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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 335

[Docket ID: OPM–2023–0041]

RIN 3206–AO52

Time-Limited Promotions

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to specify that employees who are detailed or temporarily promoted to higher-grade duties of a higher-graded position should be paid accordingly for the entire time spent performing the duties of the higher-graded position, as found pursuant to a final order by an appropriate authority.

DATES: Effective August 26, 2024.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *awr@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

I. Background

Agencies must follow competitive procedures for time-limited promotions of more than 120 days to higher-graded positions in the competitive service. 5 CFR 335.103. The Federal Labor Relations Authority (FLRA) has found union proposals requiring the temporary promotion of bargaining unit employees officially assigned to a higher-graded position, or to the duties of a higher-graded position, for certain specified time periods are within the duty to bargain.[1] The FLRA has further found that, under Federal personnel law, an employee may be entitled to a temporary promotion for performing the duties of a higher-graded position for an extended period of time. The FLRA has emphasized that ''the entitlement must be based on a provision of a collective bargaining agreement or an agency regulation making a temporary promotion mandatory for details to, or the performance of the duties of, a higher-grade position after a specified period of time.'' [2] As a result, some collective bargaining agreements between Federal agencies and unions have provisions requiring the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures. As provided for in 5 U.S.C. 7121, disagreements on application and interpretation of such provisions are subject to negotiated grievance procedures that provide for binding arbitration.

Prior to 2004, arbitrators awarded backpay to employees who filed grievances after being assigned to higher-graded duties and were not temporarily promoted, and those awards were not time-limited to 120 days.[3] However, on September 10, 2003, the FLRA, in accordance with 5 U.S.C. 7105(i), requested an advisory opinion from OPM regarding an interpretation of 5 CFR part 335 and posed the following question: ''Where an agency violates a collective bargaining agreement provision entitling employees to noncompetitive temporary promotions and an arbitrator grants a retroactive temporary promotion of more than 120 days to remedy that violation with the retroactive promotion what is the applicability, if any, of the requirements of 5 CFR part 335 § 103(c)(1)(i) that 'competitive procedures' apply to promotions exceeding 120 days. If the requirements apply, what effect do they have on the arbitral remedy of a retroactive temporary promotion exceeding 120 days?'' [4] On February 27, 2004, the OPM General Counsel provided a letter response to the FLRA. In its letter, OPM noted: ''Upon analysis of this issue, OPM concludes that 5 CFR 335.103 applies and that the arbitration award in this matter is contrary to the regulatory requirement that executive agencies must apply competitive procedures for the purposes of implementing temporary promotions in excess of 120 days.''

Relying upon OPM's February 27, 2004, advisory opinion about 5 CFR 335.103(c)(1)(i), the FLRA rendered a decision finding that an arbitrator's decision involving an employee of the Department of Veterans Affairs (DVA), to the extent that it directs a retroactive temporary promotion of more than 120 days, is contrary to 5 CFR 335.103(c) and a DVA regulation. The FLRA noted that OPM advised the arbitrator's decision was contrary to a government-wide regulation, 5 CFR 335.103(c), by providing the grievant a retroactive temporary promotion exceeding 120 days with no competitive process. Based on this advisory opinion from OPM, the FLRA modified the arbitrator's award and ordered the agency to grant the grievant a retroactive temporary promotion with backpay for the difference between GS–7 and GS–9 wage rate, effective August 1999, for a period of 120 days because there was no evidence that competitive procedures were applied in the promotion of the grievant.[5] Furthermore, the FLRA decided there was ''no showing that a personnel action resulted in the withdrawal or reduction of the grievant's pay and therefore the grievant was not entitled to back pay for the period exceeding the 120-day limitation.'' [6] Following its decision in 2004, the FLRA has issued various decisions which set aside portions of

[1] See *National Federation of Federal Employees* v. *Department of the Interior Bureau of Land Management,* 29 FLRA 1491 (1987).

[2] See *National Treasury Employees Union* v. *Department of Treasury Internal Revenue Service,* 29 FLRA 348 (1987).

[3] See *Oklahoma City Air Logistics Center, Tinker AFB, OK and AFGE Local 9116,* 42 FLRA 62 (October 1991); *U.S. Department of the Army, Fort Polk, LA, and the National Association of Government Employees, Local R5–168,* 44 FLRA 121 (1992); and *Social Security Administration and the American Federation of Government Employees, Local 220,* 57 FLRA 115 (2001).

[4] The case before the FLRA that prompted the request to OPM for an advisory opinion was *United States Department of Veterans Affairs Ralph H. Johnson Medical Center Charleston, South Carolina, and National Association of Government Employees,* 60 FLRA 46 (2004).

[5] *Id.*

[6] In a concurrence to the *Johnson Medical Center* decision, Member Carol Waller Pope noted ''I have concerns that OPM's interpretation actually encourages agencies to violate, rather than comply with, § 335.103(c). Specifically, under OPM's interpretation, an agency that ignores competitive procedures cannot be required to pay employees for higher-graded duties performed in excess of 120 days, while an agency that complies with competitive procedures can be required to pay employees for those duties. This provides agencies a strong incentive to ignore competitive procedures when they want to assign employees higher-graded duties for more than 120 days.''

arbitration awards ordering backpay on temporary promotions for the time period exceeding 120 days when the temporary promotion occurred without use of competitive procedures.[7] These subsequent decisions by the FLRA eventually resulted in a request to OPM by the National Treasury Employees Union (NTEU).

On August 5, 2022, OPM received a petition from NTEU, which represents Federal workers in 34 agencies and departments,[8] to amend OPM regulations at 5 CFR 335.103 ''to remove the existing 120-day cap on back pay for employees who perform higher graded work during noncompetitive temporary promotions and details.'' NTEU noted that OPM's existing regulation, as interpreted in the 2004 OPM advisory opinion, has led to ''significant unfairness.'' [9] NTEU stated that prior to that advisory opinion, arbitrators had awarded back pay to employees who performed higher-graded duties. ''Arbitrators made employees whole for the time they spent performing such work, without any 120-day limitation.'' NTEU expressed the view that the FLRA's 2004 decision abandoned years of former precedent by limiting the back pay remedy for employees performing higher-graded duties to 120 days each year. NTEU correctly noted that the FLRA's decision ''was based entirely on [OPM's] advisory opinion.''

