

# Submission of Federal Rules Under the Congressional Review Act

President of the Senate     Speaker of the House of Representatives     GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

U.S Office of Personnel Management

Division for Strategic Human Resources Policy

3. Rule Title

Time-in-Grade Rule Eliminated

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) 3206-AL18

5. Major Rule  Non-major Rule

6. Final Rule  Other  \_\_\_\_\_

7. With respect to this rule, did your agency solicit public comments?      Yes       No       N/A

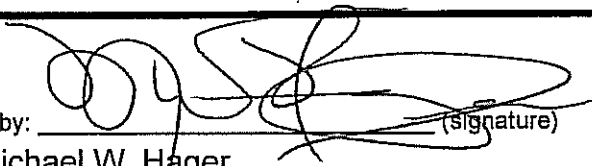
8. Priority of Regulation (fill in one)

Economically Significant; or  
Significant; or  
Substantive, Nonsignificant

Routine and Frequent or  
Informational/Administrative/Other  
*(Do not complete the other side  
of this form if filled in above.)*

9. Effective Date (if applicable) 120 days after publication in the Federal Register

10. Is a concise Summary of the Rule provided?      Yes       No

Submitted by:  (signature)

Name: Michael W. Hager

Title: Acting Director

For Congressional Use Only:

Date Received: \_\_\_\_\_

Committee of Jurisdiction: \_\_\_\_\_



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Yes No N/A

- A. With respect to this rule, did your agency prepare an analysis of costs and benefits?  Yes  No  N/A
- B. With respect to this rule, at the final rulemaking stage, did your agency
  - 1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?  Yes  No  N/A
  - 2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?  Yes  No  N/A
- C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?  Yes  No  N/A
- D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?  Yes  No  N/A
- E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?  Yes  No  N/A
- F. Did you discuss any of the following in the preamble to the rule?
  - E.O. 13132, Federalism  Yes  No  N/A
  - E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights  Yes  No  N/A
  - E.O. 12866, Regulatory Planning and Review  Yes  No  N/A
  - E.O. 12988, Civil Justice Reform  Yes  No  N/A
  - E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks  Yes  No  N/A
  - Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)  Yes  No  N/A

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 300**

**RIN: 3206-AL18**

**Time-in-Grade Rule Eliminated**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is eliminating the time-in-grade restriction on advancement to competitive service positions in the General Schedule. The rule eliminates the 52-week time-in-grade requirement for promotions. Employees must continue to meet occupational qualification standard requirements and any additional job-related qualification requirements established for the position.

**DATE:** The rule is effective [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Ms. Janice Warren by telephone (202) 606-0960; by FAX (202) 606-2329; by TTY (202) 418-3134; or by email [janice.warren@opm.gov](mailto:janice.warren@opm.gov).

**SUPPLEMENTARY INFORMATION:** On February 6, 2008, OPM published in the *Federal Register* at 73 FR 6857 a proposal to eliminate the time-in-grade (TIG) restriction found in 5 CFR part 300, subpart F. The restriction applies to Federal employees in competitive service General Schedule positions at grades 5 and above. These employees qualify for promotions to higher grades if they have: (1) at least one

year of specialized experience equivalent in difficulty to the next lower grade level or (in some cases) the equivalent education; and (2) service of at least 52 weeks at their current grade (known as “time in grade”).

The public comment period for the proposed regulation ended on April 7, 2008. We received comments from seven agencies, five unions, one national employee organization, and 33 individuals. We also received 61 form letters from individuals. We carefully considered the comments; as a result, we have decided to eliminate the time-in-grade restriction. The final regulation will become effective 120 days after the publication date of this notice in order to give agencies time to amend policies and communicate changes to their human resources staff and employees. Below is a discussion of the comments OPM received.

#### *Comment Extension*

The national employee organization and almost half of the form letter commenters suggested extending the comment period because the supplementary information accompanying the proposed rule provided incorrect dates for OPM’s prior proposals to eliminate the time-in-grade restrictions. The February 6, 2008, proposal stated that OPM published its prior proposals on June 14, 1995, and January 10, 1996. In fact, they were published on June 15, 1994, and January 10, 1995. However, the February 6, 2008 proposal provided correct citations to the Federal Register notices for the prior proposals at 59 FR 30717 and 60 FR 2546, respectively.

