “rare circumstances” and only with the written approval of the President.

Section 535.104 establishes the process and documentation required for an agency to request use of the critical position pay authority. Under the law, an agency may request critical position pay only to the extent necessary to fill a position with an exceptionally well-qualified individual. For requests seeking to set pay above the rate for EX–II and up to the rate for EX–I, § 535.104(c) requires information and data to justify the higher pay. For requests to set pay above the rate for EX–I, § 535.104(c) states that such requests require approval by the President. Under current regulations, if OPM, in consultation with OMB, concurs with a request to set pay above the rate EX–I, OPM must seek the President’s approval, and the President may establish a maximum limitation on such critical position pay rates. Since this provision was codified in 2008, no agency has ever requested critical pay rates above EX-I. While multiple factors may contribute to this limited use, OPM’s experience suggests that burdensome regulatory requirements, including additional approval layers and undefined criteria, has contributed to agencies’ reluctance to request use of this flexibility.

II. History

The current critical position pay authority under 5 U.S.C. 5377 was enacted as part of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), which allowed OMB to authorize use of the authority in consultation with OPM. The most significant amendment to this statute was made by the Federal Workforce Flexibility Act of 2004 (Pub. L. 108–411) to switch the original roles of OMB and OPM by placing OPM in charge of decisions to approve agency requests after consulting with OMB. The law was also amended to authorize OPM to regulate the critical position pay authority in place of OMB. *See* 5 U.S.C. 5377(e)(1).

Under 5 U.S.C. 5377, the President holds two functions. Under paragraph (d)(2), the President must provide written approval to fix basic pay at a rate greater than the rate payable for level I of the Executive Schedule. Under paragraph (i)(2), at the request of an agency head, the

President may designate 1 or more categories of positions within that agency to be treated as positions eligible to receive critical position pay.

Under 3 U.S.C. 301, the President may delegate certain functions to other officials within the executive branch. In 2006, the President expressly delegated his authorities under 5 U.S.C. 5377 to the Director of OPM in E.O. 13415. (71 FR 70641). OPM issued final regulations at 5 CFR part 535 governing the critical pay authority on August 26, 2008, (73 FR 50181) that addressed OPM's authority under 5 U.S.C. 5377(i)(2) (dealing with expanding the categories of positions for which the critical pay authority may be used), as delegated by the E.O. See 5 CFR 535.104(b). However, OPM did not implement its delegated authority with regard to setting critical pay rates above the rate for EX-I under 5 U.S.C. 5377(d)(2), making the current regulations inconsistent with the delegation framework established by E.O. 13415.

In practice, agencies have relied more frequently on other pay flexibilities to address recruitment and retention needs. These include governmentwide authorities such as recruitment, relocation, and retention incentives under 5 U.S.C. 5753 and 5754, special salary rates under 5 U.S.C. 5305, and pay-setting flexibilities under the General Schedule (GS) and other pay systems, as well as agency specific authorities that provide enhanced pay flexibility for certain categories of employees. Compared to these other tools, the critical position pay authority has been used sparingly. Aligning OPM's regulations with the delegation framework established by E.O. 13415 is intended to ensure that agencies can more efficiently make use of this statutory authority, including in conjunction with other available pay flexibilities, when addressing mission-critical staffing needs.

III. Proposed Changes to OPM's Critical Pay Approval Authority

OPM proposes to revise 5 CFR 535.103 and 535.104 to remove the requirement for an additional, case-by-case written Presidential approval for critical pay rates in excess of the rate for EX-I, as the delegation in E.O. 13415 constitutes that written approval. Under the proposed rule, approval authority for rates established above EX-I will reside with the Director of OPM, in

consultation with OMB, consistent with E.O. 13415. OPM also proposes to streamline § 535.104 to better align the regulatory approval criteria with statutory language.