In response to NTEU's petition, OPM published a proposed rule in the **Federal Register** at 88 FR 89321 on December 27, 2023. Specifically, OPM proposed to amend 5 CFR part 335 to specify that a bargaining unit employee found, pursuant to a final order by an arbitrator, adjudicative body, or court, to have been detailed or temporarily promoted to a higher-graded position should be paid accordingly (that is, higher compensation) for the entire time the employee performed the duties of the higher-graded position. This proposal was limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations and the agency made the assignment without use of competitive procedures. For bargaining unit employees, this may include when a collective bargaining agreement provided for the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures and the employee otherwise meets qualification and time-in-grade requirements. As proposed, this provision would apply only when a third party has found the employee is entitled to receive a retroactive temporary promotion. The proposed amendment noted that an adjudicative body could include, but not be limited to, a third party such as the U.S. Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC). The proposed modification to 5 CFR 335.103(c)(2) would mean that competitive procedures do not apply to situations where a third party has found the bargaining unit employee is entitled to receive a retroactive temporary promotion.

Similarly, the proposed amendment provided that, when a non-bargaining unit employee has been temporarily promoted to a higher-graded position as found by an adjudicative body or court, that employee should be paid accordingly (that is, higher compensation) for the entire time performing these duties of a higher-graded position, pursuant to a final order by that adjudicative body or court. It was also limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations and the agency made the assignment without use of competitive procedures. While the issue originally arose based on disputes related to collective bargaining agreements, OPM recognized that non-bargaining unit employees may pursue grievances or complaints related to temporary promotions in forums outside of procedures found in collective bargaining agreements. The proposed rule addressed such matters for the sake of consistency and fairness regardless of the employee's bargaining unit status. As proposed, the provisions for non-bargaining unit employees would only apply when a third party has found the employee is entitled to receive a retroactive temporary promotion. The proposed rule noted that an adjudicative body could include, but not be limited to, a third party such as the MSPB or the EEOC. As with bargaining unit employees, the proposed changes to 5 CFR 335.103(c)(2) would mean that competitive procedures do not apply to situations where a third party has found the non-bargaining unit employee is entitled to receive a retroactive temporary promotion.

After considering the comments received, OPM is finalizing the proposed amendments with modifications as discussed in the next section.

Public Comments

In response to the proposed rule, OPM received 21 comments during the 60-day public comment period from multiple individuals (primarily Federal employees), multiple labor organizations, a professional organization representing employment law lawyers, and one Federal agency. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments largely supported the rule change. The comments are summarized below, along with the suggestions for revisions that were considered and either adopted, adopted in part, or declined, and the rationale therefor.

In the first section below, we address general or overarching comments. In the section that follows, we address comments related to the specific portion of the regulation that OPM proposed to revise.

General Comments

A national labor organization expressed support for the rule and stated the regulatory changes are necessary to ensure compliance with merit system principles requiring fair and equitable treatment and equal pay for work of equal value. Comment 0021.[10] This labor organization further noted the changes are necessary to ensure that Federal agencies are properly incentivized to comply with Federal regulations concerning the non-competitive placement of employees in temporary promotions. The labor organization noted that employees, with limited exceptions not applicable here, are obligated to follow the instructions and orders of their supervisors and managers. Accordingly, the primary remedy available to employees assigned to perform higher-graded duties without a concurrent temporary promotion is to seek third-party review of the agency's actions. The labor organization noted that the changes ''will eliminate the arbitrary 120-day limit on backpay recovery and are necessary to ensure that employees are fully and fairly

[7] See *United States Department of the Treasury Internal Revenue Service and National Treasury Employees,* 61 FLRA 667 (2006) and *United States Department of the Navy Commander, Navy Region Mid-Atlantic Naval Weapons Station Earle and International Association of Firefighters Local F–147,* 72 FLRA 533 (2021).

[8] See NTEU, ''Our Agencies,'' available at *https://www.nteu.org/who-we-are/our-agencies.*

[9] See NTEU petition posted here: *www.nteu.org/~/media/Files/nteu/docs/public/judicial-notice/opm-petition-re-120-day-rule.*

[10] References to comments provide the location of the item in the public record (that is, the two-digit number associated with the location in the docket). Comments filed in response to the proposed rule are available at *https://www.regulations.gov/comment/OPM-2023-0041-00nn,* where 00nn is the comment number.

compensated for the assigned work they perform.'' The labor organization further stated, ''the elimination of the 120-day limit will, moreover, lead to more effective and efficient administration of the Federal government because it will remove the financial benefit agencies accrued by failing to comply with OPM regulations.'' This labor organization stated that OPM's proposed regulatory changes are consistent with the statutory authority delegated to OPM to regulate the civil service and laws governing the competitive service. Finally, this labor organization stated that the FLRA decision and OPM's 2004 advisory opinion to the FLRA were ''based solely and myopically on the existing OPM regulation,'' but OPM's ''proposed changes, on the other hand, heed Congress' instruction that '[f]ederal personnel management should be implemented consistent with the . . . merit system principles,' 5 U.S.C. 2301, and ensure that appropriate deference is given to the whole of Title 5.''

OPM thanks the labor organization for the support of the proposed rule and is not making any changes based on these comments. However, OPM wishes to respond to the labor organization's statement that ''the elimination of the 120-day limit will, moreover, lead to more effective and efficient administration of the Federal government because it will remove the financial benefit agencies accrued by failing to comply with OPM regulations.'' OPM notes that neither the proposed rule nor this final rule is eliminating the requirement for agencies to use competitive procedures when temporarily promoting employees for periods exceeding 120 days. The requirements for competitive procedures have not changed, but this final rule will require agencies to provide a time-limited promotion as a result of a determination by an appropriate authority as defined in 5 CFR 550.803.

Comment 0016, submitted by a professional organization representing employment lawyers, supports the proposed rule, stating that it clarifies that an employee working in a higher-graded position should be compensated for the entire time they performed the duties. They further note that the post-2004 FLRA cases that limited back pay to the period of temporary promotion did not fit the reality of the actual work performed at the higher grade. OPM thanks the commenter for their support of the proposed rule. OPM will not be making any changes to the proposed rule based on this comment as no recommendations for changes were offered. Nevertheless, OPM believes it is important to remind the commenter that the rule concerns situations where time-limited promotions exceeding 120 days occurred and there was an order by a third-party to provide the higher pay after a grievance or complaint was filed by the employee. Furthermore, as discussed in the proposed rule, the employee still needs to meet qualification and time-in-grade requirements to receive the time-limited promotion. Finally, agencies are not prohibited from detailing employees to higher-graded positions or duties without commensurate pay. In accordance with 5 U.S.C. 3341, an agency may detail an employee in the competitive service to a position in either the competitive or excepted service. In other words, time-limited promotions are not always required for details to higher-graded duties. There may be exceptions, such as collective bargaining agreement requirements, which require the employee to be temporarily promoted.

