

Calendar No. 703

110TH CONGRESS }
2d Session }

SENATE

{ REPORT
110-328 }

SENIOR PROFESSIONAL PERFORMANCE ACT
OF 2007

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1046

TO MODIFY PAY PROVISIONS RELATING TO CERTAIN
SENIOR-LEVEL POSITIONS IN THE FEDERAL GOV-
ERNMENT, AND FOR OTHER PURPOSES



APRIL 22, 2008.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

69-010

WASHINGTON : 2008

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Mr. LIEBERMAN, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1046]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1046) to modify pay provisions relating to certain senior-level positions in the Federal Government, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

S. 1046 raises the maximum pay levels for certain senior professionals in the federal government to match the maximum pay levels now allowed for members of the Senior Executive Service (SES), and the bill generally brings the pay system for senior professionals more in line with the pay system for the SES. Just as agencies that have certified performance management systems may now provide to SES members higher pay than other agencies may provide, this bill will likewise allow agencies with certified performance management systems to provide higher pay to covered senior

professionals than may other agencies. S. 1046 also makes a number of clarifications and technical corrections to the process by which agencies obtain such certification of their performance management systems.

II. BACKGROUND AND NEED FOR THE LEGISLATION

In 2002 and 2003, Congress strengthened the connection between performance-management and pay for members of the SES and for senior professionals, including employees classified as senior-level (SL) or scientific and professional personnel (ST) by raising certain statutory pay ceilings at agencies with certified performance appraisal systems. A statute enacted in 2002 raised the maximum annual pay of all senior employees at such agencies.¹ The Director of OPM, with the concurrence of the Director of the Office of Management and Budget (OMB), was authorized to certify an agency's performance appraisal system if it makes meaningful distinctions based on relative employee performance. Upon certification, the maximum amount that the agency may pay to a senior employee in a year (including base pay and allowances such as premium pay, bonuses, and incentive awards) was raised from the current ceiling, of level I of the Executive Schedule, to the annual pay level of the Vice President.

Then in 2003 Congress built on the 2002 amendments by also increasing the maximum level of base pay that agencies with certified performance appraisal systems are allowed to pay, but the 2003 statute applied to SES members only.² The 2003 provisions increased the maximum allowable base pay for members of the SES from level IV of the Executive Schedule to level III and ended the locality-based comparability payments to SES members. The new system also replaced the six pay steps and corresponding pay levels with a single, broad range. Upon certification of their performance management systems by OPM, with concurrence by OMB, agencies were given the authority to further increase the maximum allowed base pay for their SES workforce from level III of the Executive Schedule to level II. The 2003 pay reforms were not applied to SL or ST personnel.

While SL and ST positions are different in some respects from the SES, whose members provide the executive management of the federal government,³ these other senior positions are also recognized as providing essential specialized skills that are needed to address the federal government's 21st Century challenges. The ST system is for specially qualified non-executive personnel who conduct research and development functions in the physical, biological, medical, or engineering sciences, or a closely-related field.⁴ ST positions are graded and paid above level 15 of the General Schedule (GS-15) and, according to OPM, "would be expected to have a graduate degree, significant research experience, and a national or international reputation in his/her field."⁵ The SL system is for high-level non-executive positions, also graded above GS-15, that

¹ Section 1322 of Public Law 107-296 (Nov. 25, 2002) (5 U.S.C. § 5307(d)).

² Section 1125 of Public Law 108-136.

³ 5 U.S.C. § 3131.

⁴ See 5 U.S.C. § 3104; U.S. Office of Personnel Management, *The Senior Executive Service* (February 2004), page 8. This document is currently available at: <http://www.opm.gov/ses/pdf/SESGUIDE04.pdf>.

