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Introduction:

In July of this year, the Office of Management and Budget released a pre-decisional discussion draft of the Working for America Act (WFAA). The proposed WFAA creates a Government wide personnel system based on well-established pay-for-performance practices.

The current Federal personnel system, which was designed in the 1940s, is a system in which promotion is primarily based on longevity. Under this system, the primary criterion for promotion is longevity of service rather than employee performance. Although longevity of service was a useful basis to reward employees when the Federal workforce consisted of clerks and typists, it is unsuitable for the modern, highly mobile, professional Federal workforce of today. The Government needs a flexible personnel system that rewards superior performance and stresses employee accountability.

The issue is not the necessity for change; the issue is how reform should be implemented. It is a fact that Federal personnel systems are currently being transformed at DHS and DoD. If personnel system reforms are not extended to the rest of the Government, it is likely that the changes at DHS and DoD will significantly affect the ability of agencies without personnel flexibilities to recruit and retain employees. Agencies without personnel flexibilities will be at a competitive disadvantage. In light of the time needed to roll out the new personnel systems, it is essential to consider an extension of workforce flexibilities immediately.

The WFAA gives OPM the authority to strategically manage an efficient, results-oriented civil service. Specifically, the WFAA provides the Director of OPM the authority to coordinate and oversee a core position classification system, a core performance appraisal system, and a core strategic compensation system. Agencies have the flexibility to adapt these core systems to their own unique circumstances, as long as they follow certain guiding principles.

The core position classification system will define career/occupational groups (groupings of occupations), subgroups, and associated bands (levels of work) for those groups. The classification of occupations necessarily includes a determination of the level of pay that is appropriate for the level of proficiency and responsibility achieved by an employee in his or her position within an occupational group. Under WFAA, the classification system will incorporate a pay-banding system in which each level of work will have an associated pay band consisting of a range of pay rates. This flexible pay-banding system will replace the outmoded General Schedule pay system currently in use.

The central principle of the performance appraisal system is that employees and managers must be held accountable for their performance, and that excellence in performance should be rewarded. Therefore, the performance appraisal system is linked to the core compensation system by pay-for performance principles.

The most important element of the core strategic compensation system is the establishment of a core system of basic pay based on the principle of pay-for-performance. The core pay system includes provisions for local market supplements, which address variations in pay within a local labor market, and special market supplements, which provide higher pay levels for specified categories of employees, when warranted by current or anticipated recruitment or retention needs. Special payments are also permitted for special skills or assignments and for situations where agencies are experiencing recruitment and/or retention problems. Agencies will have the flexibility to establish alternative performance appraisal systems and alternative strategic compensation systems; however, alternative systems must be certified by OPM as meeting basic principles before such systems are implemented.

The WFAA also amends the labor-management relations, adverse actions, and appeals provisions of title 5, United State Code, to streamline procedures and to clarify the rights, duties, and responsibilities of labor organizations, management, and employees adversely affected by agency actions. The amendments in these areas are not as extensive as the authorities over labor-management relations, adverse actions, and appeals granted to the Department of Homeland Security (DHS) and the Department of Defense (DoD), in chapters 97 and 99 of title 5, United States Code, respectively. In other words, the WFAA is not simply an extension of the DHS's MaxHR and DoD's National Security Personnel System (NSPS) to the rest of the Government. With regard to the provisions related to labor-management, adverse actions, and appeals, the WFAA provides a more limited grant of authority to agencies. In addition, the WFAA does not affect the authority of DHS or DOD to administer their new personnel systems.

Legislative Provisions

Principles

The discussion draft of the Working for America Act of 2005 will establish a new Federal human resources management system. This new system would incorporate four fundamental principles:

- ▮ Employees should have clear goals for their performance, as well as opportunities for professional growth and managers who help them succeed. Pay increases for individual employees should be based on performance, not longevity;
- ▮ Any human resources management flexibilities available to Federal agencies must be exercised in accordance with the core values, principles, and protections of the American civil service, including:
 - ▮ The merit system principles set forth in chapter 23 of title 5, U.S. Code;
 - ▮ Laws and regulations barring discrimination and reprisal against whistleblowers, and shielding employees from political influence and personal favoritism;
 - ▮ The right of employees to due process in actions taken against them based on

performance or conduct;

□ Veterans' preference; and

□ The right of employees – subject to the provisions of the Act – to organize, bargain collectively, and otherwise participate (through labor organizations of their own choosing) in decisions affecting them.

- Employees at all levels must be accountable for their performance; and
- Agencies must be accountable for meeting standards for effective human capital management in carrying out their missions.