Comment 0019, submitted by a coalition of 14 labor organizations, noted that OPM's proposed changes will ''clarify that a bargaining unit employee found by an adjudicator to have been detailed or temporarily promoted to a higher-graded position should be paid accordingly (*i.e.,* higher compensation) for the entire time the employee performed the duties of the higher-graded position.'' These labor organizations further state ''OPM correctly explains the cost of this change will be negligible. And the compensating benefits are that the new rule will reinforce merit system principles and rectify an inequitable state of affairs for employees doing higher-graded work.''

These labor organizations also note the FLRA erroneously held in 2018 that a grievance on behalf of an employee who had not received appropriate compensation for higher-graded work involved a nongrievable, classification matter. They further note that the FLRA corrected course a few years later explaining that a grievance concerns a classification of a position under 5 U.S.C. 7121(c)(5) when ''the substance of the grievance concerns the grade level of the duties permanently assigned to and performed by an employee.'' They state that ''by contrast, a grievance does not involve classification within the meaning of section 7121(c)(5) when its substance concerns whether the employee is entitled to a temporary promotion . . . because the employee has performed the established duties of a higher-graded position.'' Therefore, they state that, to ensure the objective of the proposed rule is met, they recommend that OPM should further clarify that grievances seeking back pay owed for temporary promotions do not involve classification matters within the meaning of 5 U.S.C. 7121(c)(5).

OPM thanks the labor organizations for their support of the proposed rule. While OPM understands and appreciates the concerns raised by the labor organizations regarding the impact of FLRA decisions interpreting whether temporary promotions concern classification matters within the meaning of 5 U.S.C. 7121(c)(5), the issue raised is beyond the scope of this rulemaking, which addresses the narrow issue of whether an individual may receive backpay for more than 120 days in specified circumstances. Accordingly, OPM is not making any changes based on this recommendation.

Two individual commenters recommended OPM modify the regulations to allow agencies to continue temporary promotion rotations until the next individual is in the position. Comment 0002 and 0003. One of these commenters stated that administrative actions are held up by administrative and leadership decisions while the other commenter stated that it takes up to 8 months to fill the positions. The first commenter noted it would be beneficial to end the temporary promotion in conjunction with a set hiring date, instead of arbitrarily ending. Likewise, the other commenter stated it would save time for human resources personnel and allow for filling of critical positions. OPM thanks the commenters for their suggestions but is not making any changes based on these comments. OPM's interpretation of 5 CFR 335.103 continues to be that those agencies covered by this regulation must apply competitive procedures for the purpose of implementing time-limited promotions in excess of 120 days. This is consistent with the wording of regulatory language that has existed for decades. OPM believes requiring competition for these opportunities when they exceed 120 days supports the merit system principles outlined in 5 U.S.C. 2301 and provides greater opportunities for the workforce. While OPM understands that competitive actions do not always occur on the schedule desired by management, following these procedures does not prevent agencies from adjusting and improving their internal hiring processes and projecting when a time-limited promotion is scheduled to end and preparing to select another candidate for the position.

Another individual commenter expressed support for the rule change

but noted they support paying employees in time-limited promotions for the full time the employee is performing higher-graded duties, not just the first 120 days. Comment 0005. OPM thanks the commenter for their comments but is not making any changes to the rule based on this comment. OPM's interpretation of 5 CFR 335.103 continues to be that those agencies covered by this regulation must apply competitive procedures for the purpose of implementing time-limited promotions in excess of 120 days. OPM believes requiring competition for these opportunities when they exceed 120 days supports merit system principles and provides greater opportunities to the workforce. Finally, the proposed rule allowed retroactive temporary promotions only when there is a third-party decision ordering the retroactive time-limited promotion. The final rule generally adopts this proposed approach with minor revisions.

Several individual commenters expressed support for this rule and noted that employees detailed to higher-graded duties should always be compensated for higher pay. Comments 0007, 0008, and 0011. For example, one commenter expressed support for this rule noting they are on detail as an acting supervisor but without any higher pay. They noted that, while they are learning, they believe they should be provided pay for the detail or temporarily promoted for at least 120 days. Another commenter stated they were assigned to a higher-graded position for a year and a half but were not compensated and seek OPM's assistance. Another commenter stated that there are employees detailed to higher-graded or higher-level positions without formal paperwork and, when paperwork is completed, the 120-day limit is rarely observed with critical positions being vacant longer than 120 days. OPM thanks the commenters but is not making any changes to the rule based on these comments. As discussed in greater detail earlier in this preamble, agencies are not precluded from detailing employees to higher-graded positions without higher pay. In accordance with 5 U.S.C. 3341, an agency may detail an employee in the competitive service to a position in either the competitive or excepted service.

Comment 0020, submitted by an individual, suggested, if this rule is adopted, there should be a tracking mechanism that would enable all parties involved to see if they are in compliance. The commenter described a personal situation where they were detailed to a higher-graded position for more than 120 days but needed to file an EEOC complaint to compel the agency to comply with a collective bargaining agreement requirement regarding such matters. The commenter noted a court ruled they were not entitled to any back pay despite producing evidence they were doing the higher-graded work over the six-year period in question. OPM thanks the commenter for their response but is not making any changes to the rule based on this comment. Both the proposed rule and final rule note there must be a third-party decision ordering the retroactive time-limited promotion. The appropriate mechanism for parties to address any compliance issues is with the party ordering the retroactive time-limited promotion. It should be noted that, in the case of the commenter, they state the court ruled they were not entitled to any back pay. The commenter does not explain the rationale the court used in making this determination. In any case, this example highlights that not all third parties will necessarily rule in favor of the employee, and this rule may not have changed the outcome in the commenter's case. OPM also notes that this final rule is prospective in nature and does not apply to any determinations made prior to the effective date of the rule.

Comment 0012, submitted by an individual, stated this rule needs to be adopted and observed by all agencies, even if there is no collective bargaining agreement. The commenter noted that they have seen many temporary promotions happening in excess of 120 days where the employee has all of the duties and responsibilities of the higher-graded position with no benefits of higher pay. Comment 0013, submitted by a bargaining unit employee, stated they strongly support the proposed rule. They noted that all employees who work higher-graded positions should be granted the appropriate pay no matter the length of time they are performing the duty. OPM thanks the commenters for supporting the proposed rule. OPM is not making any changes based on these comments. As discussed in the proposed rule, this is not limited to bargaining unit employees covered by a collective bargaining agreement. Still, the proposed rule noted there must be a third-party decision ordering the retroactive time-limited promotion.

