

Approved for Release

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**DEPARTMENT OF COMMERCE
OFFICE OF HUMAN RESOURCES MANAGEMENT**

HUMAN RESOURCES (HR) BULLETIN #268, FY24

SUBJECT: Prohibiting Non-Federal Salary History or Competing Job Offers When Setting Pay

EFFECTIVE DATE: Upon release.

EXPIRATION DATE: Effective until canceled or superseded.

COVERAGE: This Human Resources Guidance Bulletin applies to all Department of Commerce (DOC) Operating Units (OUs) and DOC Servicing Human Resources Offices (SHROs), and for General Schedule (GS), Prevailing Rate (PR), Commerce Alternative Personnel System (CAPS), and Alternative Personnel Management System Positions (APMS), positions.

PURPOSE: This Bulletin establishes the following:

1. A GS, PR, CAPS, and APMS pay setting policy in accordance with the Office of Personnel Management (OPM) regulations.
2. A DOC CAPS Salary Approval Form for Operating Personnel Management Board (OPMB) adoption that can be used for CAPS Competitive Service and Excepted Service appointments (e.g., new hires, reassignments, transfers, and temporary) with or without pay adjustments.

The policy and DOC CAPS Salary Approval Form for OPMB adoption has been developed and designed to ensure adherence to the OPM's new regulation prohibiting the consideration of non-federal salary history or the salary of a competing job offer when setting pay for individuals receiving their first appointment as a civilian employee in the Federal government (or reappointment after a break in service), and to help management better understand how to determine an appropriate pay rate or range.

BACKGROUND:

On January 30, 2024, OPM issued final regulations governing the criteria for making salary determinations based on salary history to advance pay equity in the GS, PR, Administrative

Appeals Judge, Administrative Law Judge, Senior Executive Service (SES), and senior-level and scientific or professional pay systems, effective April 1, 2024. For individuals receiving their first appointments as a civilian employee of the Federal Government (or a reappointment after a break in service) in one of these pay systems, agencies cannot set pay based on the job candidate's non-federal salary or pay history, which could vary between equally qualified candidates, or based on a competing job offer.

Salary history is not necessarily a good indicator of worker value, experience, and expertise, and it also may contain or exacerbate biases. Pay setting based on salary history may be inequitable, can perpetuate disparity a worker may carry from job to job, and may negatively contribute to existing pay gaps between males and females. By eliminating a factor that may contain or exacerbate biases, and that may be inconsistent with the merit system principles in 5 United States Code (U.S.C.) 2301, OPM's regulations seek to promote pay equity consistent with the President's Executive Orders 14035 (86 Federal Register (FR) 34593) and 14069 (87 FR 15315).

CAPS POSITIONS:

On March 29, 1998, DOC implemented a Demonstration Project as authorized by Title 5, U.S.C. § 4703. It was designed by DOC with the participation and review of OPM. On December 26, 2007, the Demonstration Project became permanent with the passage of the Consolidated Appropriations Act, Fiscal Year 2008, and it was renamed the Commerce Alternative Personnel System (CAPS).

The CAPS Board exercises overall authority for setting policy and managing the System. The CAPS Board also delegates to each (OU) the authority to oversee internal operations through OPMBs. The OPMBs within each CAPS OU establish guidelines and delegate pay setting approval authority for Competitive and Excepted Service appointments with or without pay adjustments. As a result, the salary approval process for each OPMB may vary.

On March 13, 2024, the CAPS Board adopted the OPM final regulations issued January 30, 2024 governing the criteria for making salary determinations.

Although there is pay setting flexibility under CAPS, hiring managers should approach pay setting consistently to ensure fairness across the organization.

CAPS SALARY APPROVAL FORM FOR OPMB ADOPTION:

To assist with establishing salaries, the Office of Human Resources Management (OHRM) has developed the accompanying DOC CAPS Salary Approval Form to ensure consistent submission throughout DOC, provide more effective documentation for the SHRO, and support compliance with OPM regulations. While all OPMBs are highly encouraged to use the attached CAPS Salary Approval Form, they have the authority to develop their own forms for Competitive and Excepted Service appointments with or without pay adjustments.