OPM proposes to remove the “rare circumstances” criterion for approving critical pay rates above the rate for EX-I in §§ 535.103 and 535.104. The requirement that rates exceeding EX-I be established only in “rare circumstances” was created by OPM via rulemaking and is not required by statute. In addition, the regulation provides no guidance on what constitutes “rare circumstances.” Removing this language promotes consistent and transparent administration of the critical position pay authority while preserving all statutory criteria governing approval.

OPM acknowledges that removing the “rare circumstances” criterion may result in an increased number of requests for higher pay rates, reflecting a broader range of situations in which agencies may seek to use the authority. However, the statutory eligibility criteria under 5 U.S.C. 5377(b) continue to limit use of the authority to positions critical to an agency’s mission and only to the extent necessary to recruit or retain an exceptionally well-qualified individual. Thus, the proposed rule replaces undefined and subjective regulatory criteria with a framework grounded in statutory requirements and supported by objective, evidence-based justification, including labor market considerations. This proposed change remains limited by the statutory scope of the critical position pay authority and allows OPM, in consultation with OMB and based on an agency head’s request, to determine when critical pay rates are appropriate in each circumstance.

OPM proposes to amend §§ 535.103(a), 535.104(c)), and 535.105(b) and (c) to remove the exceptional circumstances criterion for approving, setting, and adjusting critical pay rates above the rate for EX-II to the rate for EX-I. The law does not prescribe criteria that limits critical pay rates above EX-II and the regulations do not define “exceptional circumstances.” In practice, given the statute’s high bar for approving critical pay in 5 U.S.C. 5377(b), “exceptional circumstances” (like “rare circumstances”) are difficult to identify and distinguish among eligible positions and thus can serve as an artificial barrier to appropriate uses of this pay

flexibility. Under the proposed rule, the rate payable for EX-I would serve as the default maximum rate for critical position pay consistent with the law, with rates above EX-I requiring written approval by the Director of OPM.

OPM proposes to remove the requirement in § 535.104(b) that agencies must submit requests covering multiple positions in priority order. OPM could better address prioritization administratively, if necessary, in consultation with agencies following submission of requests. Removing this requirement eliminates an unnecessary procedural constraint and is consistent with the rule's broader objective of replacing rigid regulatory requirements with more flexible, administratively managed processes.

Finally, because critical position pay may be authorized only for positions "critical to the agency's successful accomplishment of an important mission" (5 U.S.C. 5377(b)), it is essential that the agency head (or authorized delegee) has sole and exclusive authority in making the judgment regarding whether and how the critical position pay authority is used. We have revised § 535.303(a) to reflect this.

IV. Proposed Changes on Treatment as Basic Pay

OPM also proposes to amend 5 CFR 535.106 to clarify that a critical pay rate is not considered a rate of basic pay in applying the GS pay administration rules in 5 CFR part 531, subpart B, which apply to GS rates of basic pay. An employee in a critical pay position is entitled to a (1) critical pay rate fixed by the agency head or designee under 5 U.S.C. 5377 and 5 CFR part 535 and (2) lower, underlying rate of basic pay that would otherwise be payable for his or her position if not for the critical pay authorization. (See 5 U.S.C. 5377(d)(1) and 5 CFR 535.105(a).) For an employee in a GS position receiving critical pay, the rate that would be otherwise payable is a GS rate of basic pay authorized under 5 U.S.C. chapter 53, subchapter III and 5 CFR part 531, subpart B. Since a critical pay rate is authorized under 5 U.S.C. 5377 and 5 CFR part 535, it is not a GS rate of basic pay for purposes of the GS pay administration rules, such as the GS two-step promotion rule at 5 U.S.C. 5334(b) and 5 CFR 531.214. Proposed new

paragraph (c) also references an exception in § 531.221(a)(4), which currently allows a critical pay rate to be treated as a non-GS rate of basic pay in applying the GS maximum payable rate rule in §§ 531.221 through 531.223. This pay-setting flexibility would continue and allows an agency to set pay for an employee in a GS position at a step rate (not to exceed step 10 of the grade) based on a former critical pay rate as long as it is higher than the rate the employee is otherwise entitled to under the normal GS pay-setting rules.