The Role of the U.S. Office of Personnel Management

The bill expands the functions of the Director of the Office of Personnel Management (OPM) to provide the Director with the authority to strategically manage an efficient, results-oriented civil service. The Director will be responsible for establishing and administering Governmentwide authorities, systems, and programs under the revised civil service provisions of title 5, United States Code. Once the Governmentwide authorities are established, the Director will ensure that the human resources management flexibilities provided by the draft bill are implemented and carried out in a consistent manner. For example, The Director will certify agency alternative strategic compensation systems and assist agencies with establishing their own accountability systems.

Performance Appraisal

The WFAA requires agencies to establish performance appraisal systems that promote high performance. An agency performance appraisal system must provide for: (1) setting and communicating performance expectations; (2) monitoring performance and providing timely feedback; (3) developing employee performance and addressing poor performance; (4) rating (generally on an annual basis) employees' performance based on expectations; (5) holding supervisors and managers accountable for the effective management of the performance of employees they supervise; and (6) involving employees in the development and implementation of the performance appraisal system. Performance expectations must also support and align with agency mission and strategic goals, organizational program and policy objectives, annual performance plans, results, and other measures of performance.

A performance appraisal system established by an agency must consist of rating levels for unacceptable performance, fully successful performance (or equivalent), and at least one rating level above fully successful performance. For employees who are in an Entry/Developmental band, an agency may establish a two-level rating system (consisting of an unacceptable summary rating level and a summary rating level of fully successful or equivalent).

Under a new performance appraisal system, employee performance will be evaluated based on written performance expectations, and unwritten work assignments or oral instructions. Whenever an employee receives an unacceptable performance rating, the employee's manager will be required to consider a range of options available to address the performance deficiency. These options include, but are not limited to, remedial training, a period during which the employee would be given an opportunity to improve, a reassignment, an oral warning, a letter of counseling, a written reprimand, or adverse action.

Supervisors will be accountable for: (1) clearly communicating performance expectations and holding employees accountable for accomplishing them; (2) making meaningful distinctions among employees based on performance; (3) fostering and rewarding excellent performance; (4) addressing poor performance; and (5) making sure that employees are assigned a rating of record. Performance expectations for supervisors and managers must include the degree to which supervisors and managers plan, assess, monitor, develop, correct, rate, and reward subordinate employees' performance.

The Director of OPM will have the authority to review agency performance appraisal systems. When the Director determines that a performance appraisal system does not meet specified requirements, the Director must direct the agency to (1) implement an appropriate system or (2) take other appropriate corrective action. Agencies will be required to take any corrective action the Director prescribes.

Strategic Compensation System

The WFAA establishes a strategic compensation system that will replace the General Schedule, the Federal Wage System, and the system for senior-level and scientific and professional (SL/ST) employees.

The proposed bill requires the Director of OPM to establish a new core strategic compensation system. Agencies would be allowed to establish alternative compensation systems, after receiving OPM certification. The strategic compensation system established by the Director, or an alternative compensation system established by an agency, must incorporate pay-for-performance principles. The conversion of employees to the new compensation system may not cause an employee to experience a reduction in his or her rate of basic pay. The core strategic compensation system will preserve the merit system principle of equal pay for work of equal value, and appropriate incentives and recognition for excellence in performance.

The draft bill also contains provisions directed toward the law enforcement workforce. The Director of OPM, with the concurrence of the Attorney General and in consultation with other law enforcement agencies, will have the authority to prescribe regulations to establish consistency in the pay of employees engaged in law enforcement.

The bill provides that all employees eligible for coverage under the core strategic

compensation system will be covered by that system by the first day of the first pay period beginning on or after January 1, 2010; however, agencies will be allowed to phase in coverage prior to January 1, 2010.

Core Position Classification System

Under provisions of the bill, the Director of OPM must establish a core position classification system. The Director may establish, revise, or abolish official position titles, career/occupational groups, subgroups, or bands. Each career/occupational group may include, but is not limited to, bands for entry/developmental work, full performance work, senior expert work, and supervisory work.

Each agency must classify each position under its jurisdiction into the appropriate occupational series, career/occupational group, subgroup (if applicable), and band in conformance with standards published by, or coordinated with, the Director of the Office. An agency may change the classification of a position, as required.

The Director may review an agency's classification of positions and order corrective action, where necessary, with respect to the placement of one or more positions in the appropriate pay system, series, occupational group/subgroup, and band, or with respect to the official title of a position. Agencies are required to take any corrective action prescribed by the Director. When the Director finds that positions are not being classified in conformance with, or consistent with, published standards, he or she may limit, revoke, or suspend an agency's authority to classify positions.

