

## Comments on Proposed 5 CFR Chapter XCIX and Part 9901 National Security Personnel System (NSPS)

**Definitions:** 5 CFR 9901.103, 9901.304, et al.

The proposed regulation does not define "Agency" - Is it intended that for purposes of NSPS, "agency" means Department of Defense, or are there circumstances where "agency" will mean the individual components of DOD, i.e., Army, Navy, Air Force, etc.)?

Additionally, "transfer" is not defined. 5 CFR 210.102 b (18) defines transfer as a change of an employee, without a break in service of 1 full workday, from a position in one agency to a position in another agency. The language in proposed 5 CFR 9901.409 (h) equates "transfers" with "details" with respect to whether an additional performance appraisal may be a rating of record. Typically, a transfer is similar to a reassignment with the difference that the change is to a different position but in another agency. Therefore, the definition of "agency" is also significant in this context.

**Subpart C and Subpart F.** Subpart C provides for the establishment of performance pay pools based on a variety of categories. Subpart F provides for the establishment of competitive areas based on a variety of factors, including funding lines. The regulation is silent as to what, if any, relationship there is between establishing pay pools and competitive areas, when they are based on funding lines.

**Subpart C - Pay and Pay Administration.** Although NSPS will not be applied to prevailing wage system employees initially, it is not clear whether DOD will continue to perform locality wage surveys and that "Local Market Supplements" for such positions will be based on the survey results.

**Subpart D - Performance Management.**

Proposed 5 CFR 9901.408 (b) (1). Implementing regulations should provide guidelines as to application of the options for addressing performance deficiencies (perhaps similar to a Table of Penalties) to assure consistency. Typically, when actions are taken under Chapter 75, the standard is for "efficiency of the service" and the treatment of similarly situated employees is a consideration.

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Proposed 5 CFR 9901.409 (b) and (h). Unless otherwise defined, a “transfer” occurs when a person leaves a position in one agency for one in another agency. (5 CFR 210.102 (b) (18). It is unclear whether “agency” under NSPS is the entire Department of Defense. If that is the case, there should be a uniform performance management system for all DOD components to facilitate the Human Resources aspects of NSPS. Otherwise, the use of “transfers” as an example in 5 CFR 9901.409 (h) is inconsistent with 5 CFR 9901.409 (b) because the this provision could be read as not requiring a rating after the end of the rating period if the employee is transferring out of the agency because it would not constitute a rating of record. Moreover, the regulation as written does not address the preparation of closeout or interim ratings by supervisors who depart near the end of the rating period. At best, they are optional under the current language in 5 CFR 9901.409 (h) thus raising the question of whether employees will be disadvantaged with respect to performance payouts and awards by not having a rating of record for that rating period.

5 CFR 9901.409 Rating and rewarding performance. It is unclear whether an otherwise eligible employee becomes ineligible for a performance pay increase and or award bonus if they leave the pay pool position (whether to another position or retirement, etc.) after receiving a rating of record for the rating period.

5 CFR 9901.409 (f). This provision provides that an employee on an approved absence may not receive a lowered rating of record. However, the regulation does not address whether performance payouts and awards for such employees must be related to actual job performance during the rating period (as opposed to “presumptive” ratings).

**Subpart E – Staffing and Employment –**

5 CFR 9901.514. Non-citizen Hiring. As written, this provision seems to apply to NSPS positions locate within CONUS, however, since NSPS positions may also exist overseas, does this provision only apply to CONUS hires?

**Subpart F – Workforce Shaping –**

5 CFR 9901.608. The current language suggests that an employee who is displaced from his or her position can displace an employee with lower standing on the retention list. However, does this provision intend that there is no longer an opportunity to retreat to a position previously held as provided for under current OPM regulations? If so, this provision provides an opportunity for management to use reduction in force procedures to target a particular position for abolishment to separate an employee rather than using adverse action procedures because of the minimal impact on other employees.