V. Proposed Changes on Service Agreements and Appeal/Grievance Rights

OPM proposes adding a new paragraph (e) to 5 CFR 535.103 to address the use of written service agreements in connection with critical position pay.

The proposed regulations would authorize agencies to require that an employee sign a written service agreement with the agency that governs future payments of critical position pay. Also, OPM would be authorized to require an agency to establish written service agreement or notice requirements as part of its determination to approve (or not withdraw) critical position pay. OPM may specify the matters such a service agreement or notice must address, such as the position the employee will hold and the duties the employee is expected to perform; the level of performance and accomplishments expected; and the factors that an agency must consider in determining whether to continue, increase, reduce, or terminate the employee's critical position pay rate.

OPM proposes adding a new paragraph (f) to 5 CFR 535.103 to make clear that an employee has no right to grieve or appeal a decision to reduce, not increase, or terminate a critical position pay rate. Section 535.106(b) already provides that a reduction or termination of a critical position pay rate is not an adverse action under 5 U.S.C. 7512.

In addition, OPM proposes to amend 5 CFR part 752 to clarify that a reduction or termination of a critical position pay rate under 5 U.S.C. 5377 does not constitute an adverse action when the employee has been informed that the rate is time-limited, subject to annual review, and may be reduced or terminated if no longer necessary. OPM's proposed addition to

the adverse action coverage exclusions in 5 CFR 752.401(b)(18) is intended to clarify that certain reductions or terminations of a critical position pay rate are part of a discretionary, time-limited pay-setting and continuation framework under 5 U.S.C. § 5377, rather than a disciplinary ‘reduction in pay’ that triggers chapter 75 procedures and Merit Systems Protection Board (MSPB) appeal rights. Section 5377 authorizes OPM to grant critical pay authority and to determine, under procedures and ‘terms or conditions’ prescribed by regulation, when that authority should terminate because the statutory requirements are no longer met. 5 U.S.C. § 5377(e)(1). Consistent with that structure, OPM’s current regulation treats a critical position pay rate as basic pay for most purposes, but provides that the adverse action provisions (e.g., 5 U.S.C. 7512) do not apply to critical position pay determinations. See 5 C.F.R. § 535.106(b). Proposed § 752.401(b)(18) reinforces this interpretation directly in the chapter 75 implementing regulations. It does so using the same “notice and limited duration” approach already employed elsewhere in part 752. (See, for example, § 752.401(b)(12) (termination of temporary or term promotions)). If the employee was informed that the critical position pay rate is approved on a time-limited basis, subject to annual review and reapproval, and may be reduced or terminated if determined to no longer be needed, then a later reduction or termination of the rate is excluded from adverse action coverage. This exclusion also reflects that, once OPM or the agency determines the statutory standard is no longer met, continued payment of the higher rate would be inconsistent with the governing critical pay determination and implementing regulations, and a prospective adjustment aligns the rate with what is legally payable.

The proposed amendment to 5 CFR part 752 is also consistent with 5 U.S.C. 5377(e), which authorizes OPM to prescribe the terms and conditions under which critical position pay authority is exercised and terminated.

OPM requests comment on these proposals and the potential impacts on agencies and employees.

VI. Rationale

The proposed amendment modernizes regulatory procedures to accurately reflect existing delegated authority. The proposed amendment:

- Aligns OPM's regulations with 5 U.S.C. 5377 and E.O. 13415;
- Eliminates non-statutory procedural constraints;
- Simplifies the regulatory structure by eliminating the EX-II threshold;
- Improves the timely use of critical position pay authority for mission-essential roles;
- Reduces administrative burden and approval delays;
- Maintains all statutory oversight safeguards;
- Provides authority for use of service agreements;
- Makes clear that an employee has no right to grieve or appeal a decision to reduce, not increase, or terminate a critical position pay rate;
- Clarifies, through conforming amendment to 5 CFR part 752, that reductions or terminations of critical position pay do not constitute adverse actions; and
- Clarifies current pay administration authorities.