An employee may request reconsideration of the classification of the employee's official position of record with respect to the assigned pay system, career/occupational group, subgroup, occupational series, official title, or band. The reconsideration request may be filed with the agency or with the Office. An employee may ask the Director to review an agency reconsideration decision. The decision of the Director will be final and will not be subject to further review or appeal. An agency reconsideration decision is also considered to be final and not subject to further review or appeal if the employee does not request reconsideration by the Director.

Core Pay System

The bill requires the Director of OPM to establish a core pay system consistent with the core classification system. The pay system must be based on the principle of pay-for-performance. The core pay system will consist of a series of pay bands for career/occupational groups and subgroups. The Director of OPM will establish a common base rate range that applies in all locations worldwide (before applying any local or special market supplements).

The Director of OPM will have the authority to set and adjust rate ranges. The Director will be required to make a determination annually regarding whether to adjust rate ranges

and by what amount, if any. The Director may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and any other relevant factors. The Director may provide different adjustments for different bands, may adjust band minimum and maximum rates by different percentages, and will determine the effective dates of rate range adjustments.

The Director may prescribe pay progression policies (or allow agencies to establish such policies) that could apply either to an entire rate range or a portion of a rate range. The Director may take into account differences among employees' competencies, performance, organizational levels, or other appropriate factors when setting these policies.

Employees with performance evaluations of fully successful or above will be entitled to a pay increase due to a rate range adjustment. In general, employees with a performance rating below fully successful are prohibited from receiving a pay increase.

The bill requires the Director of OPM to establish a 16-member Federal Pay Council, with 1 official of the Office serving as the Chair, 3 experts, 6 employee representatives, and 6 management representatives appointed from among members of the Chief Human Capital Officers Council. The Federal Pay Council will provide the Directors of OPM and OMB with views and recommendations regarding setting and adjusting band rate ranges, establishing and modifying local market areas, and the methodology for determining the amounts of local market supplements.

Core Pay System; Local and Special Market Supplements; Special Payments

Provisions of the proposed bill allow the Director of OPM to establish local market supplements that may vary by career/occupational group, band, and location. These local market supplements are similar to locality-based comparability payments currently authorized under 5 U.S.C. ~ 5304. Local market supplements will apply only to employees whose official duty station is located in a particular local market area. The Director is authorized to establish and modify local market area boundaries by regulation.

The Director of OPM may establish special market supplements that provide higher pay levels for specified categories of employees if the Director determines that such supplements are warranted by current or anticipated recruitment or retention needs, or both. A special market supplement replaces any lower local market supplement that would otherwise be applicable.

In determining the amount of local and special market supplements, the Director may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other agencies, and any other relevant factors that pertain to the covered category of employees.

Any employee with a performance evaluation of fully successful or above will receive a

local or special market supplement. In general, employees with a performance rating below fully successful are prohibited from receiving a pay increase due to an adjustment of a local or special market supplement.

Provisions of the bill also allow agencies to authorize certain special payments to employees for special skills or assignments and for situations where agencies are experiencing recruitment and/or retention problems.

Core Pay System; Performance-Based Pay

Performance-based pay adjustments and cash awards will be an integral part of the core pay system which, operating in conjunction with the performance appraisal system, will constitute a pay-for-performance system. The provisions of the bill concerning performance-based pay are designed to ensure that higher performance is rewarded with higher pay.

The proposed bill includes detailed rules on performance-based pay increases. In general terms, performance-based pay increases will be distributed to employees from pay pools based on the number of performance shares awarded to an employee. The number of performance shares an employee receives will be directly related to the performance appraisal an employee receives (i.e., the highest performing employees receive most shares).

Agencies are required to establish pay pools for allocating performance pay increases. During the first 5 years after converting to a pay-for-performance system, agencies must allocate an amount for performance pay increases equal to or greater than the Governmentwide historical average value of within-grade and quality step increases under the General Schedule, as well as the estimated average amount that otherwise would have been spent on promotions between General Schedule grades. After the first 5 years, agency heads will determine annually the funds to be allocated to performance pay increases, subject to any minimum amount the Director may prescribe. Subject to regulations of the Director, agencies may distribute among pay pools the funds allocated for performance pay increases and, in so doing, may take into account organizational performance and contribution to agency mission.