Comment 0018, submitted by an individual, stated they have been acting in a Senior Executive Service (SES) position for 43 weeks without higher compensation. The commenter recommended revisions should be made to 5 CFR 317.903, which concerns details to SES positions. The commenter also suggested the proposed rule should address changes to 5 CFR part 630 to address accrued annual leave for non-SES employees on detail to SES positions. OPM thanks the commenter for these suggestions. These comments and recommendations are outside the scope of the rulemaking, so there are no changes to the rule based on this comment.

Comment 0010, submitted by an individual, stated that the rule has great potential to be implemented in a manner that sidesteps competitive procedures. The commenter asserted the rule could, in some agencies, prevent an individual from ever being eligible for promotions as they may not receive proper time-in-grade credit. Finally, the commenter stated there needs to be strict prohibitions in place preventing any misuse by agency management, especially when the agency's human capital team is lacking in its ability to provide skillful oversight. OPM thanks the commenter for their concerns and suggestions. OPM will not be making any changes to the proposed rule based on this comment. OPM disagrees with the commenter's conclusion this rule has great potential to be implemented in a manner that sidesteps competitive procedures. As OPM noted in the proposed rule, agencies must still use competitive procedures for any time-limited promotion that exceeds 120 days. The rule only provides for a retroactive time-limited promotion to a higher-graded position pursuant to an order by a third-party to provide the higher-pay. Also, as discussed earlier in this preamble, agencies have authority to detail employees without providing time-limited promotions. OPM also disagrees that this rule would prevent an individual from ever being eligible for promotion. OPM notes that rules have always required an individual to meet both qualification and time in grade requirements in order to receive a time-limited promotion. OPM did not propose to change these requirements.

Another individual stated that it is a fairly common occurrence that agencies assign higher-graded duties to personnel beyond 120 days without following competitive procedures. Comment 0014. They state that, more often than not, employees accept the higher-graded duties in hopes they will earn a greater chance of being selected for the position when the agency finally opens the position for competition. The commenter states this (1) reduces motivation for the agencies to employ competitive procedures even when a need exists to do so; and (2) potentially offers a competitive advantage to

employees who are willing to accept higher-graded assignments without providing opportunities for others to do the same. OPM thanks the commenter for their comments but is not making any changes based on these comments as the commenter makes no recommendations on the proposed rule. As discussed earlier in this preamble, agencies already have the authority to detail employees to higher-graded duties without receiving the higher pay.

Comment 0015, submitted by another individual, would like to see the proposed rule adopted so that ''abusive practices'' will cease. The commenter stated that it is crucial that employees assigned additional duties, temporary promotions, or temporary details at higher grades are compensated. They further note that failure to establish a policy governing the duration of time-limited promotions and corresponding pay discourages employees from seeking growth opportunities, prolongs periods of vacancies, perpetuates unfair labor practices, and pay inequity, and undermines morale and motivation. They stated that OPM should regulate these practices to ensure the protection of employees and their rights. OPM thanks the commenter for supporting the proposed rule. OPM is not making any changes based on this comment as the commenter makes no recommendations regarding the proposed rule. It is worth noting that agencies are not precluded from detailing employees to other positions without higher pay. It should also be noted that the proposed rule only provides a retroactive time-limited promotion to a higher-graded position pursuant to an order by a third-party to provide the higher-pay. In other words, a third-party would need to make a finding that a temporary promotion exceeding 120 days is appropriate based on the circumstances. For example, an arbitrator could determine the agency failed to follow requirements outlined in a collective bargaining agreement and order a retroactive time-limited promotion as a remedy.

Comment 0009, submitted by an individual, stated that rules are always for the employer's benefit, and we should start working on rules for a better working environment. This commenter stated that the time spent in a temporary grade and step is not creditable towards the completion of a waiting period when the employee is permanently promoted. The commenter suggests this restriction on creditable service be lifted so it can provide morale and financial benefits to employees on time-limited promotions. This commenter also states that their organization standardizes position descriptions and recommends they instead be based on real responsibility and not standardized. OPM thanks the commenter for these suggestions. These comments and recommendations are outside the scope of the rulemaking, so OPM is not making changes to the rule based on this comment.

Another individual commenter stated that detailing people into higher-graded positions is happening more often and is needed because the hiring process is too slow and needs to be fixed. Comment 0006. OPM thanks the commenter for their comment but is not making any changes based on this comment. This suggestion is beyond the scope of this rulemaking as OPM did not propose any changes to the hiring process.

Finally, an individual commenter noted that the proposed rule only permits a non-competitive time-limited promotion if a third party makes a decision to do so. Comment 0022. The commenter notes that, for bargaining unit employees, this scenario seems more likely if a collective bargaining agreement calls for it but notes that collective bargaining agreements also should be consistent with government-wide regulations. Yet, the commenter observes that government-wide regulations require competition for time limited promotions exceeding 120 days. The commenter asks whether OPM is giving arbitrators a green light to ignore a government-wide regulation when making decisions on this issue and whether OPM is doing the same for agencies and unions when negotiating new collective bargaining agreement. The commenter asks about non-bargaining unit employees who are not covered by a collective bargaining agreement. The commenter suggests it is not likely that a third party would order a temporary promotion exceeding 120 days for a non-bargaining unit employee not covered by a collective bargaining agreement. The commenter expresses skepticism that the MSPB would adjudicate matters related to this issue and questions whether the EEOC or U.S. Office of Special Counsel would hear such complaints. The commenter questions whether employees could file a pay claim with OPM or another third party on such matters.

OPM thanks the commenter for their comments but will not be making any changes to the proposed rule based on these comments as the commenter does not make any recommendations regarding changes to the proposed rule. The proposed rule does not allow arbitrators to ignore regulatory requirements. In fact, this final rule changes the regulations to allow arbitrators to provide a remedy for employees where an agency has not complied with regulatory requirements. Similarly, this final rule does not allow agencies or unions to ignore regulatory requirements. The background in the proposed rule provided extensive detail regarding OPM's expectations that agencies comply with the requirements to use competitive procedures for time-limited promotions exceeding 120 days. The proposed rule reminded agencies to be mindful of government-wide regulations on this matter when negotiating new collective bargaining agreements which include any procedures regarding time-limited promotions. The proposed rule also reminded agencies to be mindful of these regulations when subjecting a collective bargaining agreement to agency head review under the Federal Service Labor-Management Relations Statute. OPM repeats these reminders in this final rule in greater detail in the preamble for ''Section 335.103—Agency Promotion Program.'' The scope of this rule is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations; and an appropriate authority has made a determination the employee is entitled to a retroactive time-limited promotion to resolve a grievance or a complaint after the agency has made the assignment without use of competitive procedures as required by OPM regulations. OPM's interpretation of 5 CFR 335.103 continues to be that agencies covered by this regulation must apply competitive procedures for the purpose of implementing time-limited promotions in excess of 120 days, whether the employee is a bargaining unit employee or non-bargaining unit employees. As discussed in more detail in the preamble for ''Section 335.103—Agency Promotion Program,'' other third parties may have reason to make a determination on such matters.