⁵ *Id.*

do not involve fundamental research and development responsibilities. Examples offered by OPM include “a high level special assistant or a senior attorney in a highly-specialized field who is not a manager, supervisor, or policy advisor.”⁶

In 2006, the Government Accountability Office identified the difference between the maximum rate of basic pay for the SES and the maximum for SL and ST employees as an undesirable anomaly in the law.⁷ The Senior Executives Association, whose membership includes SL and ST employees, has requested that their pay systems be made comparable to that of the SES. Moreover, the Office of Personnel Management (OPM) has proposed that Congress make the pay system for senior federal employees comparable to the pay system for members of the SES.⁸

The principal purpose of S. 1046 is to bring the pay system for SL and ST personnel into line with that for SES members. Locality-based comparability payments for SL and ST employees will be eliminated and replaced with a boost in the maximum pay level that may be paid to these employees. Specifically, the bill will raise the basic-pay ceiling for SL and ST personnel from level IV to level III of the Executive Schedule, or, assuming that the employing agency has a certified performance appraisal system, to level II of the Executive Schedule.

The bill also makes a variety of adjustments to the standards and procedures for appointing and employing senior professional personnel, as well as clarifications and technical corrections to the process by which agencies obtain certification of their performance management systems. These provisions of the bill are based on legislative proposals made by OPM.⁹

III. LEGISLATIVE HISTORY

Senator Voinovich introduced S. 1046 on March 29, 2007. The bill was referred to the Committee on Homeland Security and Governmental Affairs and, on June 6, 2007, was further referred to the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia.

The Subcommittee subsequently favorably polled S. 1046, and, on June 13, 2007, the Committee considered the bill and ordered it reported favorably without amendment to the full Senate by voice vote. Senators present were: Lieberman, Levin, Akaka, Pryor, Tester, Collins, Stevens, Voinovich, Coleman, and Warner.

The subject matter of the bill had also been considered by the Committee in past Congresses. In the 109th Congress, section 6 of S. 3492, the Federal Workforce Performance Appraisal and Management Improvement Act of 2006, would have established parity between the pay systems for members of the SES and SL and ST employees. The Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia held

⁶*Id.* at page 7. See 5 U.S.C. § 5108.

⁷U.S. Government Accountability Office, *Human Capital: Trends in Executive and Judicial Pay*, GAO-06-708, p. 7.

⁸Letter from Linda M. Springer, Director, OPM, to Richard B. Cheney, President of the United States Senate, June 8, 2007. This letter is currently available at: http://www.opm.gov/news_events/congress/proposals/senior_professional_performance_act.pdf.

⁹*Id.*; Letter from Linda M. Springer, Director, OPM, to Richard B. Cheney, President of the United States Senate, February 7, 2007. This letter is currently available at: http://www.opm.gov/news_events/congress/proposals/ses_certification.pdf.

a hearing on June 29, 2006, entitled, Enhancing Employee Performance: A Hearing on Pending Legislation, at which S. 3492 was discussed. In the 108th Congress, S. 768, the Senior Executive Service Reform Act of 2003, which would have made similar amendments to both the SES and the SL and ST pay systems, was introduced and referred to the Committee.

IV. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that the short title of the bill is “The Senior Professional Performance Act of 2007.”

Section 2. Pay provisions relating to certain senior-level positions

Subsections (a) and (b) of Section 2 amend Title 5, United States Code, to make the pay provisions for SL and ST employees comparable to the pay provisions for members of the SES as modified by legislation enacted in 2003. These changes will end the virtually automatic locality-based comparability payments to personnel in SL and ST positions and will increase the maximum levels of basic pay that agencies may provide to such personnel. The highest levels of basic pay will be available at agencies that have certified performance appraisal systems.

Subsection (a)—Locality Pay. This subsection amends 5 U.S.C. § 5304, which generally governs locality-based comparability payments for federal employees, by exempting personnel in SL and ST positions from receiving locality pay. For these personnel, 5 U.S.C. § 5304 currently places a cap on total basic pay including locality pay at no more than level III of the Executive Schedule; the amendments in this subsection of the bill also remove SL and ST personnel from that ceiling on basic pay.

Subsection (b)—Access to Higher Maximum Rate of Basic Pay. This subsection amends 5 U.S.C. § 5376, which generally governs the establishment of basic pay rates for SL and ST personnel. Counterbalancing the withdrawal of locality pay under subsection (a), this subsection (b) will raise the available pay range for SL and ST personnel by increasing the ceiling on their rate of basic pay from level IV to level III of the Executive Schedule. Moreover, if the employing agency has a performance appraisal system that has been certified under section 5 U.S.C. § 5307 as making meaningful distinctions based on relative performance, the cap on basic pay will be further raised, to level II of the Executive Schedule. These changes will parallel the provisions enacted in 2003 with respect to members of the SES.