We are not extending the comment period. OPM provided the dates and citations for its previously-published proposals as background information only. Potential commenters could adequately evaluate the February 6, 2008 proposal without reviewing

the prior proposals. Moreover, the February 6, 2008 proposal supplied correct Federal Register citations for both of the previously-published proposals, thereby adequately facilitating their review by potential commenters.

*Potential for Abuse and Favoritism*

Many commenters stated that abolishing the time-in-grade requirement would lead to abuse of a manager's promotion authority, primarily because it would allow managers to promote their favorite employees. These commenters believe that eliminating the time-in-grade requirement will subject agencies to charges of disparate treatment, and that the requirement ensures fairness and equity in promotions. One commenter also thinks too many individuals will reach their full performance levels in their positions too soon.

We disagree. The time-in-grade requirement is only one of the requirements for eligibility for promotion. Managers must still select only from those individuals who have at least one year of specialized experience equivalent in difficulty to the next lower grade level or (in some cases) the equivalent education. Moreover, individuals must meet occupational qualification standard requirements and any additional job-related qualification requirements established for the position.

Further, since the advent of the merit system, Federal managers always have possessed discretion to choose whom to promote. Managers are presumed to act in good faith in making employment decisions. In addition, there are safeguards in place to protect the merit system. Section 2302, which enumerates prohibited personnel practices, defines a personnel action as including a promotion, and enhances merit system protections that have existed in various forms since the Nineteenth Century.

When the time-in-grade restriction was first implemented, procedures for redressing prohibited personnel practices had not yet been enacted, and OPM's qualification standards did not exist. Eliminating the time-in-grade restriction does not alter management's responsibility to ensure that promotions are merit-based, and based on an individual's relative knowledge, skills, and abilities for a particular position.

In its oversight role, OPM will continue to review agency promotion actions for adherence to applicable requirements and identify necessary corrective actions.

The comment that the elimination of the time-in-grade requirement will result in individuals reaching their full performance levels too soon is merely speculative. The pace at which an employee advances to the full performance level of his or her position is a function of the employee's experience and/or knowledge, skills, and abilities relative to the qualification standard for the position. Even after the elimination of the time-in-grade restriction, qualification standards will provide the basis for managers to determine whether a particular employee is qualified for a promotion.

One individual commented that although safeguards against improper promotions exist, these systems have proven to be ineffective in responding to alleged violations and prescribing corrective or disciplinary actions. OPM is not responding to this comment because the efficacy of those safeguards is beyond the scope of these regulations.

*Impact on Minorities and Veterans*

Many commenters were concerned that eliminating the time-in-grade requirement would have a negative impact on minorities and veterans. There is no logical or factual basis for this concern. The time-in-grade restriction applied to *all* individuals seeking promotion above grade 5 to a competitive service position, without regard to whether

employees are minorities or veterans. Accordingly, eliminating the restriction negates one of the requirements for advancement applicable to *all* individuals, including minorities and veterans. In making selections for promotions, managers and human resources staff continue to be bound by applicable civil service laws and the laws pertaining to equal employment opportunity.

*Using Qualification Standards and Delegated Examining*

A number of commenters questioned the use of qualification standards as the sole determination for promotion. They expressed concerns that qualification determinations will be subjective. Some commenters also felt that using qualification standards will lead to “grade creep.”

Agencies use qualification standards to ensure candidates for promotion demonstrate at least one year or the appropriate level of education as outlined in the OPM Operating Manual Qualification Standards for General Schedule Positions (available on the OPM website ([www.opm.gov](http://www.opm.gov))). An individual may demonstrate the required competencies (or knowledge, skills, and abilities) by paid or unpaid experience. This includes experience gained through school, volunteer work, military service, paid employment, or hobbies. Beyond the OPM qualification standards, agencies have discretion to establish additional requirements that employees must meet for promotions. Examples include a specified level of performance achieved; possession of specific job-related competencies (or knowledge, skills, and abilities); and evidence of ability to perform higher-level duties.

