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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: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is amending its regulations governing the critical position pay (CPP) 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. The final rule eliminates non-statutory caps and approval criteria; addresses the use of service agreements; clarifies that reductions or terminations of CPP are not adverse actions or subject to grievance or appeal rights; and clarifies the treatment of critical pay rates as basic pay. This final rule simplifies and better aligns OPM's regulations with governing law and delegated authority.

DATES: *Effective date*: This regulation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. OPM is waiving the 30-day delayed effective date under 5 U.S.C. 553(d)(1), as this rule relieves restrictions that are not required by statute.

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

SUPPLEMENTARY INFORMATION: On April 24, 2026, OPM issued a proposed rule (91 FR 22070) to amend the CPP regulations under 5 CFR part 535 and adverse action regulations at 5 CFR part 752. The proposed rule had a 30-day comment period ending May 26, 2026. OPM received one substantive comment and is adopting the proposed rule without change.

Background

Section 5377 of title 5, United States Code, authorizes CPP 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, 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 CPP authority. Section 535.103 describes the circumstances under which an agency head may exercise CPP authority and sets the limitations on pay rates that may be established. Under prior regulations, 5 CFR 535.103(a) provided 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 CPP authority. Under the law, an agency may request CPP only to the extent necessary to fill a position with an exceptionally well-qualified individual.

History

The current CPP 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 CPP 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 CPP.

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 Executive Order (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 prior regulations inconsistent with the delegation framework established by E.O. 13415.

Amendments to the Critical Position Pay and Adverse Actions Regulations

This final rule amends OPM's regulations governing the CPP authority under 5 CFR part 535 and related adverse action regulations under 5 CFR part 752. The amendments align OPM's regulations with the governing statute at 5 U.S.C. 5377 and the President's delegation of authority under E.O. 13415, while simplifying administration of the CPP authority and removing certain non-statutory requirements.

This rule revises 5 CFR 535.103 and 535.104 to remove the requirement for case-by-case Presidential approval of critical pay rates above EX-I. E.O. 13415 delegates to the Director of OPM the President's authority under 5 U.S.C. 5377(d)(2) to provide written approval of such rates. Approval authority for rates above EX-I therefore resides with the Director of OPM, who provides that written approval in consultation with OMB, and without the need for separate Presidential approval.

This rule also removes the "rare circumstances" and "exceptional circumstances" criteria from 5 CFR 535.103 through 535.105. These criteria were created by regulation, were not defined in regulation, and were not required by statute. In practice, they were difficult to apply and served as an artificial barrier to appropriate use of the authority. 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. Under the revised regulations, EX-I serves as the default maximum rate, and rates above EX-I require written approval by the Director of OPM based on objective, evidence-based justification.

This rule also removes the requirement in § 535.104(b) that agencies submit requests covering multiple positions in priority order, and revises (a) to clarify that the agency head has sole and exclusive discretion in determining whether and how to use the CPP authority.

This rule amends 5 CFR 535.106 to clarify that a critical pay rate is not considered a rate of basic pay for purposes of the General Schedule (GS) pay administration rules in 5 CFR part 531, subpart B. New paragraph (c) preserves the existing exception in § 531.221(a)(4), under which a critical pay rate may be treated as a non-GS rate of basic pay in applying the GS maximum payable rate rule. This 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 when doing so produces a higher payable rate than the normal GS pay-setting rules.

This rule adds new paragraph (e) to 5 CFR 535.103 authorizing agencies to require employees to sign written service agreements governing future payments of CPP. OPM may also require an agency to establish a service agreement as a condition of approving critical pay authority and may specify the matters such an agreement must address.

New paragraph (f) to 5 CFR 535.103 clarifies that an employee has no right to grieve or appeal a decision to reduce, not increase, or terminate a CPP rate, although nothing in this paragraph limits any right or remedy provided by another applicable law. This rule also amends 5 CFR part 752 by adding § 752.401(b)(18) to clarify that a reduction or termination of a CPP rate is not an adverse action under chapter 75 when the employee was informed that the rate is approved on a time-limited basis, subject to annual review and reapproval, and may be reduced or terminated if no longer needed. This exclusion reflects that CPP is a discretionary, time-limited pay-setting framework under 5 U.S.C. 5377, rather than a disciplinary "reduction in pay" that triggers chapter 75 procedures and Merit Systems Protection Board appeal rights. It uses the same "notice and limited duration" approach already employed elsewhere in part 752 (see, e.g., § 752.401(b)(12) (termination of temporary or term promotions)). This amendment is also consistent with 5 U.S.C. 5377(e), which authorizes OPM to prescribe the terms and conditions under which CPP authority is exercised and terminated.

The provisions of this rule are severable. The amendments address distinct aspects of the administration of the CPP authority and are designed to operate independently consistent with 5 U.S.C. 5377. If any provision is held invalid or unenforceable, the remaining provisions are intended to remain in effect. 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.

Comments Received on the Proposed Rule

Commenter 0002 expressed general support for aligning the CPP regulations with the delegation framework established by E.O. 13415. The commenter noted that transferring approval authority for pay rates above the rate for level I of the Executive Schedule from the President to the Director of OPM would reduce processing time and administrative burden for agencies. The commenter also acknowledged that removing the "rare circumstances" threshold would likely increase the volume of agency requests and make the CPP authority a more competitive tool relative to other pay flexibilities. The commenter cautioned that increased utilization could cause agencies to approach the statutory cap of 800 critical pay positions more quickly and urged OPM and OMB to maintain rigorous oversight to ensure approvals remain limited to truly critical, high-impact roles.