Subsection (c)—Authority for Employment; Appointments; Classification Standards. This subsection makes several changes to the standards and procedures relating to the appointment and employment of senior-level professional personnel. These changes, which were requested by OPM,¹⁰ are as follows:

Paragraph (1) of this subsection amends 5 U.S.C. § 3104(a). The current code provision authorizes agencies to establish ST positions under standards and procedure prescribed by OPM. Under the

¹⁰Letter dated June 8, 2007, note 8 above.

amendment, these standards and procedures prescribed by OPM will be published in such form as OPM may determine.

Paragraph (2) amends 5 U.S.C. § 3324, which now provides that the qualifications of a proposed appointee for a position classified above GS-15 must be approved by OPM. The amendment specifies that OPM must grant such approval on the basis of qualification standards developed by the employing agency, and that the agency must develop those qualification standards in accordance with criteria specified in regulation by OPM. OPM has also pointed out that, under its general delegation authority, OPM “could and should delegate this determination to agency heads, where appropriate.”¹¹

Paragraph (3) amends 5 U.S.C. § 3325, which now provides that the qualifications of a proposed appointee for an ST position must be approved by OPM if the appointment is made without competitive examination. The amendments specify that OPM must grant such approval on the basis of qualification standards developed by the employing agency, and that the agency must develop those qualification standards in accordance with criteria specified in regulation by OPM. The amendments also require OPM to prescribe regulations to carry out 5 U.S.C. § 3325.

Paragraph (4) amends 5 U.S.C. § 5108(a)(2). The current code provision authorizes OPM to establish standards and procedures in accordance with which an agency may classify positions above GS-15. Under the amendment, these standards and procedures will be published in such form as OPM may determine.

Subsection (d)—Effective Date and Application.

Paragraph (1) states that the amendments made by Section 2 of the bill will go into effect on the first day of the first pay period beginning on or after the 180th day following the date of enactment.

Paragraph (2) provides that, when the amendments in Section 2 go into effect, they may not reduce the rate of basic pay of any personnel in an ST or SL position. Instead, for affected individuals, the rate of basic pay will be deemed to be the rate of basic pay set for the individual, plus locality pay paid to the individual, as of the effective date.

Paragraph (3) clarifies the meaning of cross references elsewhere in law that refer to the maximum rate of pay under the code provision that governs ST and SL employees’ pay.

Section 3. Limitations on certain payments

Under 5 U.S.C. § 5307(d), OPM, with the concurrence of OMB, provide certifications to agencies that have performance appraisal systems that make meaningful distinctions based on relative performance. This certification is necessary for agencies to be subject to higher ceilings on aggregate annual pay and on rates of basic pay for their senior executives and other senior personnel. Section (3) makes corrections and clarifications to the process by which agencies’ performance appraisal systems are certified. These corrections and clarifications, which were requested by OPM,¹² are as follows:

¹¹*Id.*, Section-by-Section Analysis enclosed with the letter.

¹²Letter dated February 7, 2007, note 9 above.

Subsection (a)—In General.

Paragraph (1) amends 5 U.S.C. § 5307(d)(2) to clarify that the certification applies to the performance appraisal system, not to the agency.

Paragraph (2) amends 5 U.S.C. § 5307(d)(3)(B) to provide that the certification of a performance appraisal system may be granted for up to 24 months, with the option of extension by the OPM Director for up to an additional 6 months. Under the current code provision, certification is effective for two calendar years, and OPM has pointed out that this has resulted in unduly short certification periods, placing agencies at an unintended disadvantage, when their appraisal systems are certified near the end of a calendar year.¹³

Subsection (b)—Extension of Certification. To address the problem of performance appraisal systems that were certified close to the end of a calendar year prior to enactment of this legislation, this subsection (b) authorizes OPM to grant short extensions of such certifications. For certifications that are set to expire at the end of 2007, the extension could be up to June 30, 2008, or the first anniversary of the certification, whichever is later. For certifications set to expire at the end of 2008, the extension could be up to June 30, 2009, or the second anniversary of the certification, whichever is later.