Under CAPS, OPMBs may also establish an approval procedure for special individual cases (e.g., a manager's desire to set pay at a high rate due to an employee's qualifications).

APMS POSITIONS:

In accordance with Public Law 99– 574, the National Institute of Science and Technology (NIST) Authorization Act for 1987, OPM approved a demonstration project plan, “APMS at the NIST,” and published the plan.

In accordance with the original NIST project legislation, the project is conducted by the Director of the National Bureau of Standards (now NIST). The Director has delegated management and oversight of the NIST APMS to the Personnel Management Board (PMB). The PMB is the NIST body to manage, evaluate, and execute policy and procedural changes. The PMB establishes the management and administrative structures for running and evaluating APMS and oversees the delegations of authority to managers, supervisors, and management bodies, including the withdrawal of authority when warranted.

On July 18, 2024, the PMB adopted the OPM final regulations issued January 30, 2024, governing the criteria for making salary determinations.

Although there is pay setting flexibility under APMS, hiring managers should apply pay setting consistency to ensure fairness across the organization.

POLICY:

For individuals receiving their first appointment as a civilian employee of the Federal Government (or a reappointment after a break in service), DOC may not consider non-Federal salary history or salary in a competing job offer when establishing salaries for GS, PR, Administrative Appeals Judge, Administrative Law Judge, SES, and senior-level and scientific or professional pay systems.

Hiring managers and Human Resources Specialists must adhere to the appropriate regulations and/or procedures in accordance with the applicable position as follows:

Position	Law, Regulation, and/or Procedures
General Schedule (GS)	Title 5 U.S.C. § 5332, 5 Code of Federal Regulations (CFR) § 531.
Prevailing Rate (PR)	Title 5 U.S.C. § 5342, Title 5 U.S.C. § 5343, and 5 CFR § 532.
Commerce Alternative Personnel System (CAPS)	Title 5 U.S.C § 4703, Federal Register Notices, Department of Commerce Alternative Personnel System Operating Procedures, OPMB policies, and CAPS Board decisions.
Alternative Personnel Management System (APMS)	Public Law 99– 574, Federal Register Notices, NIST APMS Project Operating Procedures and PMB decisions.

The Servicing Human Resources Offices (SHROs) are available to assist its customers and provide guidance on the following pay setting factors that **should** be considered when determining a salary:

- The level, type, or quality of the candidate's skills, competencies, experience, and qualifications.
- Significant disparities between federal and non-federal salaries for the skills and competencies required in the position to be filled.
- Existing labor market conditions and employment trends, including the availability and quality of candidates for the same or similar positions.
- The success of recent efforts to recruit candidates for the same or similar positions.
- Recent turnover in the same or similar positions.
- The importance/criticality of the position to be filled and the effect on the agency if it is not filled or if there is a delay in filling it.
- The desirability of the geographic location, duties, and/or work environment associated with the position.
- Organizational workforce needs, as documented in the strategic human capital plan.
- Other relevant factors.

In addition to these considerations, hiring managers for CAPS and APMS positions should also consider:

- Salaries of other employees in the office/bureau who encumber the same or similar positions, with the same or similar job-related qualifications.
- Pay progression within the band and promotion potential to allow potential salary increases.
- Candidate's eligibility for a performance increase (e.g., CAPS employees are unratable if they did not meet the minimum appraisal period requirement or were appointed to a covered position, and therefore ineligible for a performance increase during the last 120 days of the performance cycle).

The following pay setting factors **may not** be considered when determining a salary:

- Non-federal salary history, which could vary between similarly qualified candidates.
- Salary in a competing job offer.