In the following sections, we address the public comments related to the specific portion of the regulation to which each comment applied.

Part 335—Promotion and Internal Placement

Part 335 addresses promotions and internal placement in the competitive service. The authority citation provided in the proposed rule did not reflect the addition of ''Public Law 114–47, sec. 2(a) (Aug. 7, 2015), as amended by Public Law 114–328, sec. 1135 (Dec. 23, 2016), codified at 5 U.S.C. 9602,'' which was made by the Appointment of Current and Former Land Management

Employees final rule published on December 6, 2023 (88 FR 84685). OPM also notes that several authority citations were inadvertently removed in that final rule. The updated authority citation in this final rule reinstates the inadvertently deleted authorities, which were provided in the proposed rule, and includes the Land Management appointment authority.

Subpart A—General Provisions

Section 335.103—Agency Promotion Program

In this section, OPM proposed to amend § 335.103 by adding a new paragraph (c)(2)(iii) to read, ''Retroactive temporary promotions to higher-graded positions pursuant to a final order by an arbitrator, adjudicative body or court.'' This proposed language would require agencies to pay an employee who has been found to have been noncompetitively, temporarily detailed to a higher-graded position at the higher grade even for a period of time that exceeds 120 days, pursuant to a final order by an arbitrator, adjudicative body, or court. As previously noted, this regulatory change would also apply to any employee, including non-bargaining unit employees, pursuant to a final order by an adjudicative body or court unrelated to procedures found in a collective bargaining agreement. For example, an employee may file a complaint with the Equal Employment Opportunity Commission alleging discrimination on matters related to a temporary promotion exceeding 120 days. Finally, as previously discussed, this is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations and the agency made the assignment without use of competitive procedures.

A Federal agency commented that it does not challenge OPM's proposed change and concurs that, where a collective bargaining agreement provides for a retroactive temporary promotion, the regulation should not limit the promotion to 120 days. Comment 0017. However, the agency expressed significant concerns that the proposed language would not allow an agency to settle grievances where an employee correctly claims that he or she has been temporarily, noncompetitively assigned to a higher-graded position for longer than 120 days and where the collective bargaining agreement or some other document requires the higher compensation. The agency noted that the current language prevents an agency and a union from resolving a grievance at the lowest possible level and would force the union to invoke arbitration resulting in monetary outlays and lost productivity by both parties for an issue not in dispute. The agency stated these limitations unnecessarily impact the agency's mission and budget as well as negatively impact the labor-management environment. The agency encouraged OPM to modify the proposed rule to allow for agency settlements, with backpay. Specifically, the agency suggested OPM include a definition of ''adjudicative body'' to avoid any confusion as to who can direct the monetary award.

OPM notes the proposed rule was never intended to prevent agencies from entering into lawful settlement agreements before a grievance or complaint, informal or formal, was filed with an outside third party. Yet, OPM agrees that the term ''adjudicative body'' may not be clear on its face and could cause confusion when parties are applying it. Therefore, OPM will revise the language to be consistent with other situations where the Back Pay Act, 5 U.S.C. 5596, is applied.

OPM's Back Pay Act regulations are found in subpart H of 5 CFR part 550. Specifically, 5 CFR 550.801 notes that the Back Pay Act authorizes the payment of back pay, interest, and reasonable attorney fees for the purpose of making an employee financially whole (to the extent possible) when, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or grievance), the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee. Furthermore, 5 CFR 550.803 defines ''appropriate authority'' as an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (1) a court, (2) the Comptroller General of the United States, (3) the Office of Personnel Management, (4) the Merit Systems Protection Board, (5) the Equal Employment Opportunity Commission, (6) the Federal Labor Relations Authority and its General Counsel, (7) the Foreign Service Labor Relations Board, (8) the Foreign Service Grievance Board, (9) an arbitrator in a binding arbitration case, and (10) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

With this in mind, OPM will amend the new paragraph (c)(2)(iii) to read as follows: ''A retroactive temporary promotion to a higher-graded position pursuant to a determination by an appropriate authority as defined in 5 CFR 550.803.'' This revision not only covers the third parties specifically identified in the proposed rule but would permit agencies to make settlement agreements where appropriate.

The same Federal agency also recommended the regulatory language be revised to elaborate on what a collective bargaining agreement does or does not require as relevant to this issue. OPM thanks the commenter for the suggestion but is not making any changes based on this recommendation. OPM does not believe it is necessary to add regulatory language about collective bargaining agreements. Agencies and unions already have decades of experience resolving negotiated grievances regarding interpretation and application of collective bargaining agreements. If an arbitrator determines a collective bargaining agreement has been violated regarding a time-limited promotion, the arbitrator is essentially determining that an unjustified or unwarranted personnel action has occurred. Likewise, an agency official with the authority to enter into settlement agreements regarding negotiated grievances can make a determination that an unjustified or unwarranted personnel action has occurred. This can and already happens today without specific regulatory language discussing what collective bargaining agreements can and cannot do in this situation or other employment situations that are subjects of negotiated grievances. Therefore, OPM is not revising the regulatory language based on this comment.

Even with the revisions to paragraph (c)(2)(iii), OPM's interpretation of 5 CFR 335.103 will continue to be that agencies covered by this regulation must apply competitive procedures for the purpose of implementing temporary promotions in excess of 120 days. This is consistent with the wording of regulatory language that has existed for decades. OPM believes requiring competition for these opportunities when they exceed 120 days supports merit system principles at 5 U.S.C. 2301 and provides greater job opportunities to the workforce.