Subsection (c)—Effective Date. This subsection makes the provisions of Section 3 effective upon enactment of the legislation.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirement of paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate the Committee has considered the regulatory impact of this bill. CBO states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on State, local, or tribal governments. The legislation contains no other regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 12, 2007.

Hon. JOSEPH I. LIEBERMAN, *Chairman,*
Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1046, the Senior Professional Performance Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Barry Blom.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 1046—Senior Professional Performance Act of 2007

Summary: S. 1046 would raise the cap on base pay for certain senior-level, scientific, and professional employees while eliminating locality-based comparability payments for those employees.

¹³*Id.*, Section-by-Section Analysis enclosed with the letter.

It also would make several other small changes to the procedures for new appointments of senior-level, scientific, and professional positions classified above GS-15. Finally, it would allow the Director of the Office of Personnel Management (OPM) to extend the certification of an agency's performance appraisal system, which is otherwise limited to 24 months under the bill, for up to six months. CBO estimates that implementing the legislation would cost the federal government roughly \$7 million between 2008 and 2012, which would be paid from discretionary appropriations. Enacting the bill would not affect direct spending or revenues.

S. 1046 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The following table shows the estimated costs of S. 1046. The costs of this legislation fall within nearly all budget functions.

	By fiscal year, in millions of dollars—				
	2008	2009	2010	2011	2012
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	*	*	1	2	3
Estimated Outlays	*	*	1	2	3

Note: * = less than \$500,000.

Basis of estimate: Under current law, senior-level (SL) and scientific and professional (ST) employees may receive basic pay up to Level IV of the Executive Schedule (\$145,400); their maximum pay with the locality-based comparability adjustment is set at Level III of the Executive Schedule (\$154,600). SL and ST employees receive the same annual across-the-board pay raises and locality-based comparability adjustments that General Schedule employees receive.

S. 1046 would raise the cap on base pay for most SL and ST employees to \$154,600 on the first day of the first pay period that occurs six months after enactment. Those employees working at agencies with a performance appraisal system that is certified as making meaningful distinctions based on relative performance would have their base pay capped at Level II of the Executive Schedule (\$168,000). Locality adjustments for SL and ST employees would be eliminated, affecting roughly 900 employees. The legislation specifies that no SL or ST employee will experience a reduction in pay (defined so as to include the locality adjustment).

CBO assumes that—under both current law and under the proposed legislation—the number of employees in the affected categories will remain constant over the 2008–2012 period and that base pay after 2007 will increase by CBO's projection of the employment cost index for wages and salaries (ECI) minus one-half percentage point in each year. Furthermore, CBO estimates the average merit adjustment after 2007 will raise pay by an additional one-half of one percent in each year for employees in agencies without an OPM-certified performance appraisal system and by 1.0 percent for employees who fall under a certified system. In addition, CBO assumes that those agencies that have received full certification from OPM for their Senior Executive Service appraisal system in 2007 will also receive approval for their SL and ST ap-

praisal systems. CBO inflated the statutory caps on base pay and overall pay from 2008 through 2012 by projected raises for Executive Schedule employees. Data about the number of employees and average salary in each category comes from the Office of Personnel Management.

Estimated impact on the private-sector: S. 1046 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal costs: Barry Blom; Impact on state, local, and tribal governments: Elizabeth Cove; Impact on the private sector: Amy Petz.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

PART III—EMPLOYEES

Subpart B—Employment and Retention

CHAPTER 31—AUTHORITY FOR EMPLOYMENT

Subchapter I—Employment Authorities

SEC. 3104. EMPLOYMENT OF SPECIALLY QUALIFIED SCIENTIFIC AND PROFESSIONAL PERSONNEL.

(a) The Director of the Office of Personnel Management may establish, and from time to time revise, the maximum number of scientific or professional positions for carrying out research and development functions which require the services of specially qualified personnel which may be established outside of the General Schedule. Any such position may be established by action of the Director or, under such standards and procedures as the Office **[prescribes]** *prescribes and publishes in such form as the Office may determine* (including procedures under which the prior approval of the Director may be required), by agency action.

* * * * *

CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

Subchapter I—Examination, Certification, and Appointment

SEC. 3324. APPOINTMENTS TO POSITIONS CLASSIFIED ABOVE GS-15.