Qualification standards are minimum requirements intended to identify applicants who are likely to be able to perform successfully on the job, and to screen out those who

are unlikely to do so. Qualification standards are only one element of a responsible human resources management program. They are not designed to substitute for a careful analysis of applicants' competencies (or knowledge, skills, and abilities).

Before qualification standards were implemented, agencies relied on time in grade to ensure that individuals were qualified for a higher-graded position. Now that qualification standards are in place, agencies are in a position to use the standards to determine which applicants will be able to perform at the higher grade levels.

With respect to the comment that the elimination of the time in grade restriction will lead to "grade creep," as noted previously, managers are obligated to make promotion decisions based on an individual's experience and/or knowledge, skills, and abilities relative to the qualification standard for the position.

A number of commenters suggested that agencies should use delegated examining for identifying and promoting individuals who do not meet the time-in-grade requirement. This suggestion is based on a misunderstanding of examining procedures. An agency announces a vacancy using competitive examining procedures to allow candidates from outside the Federal workforce, current Federal employees without civil service status, and employees with civil service status in other positions to compete for the position. OPM has created "delegated examining" by entering into written agreements with most agencies authorizing them to conduct competitive examining. If a current Federal employee applies for a promotion under competitive examining procedures (typically through a vacancy announcement stating it is open to the general public), the employee does not need to meet a time-in-grade requirement.



In contrast, promotions filled under the merit promotion procedures in 5 CFR part 335, are open to current or former Federal employees who hold or did hold a career or career-conditional appointment in the competitive service. If an eligible current Federal employee applies for a position at a higher grade through a merit promotion announcement, the employee must meet the time-in-grade requirement.

The decision to fill a position using delegated examining or merit promotion procedures rests with the agency filling the position. If a current or former Federal employee who holds or did hold a career or career-conditional appointment in the competitive service wants to apply under both procedures, the agency's own policy determines whether it will accept an application under both methods. If the agency allows the individual to apply only through merit promotion procedures, and the individual does not meet the time-in-grade requirement (but is otherwise qualified for the position), the agency will not consider the individual. Once the time-in-grade requirement is eliminated, the agency may consider otherwise qualified applicants who have less than 52 weeks in grade, regardless of the agency's chosen recruitment procedures.

One union commented that elimination of TIG will lead to agencies bidding against each other on the establishment of a time in grade requirement for promotion. Once TIG is eliminated, agencies are not required to implement their own TIG requirement. Agencies will use qualification standards for determining whether an employee has met the specified criteria needed for promotion to the next highest grade level.

*Effect on Within-Grade Increases*

Some commenters expressed concerns that elimination of the time-in-grade requirement would result in a reduction in the number of within-grade pay increases. Based on the descriptions of these concerns, we believe the commenters are referring to General Schedule (GS) within-grade increases (WGIs) authorized by 5 U.S.C. 5335 and 5 CFR part 531, subpart D. It appears there may be some confusion between the time-in-grade restriction for promotions and the waiting period for GS WGIs.

To clarify, the rate range for each GS grade has 10 step rates. WGIs or step increases are periodic increases in a GS employee's rate of basic pay from one step of the grade of his or her position to the *next higher step* of that grade. One of the requirements for earning a WGI is that the employee must have completed the required waiting period for advancement to the next higher step. For employees with a scheduled tour of duty, the required waiting period is 52 weeks, 104 weeks, or 156 weeks of creditable service, depending on the employee's current step. In contrast, time in grade is the amount of time one must stay at a particular grade (regardless of the step) in order to be eligible for promotion to the *next higher grade level*. Eliminating the time-in-grade requirement does not affect eligibility for WGIs.

#### Suggestions on OPM Actions

A number of commenters provided suggestions regarding what OPM can do to ensure fairness and equity in promotions. Suggestions included monitoring promotion rates for Government employees, requiring reports, and conducting random audits of agencies. As mentioned earlier, OPM will continue to monitor agency promotion actions through our normal oversight function. We do not believe additional reporting requirements are necessary.