As discussed in the proposed rule and repeated in this final rule, the merit system principles (MSPs) [11] are nine basic standards that govern the management of the executive branch

[11] See 5 U.S.C. 2301(b) for the enumerated merit system principles.

workforce and serve as the foundation of the Federal civil service. The U.S. Merit Systems Protection Board (MSPB) has noted the general themes of the MSPs and prohibited personnel practices [12] are: (1) Fairness—treating employees fairly in all aspects of their employment; (2) Protection—refraining from misuse of authority and protecting employees from harm, such as reprisal for the exercise of a legally protected right; and (3) Stewardship—managing employees in the short-term and long-term public interest.[13] For example, MSP #1 provides that recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. 5 U.S.C. 2301(b)(1). The MSPB has noted MSP #1 ''[f]ocuses on attaining a well-qualified and representative workforce through open recruitment and fair, job-related assessment of applicants.'' [14] Therefore, OPM continues to believe 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-limited promotion. For situations where agencies have more immediate, short-term needs of 120 days or less, it is appropriate for agencies to non-competitively assign higher-graded duties to qualified employees to meet these needs. For situations where agencies have longer-term needs exceeding 120 days, use of competitive procedures is consistent with the purpose of MSP #1.

Notwithstanding the addition of the new paragraph (c)(2)(iii), OPM reminds agencies that they should not assign employees to perform higher-graded duties for periods exceeding 120 days such that the employee has been effectively detailed to a higher-graded position without following applicable competitive procedures. Under this final regulation, agencies are reminded that they may be required to provide higher compensation as a result of a determination by an appropriate authority as defined in 5 CFR 550.803 and discussed in greater detail above.

OPM also reminds agencies, subject to the requirements of 5 CFR part 335, that competitive procedures should always be followed if the agency anticipates the assignment of higher-graded duties may exceed 120 days. If the agency incorrectly anticipates the assignment of higher-graded duties will last 120 days or less but later determines the need exceeds 120 days, the agency must follow competitive procedures for assignment of such duties beyond 120 days for any particular employee or assign the higher-graded work to another qualified employee, up to, but not exceeding 120 days. Finally, OPM reminds agencies to consider this when negotiating new collective bargaining agreement provisions regarding temporary promotions. Collective bargaining agreements must be consistent with requirements in Government-wide regulations on this matter. To be clear, newly negotiated collective bargaining agreements that allow non-competitive temporary promotion exceeding 120 days must be disapproved in agency head review for not complying with government-wide regulations.[15]

Finally, OPM reminds agencies that 5 CFR part 335 does not apply to positions in the Excepted Service. Therefore, the 2004 OPM advisory opinion and the various FLRA decisions on this matter are not applicable to the issue of when competitive procedures must be followed for time-limited promotions in the Excepted Service. Still, agencies with employees in the Excepted Service are subject to Merit System Principles and should be mindful of these principles when assigning Excepted Service employees the duties of a higher-graded position. These agencies often have bargaining unit employees who may be covered by collective bargaining agreement provisions outlining when an employee should receive a time-limited promotion.

III. Regulatory Analysis

A. Statement of Need

OPM is issuing this final rule for two purposes. First, OPM reminds agencies that competitive procedures must be followed when assigning duties of a higher-graded position to employees for a period of time exceeding 120 days. Second, in recognition that there continue to be situations where competitive procedures are not followed by agencies subject to 5 CFR part 335, this rule provides the possibility of remedial relief to bargaining unit employees covered by collective bargaining agreements requiring temporary promotions and to non-bargaining unit employees when an appropriate authority makes a determination to provide a retroactive time-limited promotion, usually in response to a grievance or complaint.

OPM's interpretation that competitive procedures must be followed for temporary promotions exceeding 120 days has not changed from what was stated in the proposed rule. Notwithstanding OPM's interpretation of these requirements in 5 CFR 335.103, however, OPM agrees that employees should be compensated accordingly when an agency has been found to be out of compliance with requirements of a collective bargaining agreement. Furthermore, OPM's 2004 advisory opinion should not be cited as a basis for agencies to disregard, whether intentionally or unintentionally, Government-wide regulations on use of competitive procedures and collective bargaining agreement requirements regarding temporary promotions for performing duties of a higher-graded position. Therefore, OPM has modified 5 CFR 335.103 to address these scenarios.

This modification reinforces the President's recognition that Federal civil servants' rights deserve to be protected. President Biden has stated that ''[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the Federal workforce.'' Executive Order 14003, Protecting the Federal Workforce (86 FR 7231, Jan. 22, 2021). As NTEU stated in its petition to OPM, it supports merit-based competition for long-term promotions or details to positions that are properly classified at a higher grade to ensure that the merit system principles of fair and open competition are met.

NTEU also noted that ''[i]n practice, many of these cases arise where higher-graded duties are assigned to employees on a different, lower-graded position description, due to staffing shortages, budget constraints, retirements, etc. Agency managers, who are often tasked with delivering the agency's mission without the resources to do so, simply assign the higher graded work to

[12] See 5 U.S.C. 2302: Prohibited personnel practices.

[13] See The Merit System Principles: Keys to Managing the Federal Workforce (*mspb.gov*), October 2020, available at *https://www.mspb.gov/studies/studies/The_Merit_System_Principles_Keys_to_Managing_the_Federal_Workforce_1371890.pdf.*

[14] *Id.*

[15] 5 U.S.C. 7114(c) provides that ''(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.'' and ''(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).''

whomever is available and convenient.'' NTEU noted that ''these employees are precluded from any remedial relief beyond 120 days—not because the inequity has ceased to exist, but because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles.'' OPM believes this final rule is a reasonable solution to address those situations where an agency has assigned higher-graded duties to an employee without using competitive procedures, a collective bargaining agreement requires a temporary promotion, and an appropriate authority has determined a retroactive promotion is an appropriate remedy. Likewise, OPM believes this final rule provides a reasonable solution to address similar situations for non-bargaining unit employees where an appropriate authority, such as the EEOC, has determined the employee's rights were violated.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation and to continue the possibility of agencies not using competitive procedures when assigning an employee the duties of a higher-graded position over 120 days because of an absence of clarification. As a result, employees may not have an opportunity to be made whole for time performing higher-graded duties in excess of 120 days even if the employee challenges the agency action in a grievance or complaint process. OPM has determined this is not an equitable option. As NTEU noted, an inequity exists and employees are precluded from any remedial relief beyond 120 days because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles.

Another regulatory alternative is to address this issue through OPM's oversight function. OPM's statutory responsibility to oversee the Federal personnel system encompasses assessment of compliance with merit system principles, and supporting laws, rules, regulations, executive orders, and OPM standards, as well as the effectiveness of personnel policies, programs, and operations.[16] The legal authority for OPM oversight is 5 U.S.C. 1104(b)(2) and 5 CFR parts 5 and 10. Under this authority, OPM can evaluate the effectiveness of agency personnel policies, programs and operations, and agency compliance with and enforcement of applicable laws, rules, regulations, and OPM directives. OPM can also direct corrective action where appropriate.