(a) An appointment to a position classified above GS-15 pursuant to section 5108 may be made only on approval of the qualifications of the proposed appointee by **the Office of Personnel Management** *the Director of the Office of Personnel Management on the basis of qualification standards developed by the agency involved in accordance with criteria specified in regulations prescribed by the Director.* This section does not apply to a position—

* * * * *

SEC. 3325. APPOINTMENTS TO SCIENTIFIC AND PROFESSIONAL POSITIONS.

(a) Positions established under section 3104 of this title are in the competitive service. However, appointments to the positions are made without competitive examination on approval of the qualifications of the proposed appointee by the Office of Personnel Management **or its designee for this purpose** *on the basis of standards developed by the agency involved in accordance with criteria specified in regulations prescribed by the Director of the Office of Personnel Management.*

(b) This section does not apply to positions established under section 3104(c).

(c) *The Director of the Office of Personnel Management shall prescribe such regulations as may be necessary to carry out the purpose of this section.*

Subpart D—Pay and Allowances

CHAPTER 51—CLASSIFICATION

SEC. 5108. CLASSIFICATION OF POSITIONS ABOVE GS-15.

(a) The Office of Personnel Management may, for any Executive agency—

* * * * *

(2) establish standards and procedures *published by the Director of the Office of Personnel Management in such form as the Office may determine* (including requiring agencies, where necessary in the judgment of the Office, to obtain the prior approval of the Office) in accordance with which positions may be classified above GS-15.

* * * * *

CHAPTER 53—PAY RATES AND SYSTEMS

Subchapter I—Pay Comparability System

SEC. 5304. LOCALITY-BASED COMPARABILITY PAYMENTS.

* * * * *

(g)(1) Except as provided in paragraph (2), comparability payments may not be paid at a rate which, when added to the rate of basic pay otherwise payable to the employee involved, would

cause the total to exceed the rate of basic pay payable for level IV of the Executive Schedule.

(2) The applicable maximum under this subsection shall be level III of the Executive Schedule for—

(A) positions under subparagraphs (A) ~~[(C)]~~ and (B) of subsection (h)(1); and

(B) any positions under subsection (h)(1) ~~[(D) which]~~ (C) as the President may determine.

(h)(1) For the purpose of this subsection, the term “position” means—

~~[(A) a position to which section 5376 applies (relating to certain senior-level positions);]~~

~~[(B)]~~ (A) a position to which section 5372 applies (relating to administrative law judges appointed under section 3105);

~~[(C)]~~ (B) a position to which section 5372a applies (relating to contract appeals board members); and

~~[(D)]~~ (C) a position within an Executive agency not covered under the General Schedule or any of the preceding subparagraphs, the rate of basic pay for which is (or, but for this section, would be) no more than the rate payable for level IV of the Executive Schedule; but does not include—

(i) a position to which subchapter IV applies (relating to prevailing rate systems);

(ii) a position as to which a rate of pay is authorized under section 5377 (relating to critical positions);

(iii) a position to which subchapter II applies (relating to the Executive Schedule);

(iv) a Senior Executive Service position under section 3132;

(v) a position in the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service under section 3151; ~~or]~~

(vi) a position in a system equivalent to the system in clause (iv), as determined by the President’s Pay Agent designated under subsection (d) ~~].~~; or

(vii) a position to which section 5376 applies (relating to certain senior-level and scientific and professional positions).

(2)(A) Notwithstanding subsection (c)(4) or any other provision of this section, but subject to subparagraph (B) and paragraph (3), upon the request of the head of an Executive agency with respect to 1 or more categories of positions, the President may provide that each employee of such agency who holds a position within such category, and within the particular locality involved, shall be entitled to receive comparability payments.

(B) A request by an agency head or exercise of authority by the President under subparagraph (A) shall cover—

(i) with respect to the positions under ~~[(subparagraphs (A) through (C)]~~ *subparagraphs (A) and (B)* of paragraph (1), all positions described in the subparagraph or subparagraphs involved (excluding any under clause (i), (ii), (iii), (iv), (v), ~~[(or (vi)]~~ *(vi), or (vii)* of such paragraph); and

(ii) with respect to positions under ~~[(paragraph (1)(D)]~~ *paragraph (1)(C)*, such positions as may be considered appropriate

(excluding any under clause (i), (ii), (iii), (iv), (v), **[or (vi)]** (vi), or (vii) of paragraph (1)).