An agency may also provide special within-band basic pay increases for employees within a Full Performance or higher band who possess exceptional skills in critical areas or who make exceptional contributions to mission accomplishment, or in other circumstances determined by the agency. These increases may be revoked when the agency determines that the conditions of this section are no longer met. Lump-sum cash award may be paid, either to an individual employee or to a group of employees, based on an employee's most recent rating of record (in the case of an individual award) and any other performance assessment or criteria the agency believes to be appropriate. The proposed bill also provides that an agency may reduce an employee's rate of basic pay within a band for unacceptable performance or conduct, subject to any applicable adverse

action procedures.

If an agency wishes to establish an alternative pay-for-performance system with respect to a category of employees, rather than using the core compensation system, the Director of OPM must certify that pay-for-performance system. The agency must confer with representatives of labor organizations representing employees affected by the establishment of an alternative pay-for-performance system before such a system is established.

Premium Pay Provisions

Provisions of the proposed bill would amend 5 U.S.C. § 5548 of title 5, United States Code, to allow the Director of the Office to establish, by regulation, alternative premium pay provisions in lieu of the provisions in subchapter V of chapter 55 of title 5, United States Code. This would provide flexibility to address mission-specific needs and requirements for specific agencies or occupations. The Director would issue regulations establishing any alternative premium pay provisions, identifying covered categories of employees, and determining the purposes for which any alternative premium payment is considered basic pay under various title 5 provisions, such as retirement provisions. Section 5548, as amended, also would allow the Director (regardless of any other provision of law) to apply subchapter V of chapter 55 to employees in law enforcement positions, as defined in section 5202(c)(2). This authority would include the authority to apply any applicable alternative provisions to subchapter V of chapter 55 that the Director established under section 5548, in lieu of statutory provisions that would otherwise apply.

Staffing Modernization

Provisions of the proposed bill amend chapter 31 of title 5, United States Code, which concerns employment authorities and types of appointments. The amendments would consolidate the categories of appointments into two broad categories – career and time-limited appointments; career–conditional appointments would be eliminated.

Labor Management Relations

Provisions of the proposed bill amend the definition of grievance's at 5 U.S.C. 7103(a) by providing that any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation will constitute a grievance if it was issued for the purpose of affecting conditions of employment (see discussion below). This includes any claimed violation, misinterpretation, or misapplication regarding an employee's pay, except those that involve the exercise of a manager's discretion. The rest of the definition remains unchanged. In addition, the definition of "emergency" is amended to clarify the kinds of events, or potential events, that would constitute an emergency under the labor relations

statute. The kinds of events covered by the amended definition include circumstances resulting, or potentially resulting, in adverse impact on agency resources, increased workload due to unforeseen events, as well as changed mission requirements or budgetary exigencies imposed by authorities external to the affected agency.

Section 7105 of title 5, United States Code is amended regarding powers and duties of the Federal Labor Relations Authority. The Chairman of the Authority is required to establish procedures for the fair, impartial, and expeditious assignment and disposition of cases. The Chairman must use a single, integrated process to resolve all matters associated with bargaining disputes. These procedures must be used in all cases involving certain combinations of unfair labor practices, negotiability disputes, and bargaining impasses. These procedures may permit the use of a combination of mediation, fact finding, and any other appropriate dispute resolution method to resolve all disputes. These procedures could include an authority for the Chairman to direct the General Counsel of the Authority, the Federal Service Impasses Panel, or both, to submit a case pending before them to the Authority for appropriate action. This provision would make it possible for the Authority to assess the best course of action to resolve all disputes in a streamlined, “gone-stop” fashion, and would allow for a single, integrated process for resolving all matters associated with a bargaining dispute.

Section (g)(3) of 5 U.S.C. 7105(g)(3) would be amended to limit the Authority’s ability to impose a status quo ante remedy. Such a remedy may not be imposed where there has been a finding that the agency has committed an unfair labor practice under section 7116(a)(5) or (6) (relating to refusal to consult or negotiate in good faith or failure or refusal to cooperate in impasse procedures) and the remedy would adversely impact the agency’s or activity’s mission or budget, or the public interest.

Management rights under 5 U.S.C. § 7106 would be expanded. The amendment would allow management to take necessary actions to carry out the agency’s mission in an emergency. This amendment in combination with the amendment of the definition of “emergency” would provide management with an explicit authority to prepare for, practice for, or prevent any emergency. Under the definition of “emergency” under current law, management cannot take steps prepare for, practice for, or prevent an emergency without engaging in negotiation.

The union’s right to be represented at formal discussions is reduced. Unions do not have a right to attend a meeting where a conversation between management and bargaining unit employees constitutes a reiteration or application of one or more existing personnel policies, practices, or working conditions; is incidental or otherwise peripheral to the announced purpose of the meetings; or does not result in an announcement of a change to, or a promise to change, one or more existing personnel policies, practices, or working conditions. The right of a union to be represented at grievances applies only to those grievances filed under the negotiated grievance procedure.