This proposed change eliminates undefined and subjective eligibility criteria and retains the statutory, transparent and evidence-based eligibility criteria. Critical position pay will continue to be approved only to the extent necessary to recruit or retain exceptionally well-qualified individuals. OPM will continue to monitor appropriate use of authorized critical pay positions through its annual report to Congress requirement under 5 U.S.C. 5377(h) and 5 CFR 535.107.

OPM intends that the provisions of this rule be severable. If any provision of this rule is held to be invalid or unenforceable, such holding is not intended to affect the validity or operation of the remaining provisions. The amendments in this rule address distinct aspects of the administration of the critical position pay authority and are designed to operate independently consistent with 5 U.S.C. 5377. For example, if a court were to find the service agreement provisions in § 535.103(e) to be invalid or unenforceable, agencies could continue to apply the

revised pay-setting and approval framework under §§ 535.103(a), 535.104, and 535.105 without impact. Conversely, if a court were to find the pay-setting and approval framework under §§ 535.103(a), 535.104, and 535.105 to be invalid or unenforceable, agencies could continue to apply the service agreement provisions in § 535.103(e) without impact.

VII. Regulatory Impact Analysis

Statement of Need.

OPM is issuing this proposed rule pursuant to 5 U.S.C. 5377 and E.O. 13415. The purpose of amending these regulations is to align them with existing authority delegated to the Director of OPM.

Impact.

Under the critical position pay authority, not more than 800 positions may be covered Governmentwide at any one time, and not more than 30 active authorizations may be for positions otherwise paid rates of pay under the Executive Schedule. In 2024, OPM continued to authorize critical position pay for 60 positions in 15 agencies. However, only 7 of those agencies reported using the critical position pay authority during 2024 for 10 total incumbents. Based on preliminary data for OPM's 2025 report, the number of positions using the critical position pay authority continued to be low.

Considering the limited number of employees that may be affected, OPM does not anticipate that this proposed rule will substantially impact local economies or have a large impact on local labor markets.

Costs.

OPM expects that the proposed amendments may result in some increase in the use of the critical position pay authority including approval for certain positions at rates above the rate for level I of the Executive Schedule (EX-I). Removing the requirement for case-by-case Presidential approval and eliminating the "rare circumstances" and "exceptional circumstances" criteria may reduce administrative barriers and make the authority more accessible to agencies.

Because use of the authority is highly case-specific and dependent on agency mission needs, labor market conditions, and budget constraints, OPM cannot precisely project the magnitude of any future increase in utilization. However, OPM has developed a reasonable illustrative estimate based on the statutory cap of 800 authorized positions Governmentwide.

For example, if up to one-half of the authorized positions (approximately 400 positions) were approved at rates above EX-I as a result of the proposed changes, and if the average increase above EX-I were between \$50,000 and \$100,000 per position annually, the resulting incremental cost to the government could range from approximately \$20 million to \$40 million per year. This estimate is illustrative and does not represent a prediction of actual costs to the government. Actual impacts will depend on agency-specific decisions and workforce needs. Note that these effects are considered transfers.

There are also several factors expected to constrain the potential impact. These include the statutory cap on the number of positions authorized, the requirement for OPM approval in consultation with OMB, the requirement that agencies justify higher pay based on objective, market-based evidence, budgetary constraints, the statutory “necessary to recruit or retain” standard in 5U.S.C. 5377(b), and the addition of service agreements. Agency reports for the statutory annual report to Congress in 5 U.S.C. 5377(h) and 5 CFR 535.107 will continue to allow OPM to track and monitor approved critical pay authorizations, and agencies must continue to address whether their critical pay authorizations are still needed in their annual reports (see 5 CFR 535.107(a)(5)). Administrative costs as described above will be incurred to the extent that this flexibility is utilized. Because of these factors, OPM expects use will remain limited and targeted only to mission critical positions that will enhance Federal operations when they are filled with exceptionally qualified individuals.