(C) Notwithstanding subsection (c)(4) or any other provision of law, but subject to paragraph (3), in the case of a category with positions that are in more than 1 Executive agency, the President may, on his own initiative, provide that each employee who holds a position within such category, and in the locality involved, shall be entitled to receive comparability payments. No later than 30 days before an employee receives comparability payments under this subparagraph, the President or the President's designee shall submit a detailed report to the Congress justifying the reasons for the extension, including consideration of recruitment and retention rates and the expense of extending locality pay.

(3) Comparability payments under this subsection—

(A) may be paid only in any calendar year in which comparability payments under the preceding provisions of this section are payable with respect to General Schedule positions within the same locality;

(B) shall take effect, within the locality involved, on the first day of the first applicable pay period commencing on or after such date as the President designates (except that no date may be designated which would require any retroactive payments), and shall remain in effect through the last day of the last applicable pay period commencing during that calendar year;

(C) shall be computed using the same percentage as is applicable, for the calendar year involved, with respect to General Schedule positions within the same locality; and

(D) shall be subject to the applicable limitation under subsection (g).

* * * * *

SEC. 5307. LIMITATION ON CERTAIN PAYMENTS.

* * * * *

(d)(1) Notwithstanding any other provision of this section, subsection (a)(1) shall be applied by substituting “the total annual compensation payable to the Vice President under section 104 of title 3” for “the annual rate of basic pay payable for level I of the Executive Schedule” in the case of any employee who—

(A) is paid under section 5376 or 5383 of this title or section 332(f), 603, or 604 of title 28; and

(B) holds a position in or under an agency which is described in paragraph (2).

(2) An agency described in this paragraph is any agency which, for purposes of **[the calendar year involved, has been certified under this subsection as having a performance appraisal system which (as designed and applied) makes meaningful distinctions based on relative performance.]** *applying the limitation in the calendar year involved, has a performance appraisal system certified under this subsection as making, in its design and application, meaningful distinctions based on relative performance.*

(3)(A) The Office of Personnel Management and the Office of Management and Budget jointly shall promulgate such regulations as may be necessary to carry out this subsection, including the criteria and procedures in accordance with which any determinations under this subsection shall be made.

(B) **[An agency's certification under this subsection shall be for a period of 2 calendar years]** *The certification of an agency performance appraisal system under this subsection shall be for a period not to exceed 24 months beginning on the date of certification, unless extended by the Director of the Office of Personnel Management for up to 6 additional months, except that such certification may be terminated at any time, [for purposes of either or both of those years,] upon a finding that the actions of such agency have not remained in conformance with applicable requirements.*

* * * * *

Subchapter VII—Miscellaneous Provisions

SEC. 5376. PAY FOR CERTAIN SENIOR-LEVEL POSITIONS.

* * * * *

(b)(1) Subject to such regulations as the Office of Personnel Management prescribes, the head of the agency concerned shall fix the rate of basic pay for any position within such agency to which this section applies. A rate fixed under this section shall be—

(A) not less than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule; and

(B) **[not greater than the rate of basic pay payable for level IV of the Executive Schedule.]** *subject to paragraph (3), not greater than the rate of basic pay payable for level III of the Executive Schedule.*

The payment of a rate of basic pay under this section shall not be subject to the pay limitation of section 5306(e) or 5373.

(2) Subject to paragraph (1), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 in the rates of pay under the General Schedule, each rate of pay established under this section for positions within an agency shall be adjusted by such amount as the head of such agency considers appropriate.

(3) *In the case of an agency which, under section 5307(d), has a performance appraisal system which, as designed and applied, is certified as making meaningful distinctions based on relative performance, paragraph (1)(B) shall apply as if the reference to "level III" were a reference to "level II".*

(4) *No employee may suffer a reduction in pay by reason of transfer from an agency with an applicable maximum rate of pay prescribed under paragraph (3) to an agency with an applicable maximum rate of pay prescribed under paragraph (1)(B).*

* * * * *