While OPM can, through its oversight process, identify situations where an agency is not complying with the requirement to use competitive procedures for time-limited promotions that exceed 120 days, OPM's enforcement process may not provide timely relief to employees who are impacted by an agency's failure to follow OPM procedures on time-limited promotions. Furthermore, based on OPM's 2004 advisory opinion, although OPM may direct, as part of its oversight process, an agency to follow competitive procedures for time-limited promotions exceeding 120 days, this would not provide any monetary relief for employees covered by collective bargaining agreements that require time-limited promotions and are identified by OPM as having been given a time-limited promotion where OPM's regulations were not properly followed.

C. Impact

OPM is issuing this final rule to authorize a retroactive temporary promotion when a competitive service employee, effectively, has been detailed or temporarily promoted to higher-graded duties of a higher-graded position if a collective bargaining agreement requires it and the employee has been assigned these duties outside of competitive hiring procedures, as found pursuant to a determination by an appropriate authority. By authorizing a retroactive promotion in these situations, OPM affirms that an employee should be paid accordingly for the entire time performing these duties of a higher-graded position in certain circumstances, such as when a collective bargaining agreement requires a temporary promotion and pursuant to an order by an appropriate authority, such as an arbitrator. In addition, a non-bargaining unit competitive service employee who is temporarily promoted to higher grade duties of a higher-graded position should be paid accordingly for the entire time performing these duties of a higher-graded position, as found pursuant to a determination by an appropriate authority.

OPM reminds agencies to use competitive procedures when assigning an employee duties of a higher-graded position when the assignment exceeds 120 days. This is not a new requirement and simply reinforces what agencies, subject to 5 CFR part 335, should already be doing and should have no impact. In those situations where an agency does not meet this regulatory requirement, it reinforces the commitment an agency has already made as part of the collective bargaining process under 5 U.S.C. chapter 71. It also provides all employees, whether bargaining unit or non-bargaining unit, an opportunity to be made whole if an agency does not properly follow employment policies, particularly those related to temporary promotions, and the employee pursues a grievance or complaint processes which may be available.

D. Costs

OPM received one comment from an individual commenter regarding the estimated costs of the proposed rule. Comment 0004. The commenter stated that OPM's notice assumed a rate of 200% the pay rate but the commenter believes this rate may be higher (or lower) than the cost of government civilian manpower. The commenter points to a ''Full Cost of Manpower'' tool used by the Department of Defense, which the commenter believes may be more accurate or appropriate for estimations. They recommended exploring the tool as a basis for any cost estimates.

OPM thanks the commenter for their suggestion but will not be revising its estimated costs based on this comment. OPM recognizes that costs may vary by agency and is only providing an estimated Government-wide cost. OPM cannot estimate costs with great specificity because they will vary depending on the number of times an agency may assign higher grade duties to employees that result in a decision on a grievance or complaint providing a retroactive time-limited promotion. Each agency will need to consider the potential costs of this final rule based on their unique circumstances and the practices and tools used by that agency. The economic assessment is finalized with no changes other than updates to salary costs based on 2024 average salary rates.

This rule will affect the operations of approximately 80 Federal agencies in the executive branch—ranging from cabinet-level departments to small independent agencies. We do not believe this rule will substantially increase the ongoing administrative costs to agencies as this rule leverages existing procedures and requires agencies to comply with collective bargaining agreements that they have made with unions (where applicable). Likewise, there may be other agency policies that impact time-limited promotions. Furthermore, OPM believes costs will be negligible. Agencies should be able to leverage existing resources to implement the reminders in this rule and the regulatory requirements.

[16] OPM oversight activities—*www.opm.gov/policy-data-oversight/oversight-activities.*

Ultimately, costs are likely to vary from agency to agency since some agencies have collective bargaining unit agreements with language regarding the process for detailing bargaining unit employees to a higher-graded position for more than 120 days. Furthermore, some agencies are currently already closely adhering to OPM regulations in § 335.103. Therefore, OPM has determined that finalizing this rule is not dependent on whether our cost estimate is accurate for any specific agency. As discussed earlier, OPM believes this final rule is a reasonable solution to address those situations where an agency has assigned higher-graded duties to an employee without using competitive procedures, a collective bargaining agreement requires a temporary promotion, and an appropriate authority has determined a retroactive promotion is an appropriate remedy. Likewise, OPM believes this final rule provides a reasonable solution to address similar situations for non-bargaining unit employees where an appropriate authority, such as the EEOC, has determined the employee's rights were violated. At the same time, the rule supports merit system principles by reminding agencies to use competitive procedures for time-limited promotions exceeding 120 days.

With the above in mind, we estimate this rule will require agencies to review their policies on time-limited promotions subject to 5 CFR part 335; update these policies if needed; and provide reminders and, if necessary, training to implement this final rule and reinforce existing requirements in 5 CFR part 335. For the purpose of this cost analysis, the assumed staffing for Federal employees performing the work required by the regulations in § 335.103 is one executive; one GS–15, step 5; one GS–14, step 5; and one GS–13, step 5 in the Washington, DC, locality area. The 2024 basic rate of pay for an executive at an agency with a certified SES performance appraisal system is $246,400 annually, or $118.06 per hour. For General Schedule employees in the Washington, DC, locality area, the 2024 pay table rates are $185,824 annually and $89.04 hourly for GS–15, step 5; $157,982 annually and $75.70 hourly for GS–14; and $133,692 annually and $64.06 hourly for GS–13, step 5. 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 assumed hourly labor costs of $236.13 for an executive; $178.08 for a GS–15, step 5; $151.40 for a GS–14, step 5; and $128.12 for a GS–13, step 5. In order to comply with the regulatory changes in this final rule and the reminder in this preamble to follow competitive procedures for time-limited promotions exceeding 120 days, affected agencies will need to review and update (if applicable) their policies, procedures and develop appropriate training or communications to appropriate personnel. Agencies are reminded to review 5 CFR part 335, agency merit promotion plans, and related guidance to ensure compliance. Agencies are also encouraged to communicate with managers, supervisors, and agency staff who are responsible for completing actions related to part 335. We estimate that this will require an average of 10 hours of work by employees with an average hourly cost of $173.43. This would result in estimated costs of about $1,734 per agency, and about $138,720 in total government wide. If an agency follows existing requirements to use competitive procedures for time-limited promotions exceeding 120 days, there should be no need for employees to file grievances ending in binding arbitration that could order backpay with interest. To the extent that grievances are filed and arbitration decisions order backpay or backpay is provided in other forums, the costs will vary by agency depending on the number of employees impacted, the salaries of these employees, and the amount of time performing the higher-graded duties beyond 120 days.