PAY SETTING FOR CURRENT AND FORMER FEDERAL EMPLOYEES:

For GS positions, on subsequent position changes, such as reemployment, transfer, reassignment, promotion, demotion, or change in type of appointment, pay may be set under the Maximum Payable Rate Rule (MPR) using the employee's Highest Previous Rate (HPR) as directed by 5 CFR § 531.221 - 531.223.

Under this rule, pay may be set at any step of the grade that does not exceed the employee's MPR. The MPR is an employee's best entitlement based on HPR.

An employee may be paid under MPR rules at management's discretion provided the employee does not have a higher entitlement under statute (e.g., a result of pay retention or the two-step promotion rule).

When a hiring official chooses to pay an employee under MPR rules, the official *may* select a step which is lower than the maximum step of the grade to which the employee would be entitled by virtue of their HPR. The determination to pay an employee under MPR rules and the selection of a step in the grade should be based on considerations such as a candidate's qualifications compared to those of fellow employees, recency of work experience (if the job has changed since the candidate last performed it), competition for the position, availability of funds, equity in consideration of all candidates, and other relevant factors as determined by the hiring manager and HR professional.

Pay setting using this authority must be documented in the case file and retained by the SHRO.

SUPERIOR QUALIFICATIONS AND SPECIAL NEEDS PAY SETTING AUTHORITY:

Agencies may set the rate of basic pay of a newly-appointed employee at a rate above the minimum rate of the appropriate General Schedule (GS) grade because of—

1. the superior qualifications of the candidate; or
2. a special need of the agency for the candidate's services.

The SHRO must approve each determination to use this authority before the employee enters on duty. The determination cannot be made retroactively. For more information, please see 5 U.S.C. 5333 and 5 CFR 531.212.

RESOURCES TO SUPPORT PAY SETTING DECISIONS:

The information below is a list of resources which can aid hiring managers and Human Resources Specialists in making pay setting decisions. Bureaus are encouraged to use the noted resources when determining a candidate's pay.

- [Overview of BLS Wage Data by Area and Occupation: U.S. Bureau of Labor Statistics](#)
- [USA Salary Database: Compare & Estimate Salary for Any Job \(ziprecruiter.com\)](#)
- [Salaries | Indeed.com](#)
- [Pay Strategies for Business | Salary.com](#)
- [America Works Data Center | U.S. Chamber of Commerce \(uschamber.com\)](#)
- Job Opportunity Announcement Certificate Data from Previously Recruited Similar Positions
 - Number of Qualified Candidates
 - Returned Certificates with Selections and Without Selections
 - Number of Job Offer Declinations
 - Readvertisement
- Non-Pay Incentives (e.g., remote work, telework, etc.)
- Geographic Location Desirability and Challenges

- Attrition Data
- Mission Critical Occupation Data
- Agency and/or Bureau Strategic Human Capital Plans and Priorities
- Position Descriptions
- Exit Surveys

Please consult with your Servicing Human Resources Specialist regarding questions or concerns.

DOCUMENTATION:

Pay setting decisions must be documented in the case file and retained by the SHRO.

REFERENCES:

DOC Administrative Order 202-335, Merit Assignment Program, dated June 15, 2017; 5 CFR, Part 335.103(a): Executive Order 14069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency, dated March 15, 2022; Advancing Pay Equity in Governmentwide Pay Systems, dated January 30, 2024; Department of Commerce Alternative Personnel System Operating Procedures Manual, dated May 28, 2010; Commerce Alternative Personnel System Desktop Pay Setting Guide, dated November 23, 2021; Federal Register / Vol. 62, No. 247, dated December 24, 1997; NIST APMS Project Operating Procedures, dated July 19, 2024; FR/ Vol. 52, No. 191, dated October 2, 1987.

OFFICE OF POLICY AND BENEFITS: OPBservices@doc.gov

FOR ADDITIONAL INFORMATION: Contact the Office of Human Resources Management, Office of Policy and Benefits.