OPM agrees with the commenter's general assessment. Consolidating approval authority through OPM, in consultation with OMB, and removing the “rare circumstances” and “exceptional circumstances” criteria are expected to reduce administrative burden, make the authority more accessible to agencies with mission-critical staffing needs, and make critical pay a more competitive compensation tool. OPM acknowledges the concern that these changes may result in an increased number of requests and approvals that reach the 800-position limit in statute more quickly without proper oversight. OPM is not changing the regulations in response to the commenter’s cautions. Several existing requirements and factors will constrain utilization and promote oversight: the requirement that critical pay requests be approved by OPM, in consultation with OMB under 5 U.S.C. 5377(c); the statutory requirement that critical pay be used only to the extent necessary to recruit or retain an exceptionally well-qualified individual under 5 U.S.C. 5377(b); and the requirement for objective market-based justification and the written approval of the Director of OPM for all rates above EX-I. In addition, OPM will continue to monitor utilization through its annual report to Congress under 5 U.S.C. 5377(h) and 5 CFR 535.107.

Regulatory Impact Analysis

Statement of Need.

OPM is issuing this final 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 CPP 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 2025, OPM continued to authorize CPP for 65 positions in 15 agencies. However, only 9 of those agencies reported using the CPP authority during 2025 for 25 total incumbents.

On May 29, 2026, the President issued a memorandum titled "Approving Critical Position Pay Authority for National Security Investment Workforce," authorizing the use of CPP for up to 400 positions supporting investment programs related to national security and authorizing OPM, in consultation with OMB, to approve agency requests at rates of basic pay of up to $400,000, consistent with market comparability and national security urgency. See https://www.whitehouse.gov/presidential-actions/2026/05/approving-critical-position-pay-authority-for-national-security-investment-workforce/. These 400 positions are subject to the 800-position Governmentwide statutory cap under 5 U.S.C. 5377(f). OPM, in consultation with OMB, will allocate the positions to executive departments and agencies and oversee their use to ensure CPP is used only to the extent required to recruit or retain exceptionally well-qualified individuals consistent with 5 U.S.C. 5377(b).

Considering the combined effect of existing authorizations, the May 29, 2026, Presidential memorandum, and the changes made by this final rule, OPM anticipates an increase in use of the CPP authority compared to historical levels. However, given the statutory cap of 800 positions Governmentwide and the targeted nature of approved positions, OPM does not anticipate that this final rule will substantially impact local economies or have a large impact on local labor markets.

Costs.

OPM expects that the amendments in this final rule may result in some increase in the use of the CPP 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 reduce administrative barriers and make the authority more accessible to agencies.

In the proposed rule, OPM presented an illustrative cost estimate based on the statutory cap of 800 authorized positions Governmentwide, assuming up to one-half could be approved above EX-I at an average increase of $50,000 to $100,000 per position. The May 29, 2026, Presidential memorandum described in the Impact section above now represents the most significant driver of utilization above EX-I and provides a more defined basis for estimating cost impacts. OPM has therefore updated its estimate to reflect the parameters established by that memorandum.

OPM has developed an estimated cost range based on assumptions about how many of the 400 authorized positions will be filled. Each position filled at the $400,000 maximum rate would carry an incremental cost above EX-I of approximately $146,900 annually. On that basis, OPM estimates aggregate incremental costs ranging from approximately $44.1 million annually as a lower bound (if 300 authorized positions are filled) to approximately $58.8 million annually as an upper bound (if all 400 positions are filled). Actual costs will depend on agency-specific decisions, including the number of positions ultimately filled and the rates at which they are set, and may fall outside this range. Average pay rates below the $400,000 ceiling would result in lower aggregate costs than the range presented.

The regulatory changes in this rule may also facilitate above-EX-I approvals outside the scope of the May 29, 2026, Presidential memorandum. OPM expects any incremental cost beyond the estimate above to be modest. Several factors are expected to constrain overall cost impact: the 800-position statutory cap, the OPM approval requirement in consultation with OMB, budgetary constraints, and the statutory "necessary to recruit or retain" standard under 5 U.S.C. 5377(b).

Benefits.

This final rule eliminates non-statutory procedural constraints, improves the timely use of CPP authority for mission-essential roles, and reduces administrative burden and approval delays. 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.

Effective Date.

OPM is waiving the 30-day delayed effective date of this 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;* “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*; and “Approving Critical Position Pay Authority for National Security Investment Workforce,” May 29, 2026, available at *https://www.whitehouse.gov/presidential-actions/2026/05/approving-critical-position-pay-authority-for-national-security-investment-workforce/*.

Regulatory Compliance

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.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.) requires most final rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA (5 U.S.C. 804).

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 Kupor, 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

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Federal Register Liaison

Accordingly, OPM amends 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. Nothing in this paragraph limits any right or remedy provided by another applicable law.

3. In § 535.104:

a. Amend paragraph (b) by removing the second sentence; and

b. Revise paragraphs (c) and (d).

The revisions 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).

The addition reads as follows:

§ 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) to read as follows:

§ 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.)

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