OPM does not have data to make a determination on potential costs related to arbitration decisions implementing the proposed regulatory language. OPM did not receive any comments on the implementation and impacts of the rule beyond what was discussed above.

E. Benefits

This final rule has several important benefits. First, it supports merit system principles by reminding agencies to use competitive procedures for time-limited promotions exceeding 120 days. OPM believes 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-limited promotion. OPM believes that fair and open competition is appropriate for performing duties for a period of time exceeding 120 days.

On the other hand, OPM also agrees that it is unfair for employees to be assigned these higher-graded duties and not be compensated accordingly when assignment of these duties exceeds 120 days and a third party awards the employee a retroactive temporary promotion. Therefore, the second benefit of this rule is that it facilitates agencies' provision of monetary relief to employees who perform duties of a higher-graded position for more than 120 days where the agency has failed to follow the requirements of 5 CFR part 335. OPM expects this rule to further incentivize agencies to follow proper procedures when assigning higher-graded duties and to honor the commitment agencies made in their collective bargaining agreements when they agreed to temporarily promote employees. This final rule not only reinforces merit system principles for bargaining unit and non-bargaining unit employees but reinforces the agency's obligations under the Federal Service Labor-Management Relations Statute for bargaining unit employees.

Regulatory Review

Executive Orders 13563, 12866, and 14094 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 major rules with effects of $200 million or more in any one year. This rule does not reach that threshold but has otherwise been designated by the Office of Management and Budget (OMB) as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as supplemented by Executive Orders 13563 and 14094.

Regulatory Flexibility Act

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

Federalism

This regulation 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 regulation does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule 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 and it 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

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule does not satisfy the criteria listed in 5 U.S.C. 804.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 335

Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR part 335 as follows:

PART 335—PROMOTION AND INTERNAL PLACEMENT

■ 1. The authority citation for part 335 is revised to read as follows:

Authority: 5 U.S.C. 2301, 2302, 3301, 3302, 3304(f), 3330, 9602; sec. 511, Pub. L. 106–117, 113 Stat. 1575; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 11478, 3 CFR, 1966–1970 Comp., p. 803, unless otherwise noted; E.O. 13087, 3 CFR, 1998 Comp., p. 191; E.O. 13152, 3 CFR, 2000 Comp., p. 264; and 5 CFR 2.2 and 7.1.

Subpart A—General Provisions

■ 2. Amend § 335.103 by:

■ a. Removing the word ''and'' at the end of paragraph (c)(2)(i);

■ b. Removing the period at the end of paragraph (c)(2)(ii) and adding ''; and'' in its place; and

■ c. Adding paragraph (c)(2)(iii).

The addition reads as follows:

§ 335.103 Agency promotion programs.

* * * * *

(c) * * *

(2) * * *

(iii) A retroactive temporary promotion to a higher-graded position pursuant to a determination by an appropriate authority as defined in 5 CFR 550.803.

* * * * *

[FR Doc. 2024–16030 Filed 7–24–24; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 212

[CIS No. 2769–24; DHS Docket No. USCIS–2021–0018]

RIN 1615–AC75

International Entrepreneur Program: Fiscal Year 2025 Automatic Increase of Investment and Revenue Amount Requirements

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Final rule; technical amendment.

SUMMARY: On January 17, 2017, DHS published a final rule with new regulatory provisions guiding the use of parole on a case-by-case basis with respect to certain entrepreneurs of start-up entities. The 2017 regulation provided that the investment and revenue amount requirements would automatically adjust every three years. DHS is issuing this rule to update the investment and revenue amounts in the regulations to adjust for inflation.

DATES: This final rule is effective on October 1, 2024.

FOR FURTHER INFORMATION CONTACT: For technical questions only: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20588–0009, telephone (240) 721–3000 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. The International Entrepreneur Program

On January 17, 2017, the Department of Homeland Security (DHS) published a final rule with new regulatory provisions guiding the use of parole on a case-by-case basis with respect to entrepreneurs of start-up entities. These entrepreneurs would be eligible for consideration of parole if they could demonstrate a significant public benefit to the United States through substantial and demonstrated potential for rapid business growth and job creation.[1] The final rule was to be effective July 17, 2017.[2]

On July 11, 2017, DHS published a rule delaying the effective date to March 14, 2018.[3] Two individuals, two businesses, and the National Venture Capital Association sued DHS, challenging the delay rule for violating the Administrative Procedure Act's notice and comment requirement at 5 U.S.C. 553. The D.C. Circuit, agreeing with the plaintiffs, vacated the delay rule on December 1, 2017, allowing the rule to go into effect without further delay.[4]

The regulatory provisions established by the January 17, 2017 rule, which were implemented after the delay rule was vacated on December 1, 2017,[5] provide specific investment and revenue amounts that can support an application for parole and re-parole.[6] The rule also promulgated a regulatory provision at 8 CFR 212.19(l) stating that the investment and revenue amounts will be automatically adjusted every 3 years by the Consumer Price Index for All Urban Consumers (CPI–U) and posted on the USCIS website at *www.uscis.gov* and that investment and revenue amounts adjusted under 8 CFR 212.19(l) will apply to all applications filed on or after the beginning of the fiscal year for which the adjustment is made.[7]

B. Investment and Revenue Increased for Fiscal Year 2022

On September 13, 2021, DHS issued a final rule (the 2021 final rule) adjusting the investment and revenue

[1] 82 FR 5238 (Jan. 17, 2017).

[2] *Id.*

[3] 82 FR 31887 (July 11, 2017).

[4] *Nat'l Venture Capital Assoc., et al.,* v. *Duke,* 291 F. Supp. 3d 5 (D.D.C. Dec. 1, 2017).

[5] On May 29, 2018, DHS published a notice of proposed rulemaking (NPRM) to remove the international entrepreneur program from DHS regulations, but never finalized the proposal. *See* 83 FR 24415 (May 29, 2018). Instead, on May 11, 2021, DHS withdrew the NPRM. *See* 86 FR 25809 (May 11, 2021).

[6] *See* 8 CFR 212.19(a)(5), (b)(2)(ii), and (c)(2)(ii).

[7] While DHS did not discuss these automatic adjustments in the preamble to the final rule, DHS explained in the proposed rule that it believed that automatically adjusting the minimum dollar amounts by the CPI–U every 3 years will maintain investment and revenue requirements at an appropriate level in relation to future economic conditions. DHS also believed automatically adjusting the minimum dollar amounts in 3-year increments would be more manageable operationally for DHS and less burdensome to applicants than adjustments at more frequent intervals. *See generally* 81 FR 60129, 60151 (Aug. 31, 2016).