The requirements relating to the release of information to an exclusive representative are shortened and clarified. The release of information to an exclusive representative will be

required when it is normally maintained, reasonably available, and requested by the exclusive representative; a particularized need has been demonstrated; and the disclosure is not prohibited by law. Disclosure of information is barred when prohibited by law, regulation, or agency directives and issuances or when an adequate alternate means for obtaining the information exists. Information subject to disclosure also does not include personal employee information such as phone numbers or addresses, or disclosures that compromise national security, agency mission, or employee safety.

The bill amends the duty to bargain and consult. An agency and a labor organization are obligated to bargain or consult over a subject that is otherwise negotiable only if the change will affect the bargaining unit (or a portion of the bargaining unit) in a way that is foreseeable, substantial, and significant in terms of both its impact and duration.

The bill would modify grievance procedures to clarify that the negotiated grievance procedure is the exclusive procedure for resolving grievances under chapter 71 of title 5, United States Code. Subjects not within the definition of “grievance” (including the classification of any position) would be excluded from grievance procedures. Under the definition of “grievance” in current law, a grievance filing is permitted when the complaining party merely shows that a claimed violation, misinterpretation or misapplication of any law, rule, or regulation affects conditions of employment. In other words, a grievance is permitted under current law whenever a law, rule, or regulation, including a law, rule, or regulation that was never meant to implicate conditions of employment, is violated, misinterpreted, or misapplied in such a way to affect conditions of employment. The amended definition of “grievance” allow a complaint arising from any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation issued for the purpose of affecting conditions of employment. Thus, under the modified definition, a grievance may be filed when a law, rule, or regulation that clearly implicates a condition of employment, is violated, but not when a law, rule, or regulation is only tangentially related to conditions of employment.

In addition, adverse actions generally continue to be grievable. An aggrieved employee may raise matters appealable to the Merit Systems Protection Board under an applicable appellate procedure or under the negotiated grievance procedure, but not both.

In a case where an arbitrator hears an appealable matter, he or she is bound by the same standards as a Board administrative judge. An arbitration award is considered equivalent to a decision by a Merit Systems Protection Board administrative judge and is subject to full Board review. An arbitrator may cancel a rating of record when he or she finds that the agency applied the employee’s established performance requirements or expectations in violation of applicable law, agency rule or regulation, or provision of a collective bargaining agreement in a manner prejudicial to the grievant. In such circumstances, the arbitrator may order the agency to change the grievant’s rating only when the arbitrator is able to determine the rating the agency would have given but for the violation. When an arbitrator is unable to determine what the employee’s rating would have been if the violation had not occurred, the arbitrator must remand the case to the agency for re-evaluation. An arbitrator may not independently evaluate the employee’s performance or

otherwise substitute his or her judgment for the supervisor's judgment. In addition, either party to arbitration under chapter 71 may file with the Authority an exception to any arbitration award--except an award issued in connection with a matter appealable to the Merit Systems Protection Board, or a similar matter arising under other personnel systems--which is considered equivalent to a decision of a Board administrative judge and is subject to full Board review.

Adverse Actions

The bill amends procedural due process for employees who are suspended for 14 days or less. The amendment provides that an individual who is not a preference eligible and who has completed a probationary period (i.e., three years) under an initial appointment in the competitive service is an "employee", with procedural due process rights. Alternatively, an employee who is suspended for 14 days or less during a 3-year probationary period does not have procedural due process rights. A preference eligible in the competitive service who has completed one year of creditable service (even if still serving a probationary period) is also covered by the provisions of subchapter I.

Appeals

The bill amends appellate procedures to limit the scope of a hearing, or for no hearing to be held, if it is determined that some or all of the facts are not in genuine dispute (i.e., summary judgment). The standard for review for actions taken based on unacceptable performance would be changed; a single standard of proof (preponderance of the evidence) will apply to all actions (based on conduct or performance) covered by subchapter II of chapter 75.

The U.S. Merit Systems Protection Board authority to mitigate penalties is limited. The Board may not modify an agency's determination regarding the penalty imposed in any action taken under chapter 75 unless it is totally unwarranted in light of all pertinent circumstances. In evaluating the appropriateness of a penalty, the Board is compelled to give primary consideration to the impact on the mission of the agency or activity, as determined by the agency.

The bill amends 5 U.S.C. § 7703(d) to remove the discretion of the Court of Appeals to grant or deny a petition for judicial review.