Benefits.

This proposed rule has important benefits. As previously stated, the proposed amendment eliminates non-statutory procedural constraints, improves the timely use of critical position pay

authority for mission-essential roles, and reduces administrative burden and approval delays that might otherwise result.

Effective Date.

OPM plans to waive the 30-day delayed effective date of the final rule pursuant to 5 U.S.C. 553(d)(1), as this rule relieves restrictions that are not required by statute. Prompt implementation of the final rule will assist agencies in filling critical skills gaps and meeting recruitment and retention needs essential to supporting agency missions. See, e.g., “Building the AI Workforce of the Future,” Dec. 15, 2025, available at <https://www.opm.gov/chcoc/latest-memos/building-the-ai-workforce-of-the-future.pdf>; and “Human Resources Flexibilities for Recruiting and Retaining Information Technology, Cyber, Artificial Intelligence, and Other Technical Employees,” Dec. 17, 2025, available at <https://www.opm.gov/chcoc/latest-memos/human-resources-flexibilities-for-recruiting-and-retaining-information-technology-cyber-artificial-intelligence-and-other-technical-employees.pdf>.

Regulatory Review

OPM has examined the impact of this rule as required by E.O.s 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 E.O. 12866. This rule is not considered a regulatory action under E.O. 14192 because it imposes no more than de minimis costs.

Regulatory Flexibility Act

The Director of OPM certifies that this rule would not have a significant economic impact on a substantial number of small entities as it would only impact Federal agencies and employees.

Federalism

OPM has examined this rule in accordance with E.O. 13132, Federalism, and has determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or Tribal governments.

Civil Justice Reform

This rulemaking meets the applicable standard set forth in section 3(a) and (b)(2) of E.O. 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$206 million. This rulemaking will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

This rulemaking does not impose any reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects

5 CFR Part 535

Administrative practice and procedure, Freedom of information, Government employees, Law enforcement officers, Reporting and recordkeeping requirements, Wages.

5 CFR Part 752

Administrative practice and procedure, Government employees.

Signing Statement

The Director of OPM, Scott Kuper, reviewed and approved this document and has authorized the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Office of Personnel Management

Jerson Matias

Federal Register Liaison

Accordingly, OPM is proposing to amend 5 CFR parts 535 and 752 as follows:

PART 535—CRITICAL POSITION PAY AUTHORITY

1. The authority citation for part 535 is revised to read as follows:

Authority: 5 U.S.C. 5377. E.O. 13415, 71 FR 70641, 3 CFR, 2006 Comp., p. 250.

2. In § 535.103, revise paragraph (a) and add paragraphs (e) and (f) to read as follows:

§ 535.103 Authority.

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

(1) The rate payable for level I of the Executive Schedule; or

(2) A rate in excess of the rate for level I of the Executive Schedule based on information and data that justify the higher rate, with the written approval of the Director of OPM.

* * * * *

(e) An agency may require an employee to sign a written service agreement with the agency that governs future payments of critical position pay. As part of a determination to grant

(or not withdraw) an agency authority to provide a position or positions with critical position pay, OPM may require the agency to establish written service agreement or notice requirements for employees receiving critical pay. OPM may specify the matters such a service agreement or notice must address such as the position the employee will hold and the duties the employee is expected to perform; the level of performance and accomplishments expected; and the factors that an agency must consider in determining whether to continue, increase, reduce, or terminate the employee's critical position pay rate.

(f) An employee has no right to grieve or appeal a decision to reduce, not increase, or terminate a critical position pay rate.

3. In § 535.104:

a. Revise paragraph (b) by removing the sentence "Requests covering multiple positions must include a list of the positions in priority order.";

b. Revise paragraphs (c) and (d) to read as follows:

§ 535.104 Requests for and granting critical position pay authority.