One commenter suggested, as an alternative to time-in-grade elimination, that agencies give preference to individuals who are eligible for time in grade over those who are not eligible. We are not adopting this suggestion. Agency promotions are to be based on merit, using government-wide and agency-specific qualification standards. Therefore, OPM will no longer require that time in grade be considered in selecting individuals for promotions. Eliminating the time-in-grade restriction from the selection process reinforces the principle that promotions are based on an individual's ability to perform the requirements of the position, i.e. merit, and not the passage of time per se

One commenter suggested, rather than eliminating time in grade, that agencies give incentives such as student loan repayments, performance awards, retention allowances, superior qualification appointments, retention allowances, flexiplace, and alternative work schedules to reward employees. We are not adopting this suggestion because it is based on the mistaken assumption that the items listed serve the same purpose as the time-in-grade requirement. TIG is an eligibility factor for a promotion. The items listed by the commenter, however, are recruitment and retention tools that do not define eligibility for promotion. Thus, use of the items mentioned would not be equivalent to eliminating the time-in-grade requirement.

#### *Time in Grade as an Observation period*

One union suggested we keep the time-in-grade-restriction as a period for agencies to consider an employee's demonstrated ability to perform at the next highest grade level, and to provide supervisors with a time period during which they can motivate, develop, and prepare employees for promotion. As previously noted, after the requirement is eliminated, agencies will use qualification standards to ensure that

candidates for promotion have demonstrated the ability to perform at the next highest grade level. In addition, agencies will utilize their performance management systems when considering individuals for promotion. Even after the elimination of the TIG requirement, supervisors will have some period of time to observe their employees' performance before recommending promotion. Supervisors are encouraged to motivate, develop, and prepare their employees for promotions, without regard to whether the employee is subject to a time in grade requirement.

#### Impact on Payroll Costs

One agency, a professional organization, several unions, and several individuals commented that elimination of the time-in-grade restriction would result in increased payroll costs for Federal agencies. This comment assumes that elimination of the time-in-grade requirement will correlate with an increase in the number promotions, thereby increasing payroll costs. Whether such a correlation will occur is merely speculative. Moreover, even if such a correlation were to occur, because the number of promotions is not the only factor that determines payroll costs, an increase in promotions may not lead to a rise in overall payroll costs. Payroll costs depend on a variety of other factors, including collective bargaining agreements and the agency's rate of attrition. Further, agencies are presumed to use sound management practices in making promotions, including consideration of the financial consequences of their decisions.

#### **E.O. 12866, Regulatory Review**

The Office of Management and Budget has reviewed the final rule in accordance with Executive Order 12866.

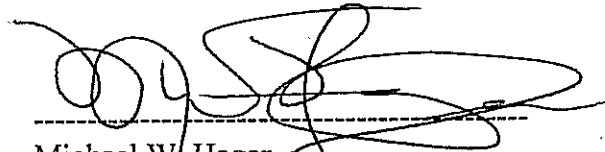
**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain Federal employees.

**List of Subjects in 5 CFR Part 300**

Freedom of information, Government employees, Reporting and recordkeeping requirements, Selective service system.

U.S. Office of Personnel Management



Michael W. Hager  
Acting Director

Accordingly, OPM is revising 5 CFR part 300 to read as follows:

**PART 300--EMPLOYMENT (GENERAL)**

1. Revise the authority citation for part 300 to read as follows:

**AUTHORITY:** 5 U.S.C. 552, 3301, 3302; E.O. 10577, 3 CFR, 1954-1958

Comp., page 218, unless otherwise noted.

Secs. 300.101 through 300.104 also issued under 5 U.S.C. 7201, 7204, 7701; E.O. 11478, 3 CFR, 1966-1970 Comp., page 803.

Sec. 300.301 also issued under 5 U.S.C. 1104 and 3341.

Secs. 300.401 through 300.408 also issued under 5 U.S.C. 1302(c), 2301, and 2302.

Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5).

**Subpart F--[Removed and Reserved]**

2. Remove and reserve subpart F, consisting of § 300.601 through § 300.606.

Billing Code 6325-39