* * * * *

(c) Requests for critical position pay authority must include information and data required by OPM to justify the higher pay, including, as appropriate, market-based justification, evidence of recruitment and retention needs, and the qualifications of the individual. The head of an agency must submit such requests to OPM with the information required in paragraph (d) of this section. If OPM, in consultation with OMB, concurs with a request to set pay above the rate payable for level I of the Executive Schedule, the Director of OPM must provide written approval and may establish a maximum limitation on the critical position pay rate.

(d) Requests for critical position pay authority must include:

(1) Position title;

(2) Position appointment authority (for Senior Executive Service positions, appointment authority for any incumbent);

(3) Pay plan and grade/level;

(4) Occupational series of the position;

(5) Geographic location of the position;

(6) Current salary of the position or incumbent;

(7) Name of incumbent (or “Vacant”);

(8) Length of time the incumbent has been in the position or length of time the position has been vacant;

(9) A written evaluation of the need to designate the position as critical. Such an evaluation must include—

(i) The kinds of work required by the position and the context within which it operates;

(ii) The range of positions and qualification requirements that characterize the occupational field, including those that require extremely high levels of expertise;

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

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

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

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

(12) The desired rate of basic pay for requests to set pay above the rate for level I of the Executive Schedule and justification, including, as appropriate, market-based justification, evidence of recruitment and retention needs, and qualifications of the individual to show that such a rate is necessary to recruit and retain an individual exceptionally well-qualified for the critical position.

4. In § 535.105, revise paragraphs (b) and (c) to read as follows:

§ 535.105 Setting and adjusting rates of basic pay.

* * * * *

(b) If critical position pay authority is granted for a position, the head of an agency may initially set pay at an amount up to the rate payable for level I of the Executive Schedule or other maximum rate below level I of the Executive Schedule that is approved by OPM in consultation with OMB. A rate in excess of the rate payable for level I of the Executive Schedule may be established only with the written approval of the Director of OPM under § 535.104(c).

(c) The head of an agency may make subsequent adjustments in the rate of basic pay for a critical position each January at the same time general pay adjustments are authorized for Executive Schedule employees under 5 U.S.C. 5318. Such adjusted rates may not exceed the new rate payable for level I of the Executive Schedule or other maximum rate approved for the critical position under § 535.104(c). However, the employee must have at least a rating of Fully Successful or equivalent, and subsequent adjustments must be based on labor market factors, recruitment and retention needs, and individual accomplishments and contributions to the agency's mission. Any adjustment in the rate of basic pay under this paragraph is also subject to service agreement and notice requirements established under § 535.103(e), if applicable.

* * * * *

5. Amend § 535.106 by:

- a. Removing the word “or” at the end of paragraph (a);
- b. Removing the period at the end of paragraph (b) and adding “; or” in its place; and
- c. Adding paragraph (c):

§ 535.106 Treatment as rate of basic pay.

* * * * *

(c) Application of the General Schedule (GS) pay administration rules in 5 CFR part 531, subpart B; however, a critical position pay rate is treated as a non-GS rate of basic pay in applying the

maximum payable rate rule in §§ 531.221 through 531.223 of this chapter, as provided in § 531.221(a)(4).

PART 752—ADVERSE ACTIONS

6. The authority citation for part 752 continues to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; 38 U.S.C. 7403. E.O. 10577, 19 FR 7521, 3 CFR, 1954-1958 Comp., p. 218.

7. In § 752.401, add paragraph (b)(18):

§ 752.401 Coverage.

* * * * *

(b) * * *

(18) Action by the agency or OPM that reduces or terminates a critical position pay rate under 5 U.S.C. 5377, if the agency informed the employee that the rate is approved on a time-limited basis, subject to annual review and reapproval, and may be reduced or terminated by the agency or OPM if determined to no longer be needed. (See also §§ 535.106 and 535.107 of this chapter.)

* * * * *