

TABLE OF CONTENTS

PREFACE	i
CHAPTER ONE: HISTORY AND STRUCTURE OF THE SENIOR EXECUTIVE SERVICE	1
I. OVERVIEW.....	1
A. STATUTORY STATEMENT OF PURPOSE.....	3
B. LEGISLATIVE HISTORY	4
C. OPM EXPLANATION OF THE LEGISLATIVE INTENT	6
II. COVERED AND EXCLUDED AGENCIES	8
A. STATUTORY PROVISIONS	8
1. Authority to Exclude Agencies From Requirements	8
2. Legislative History Concerning OPM's Authority to Exclude Agencies From Requirements.....	9
3. OPM Regulation	9
III. ORGANIZATION.....	10
A. EXECUTIVE POSITIONS	10
1. Statutory Provisions	10
2. Legislative History	12
3. OPM Guidance	13
B. ALLOCATION OF POSITIONS	13
1. OPM Guidance	13
CHAPTER TWO: QUALIFICATIONS, RECRUITMENT, CANDIDATE DEVELOPMENT, SELECTION, OVERSIGHT, AND PROBATION	15
I. QUALIFICATIONS	15
A. CORE QUALIFICATIONS	16
1. OPM Guidance	16
B. QUALIFICATION REQUIREMENTS SET BY AGENCIES	20
1. Statute.....	20
2. OPM Regulations.....	21
II. QUALIFICATIONS REVIEW BOARDS.....	21
A. STATUTE.....	22
B. LEGISLATIVE HISTORY	23
C. OPM REGULATIONS	24
D. OPM GUIDANCE	25
III. RECRUITMENT.....	31
A. STATUTE.....	31
1. Travel Expenses.....	31
a. Statute.....	31
b. Legislative History.....	32
B. OPM REGULATIONS	33
C. OPM GUIDANCE	35
IV. EXECUTIVE RESOURCES BOARDS; COMPETITION AND SELECTIONS	36
A. STATUTE.....	38
B. OPM REGULATIONS	39
C. OPM GUIDANCE	40
1. Examination Process.....	40
2. Executive Resources Boards.....	40
V. CANDIDATE DEVELOPMENT PROGRAMS	40
A. OPM REGULATIONS	42
B. 2008 PROPOSED REGULATIONS	44
C. OPM GUIDANCE	47

VI.	PROBATION FOR CAREER APPOINTEES.....	47
A.	STATUTE.....	48
B.	OPM REGULATIONS.....	48
C.	OPM GUIDANCE.....	49
CHAPTER THREE: APPOINTMENTS.....		51
I.	APPOINTMENT SCHEME.....	52
A.	THE STATUTE.....	53
B.	LEGISLATIVE HISTORY.....	57
1.	General Positions.....	57
2.	Noncareer Appointments.....	57
3.	Qualifications.....	58
C.	OPM REGULATIONS.....	59
1.	Noncareer or Limited Appointments.....	59
2.	Conversions to SES.....	61
D.	OPM GUIDANCE.....	66
1.	<i>Presidential Transition Guide to Federal Human Resources Management</i>	66
2.	<i>SES Guide: Limited Appointments</i>	68
3.	Actions Involving Noncareer Appointees.....	70
4.	Limitations on Use of Experts and Consultants to fill Positions: <i>OPM Presidential Transition Guide to Federal Human Resources Management</i>	70
5.	Overlap in Positions: <i>OPM Presidential Transition Guide to Federal Human Resources Management</i>	71
II.	DESIGNATION OF CAREER RESERVED AND GENERAL POSITIONS.....	72
A.	STATUTE.....	72
1.	OPM Regulations.....	72
a.	Movement Between Personnel Systems.....	73
2.	OPM Guidance Concerning Career-Reserved and General Positions.....	73
III.	STAFFING LEVELS.....	74
A.	STATUTE.....	74
B.	LEGISLATIVE HISTORY.....	75
C.	OPM REGULATION.....	76
D.	OPM GUIDANCE.....	76
IV.	LITIGATION CONCERNING APPOINTMENTS.....	78
CHAPTER FOUR: COMPENSATION.....		79
I.	STATUTORY PROVISIONS.....	85
II.	LEGISLATIVE HISTORY.....	87
III.	OPM REGULATIONS.....	88
A.	PAY.....	88
B.	AGGREGATE PAY LIMITATIONS.....	96
IV.	OPM GUIDANCE.....	100
A.	COMPENSATION.....	100
1.	Federal Register Notice.....	100
2.	<i>OPM Presidential Transition Guide to Federal Human Resources Management</i>	105
3.	Informal Guidance.....	106
B.	RECRUITMENT, RETENTION, AND RELOCATION INCENTIVES.....	107
C.	RETENTION OF BENEFITS FOR PRESIDENTIAL APPOINTEES.....	109
V.	MISCELLANEOUS BENEFITS.....	109
A.	LAST MOVE HOME.....	110
B.	RELOCATION AND PLACEMENT ASSISTANCE.....	110
C.	UNEMPLOYMENT COMPENSATION.....	111
VI.	LITIGATION CONCERNING COMPENSATION.....	111

CHAPTER FIVE: EXECUTIVE DEVELOPMENT	113
I. THE STATUTE.....	114
A. GENERAL PROVISIONS.....	114
B. SABBATICALS.....	116
II. LEGISLATIVE HISTORY.....	116
III. OPM REGULATIONS.....	117
A. 2008 PROPOSED REGULATIONS.....	118
IV. OPM GUIDANCE.....	122
CHAPTER SIX: REASSIGNMENTS, DETAILS, AND TRANSFERS	125
I. THE STATUTE.....	126
II. LEGISLATIVE HISTORY.....	127
III. OPM REGULATIONS.....	127
IV. OPM GUIDANCE.....	129
CHAPTER SEVEN: PERFORMANCE APPRAISAL	131
I. OVERVIEW.....	131
A. DEFINITIONS.....	132
B. OPERATION.....	133
C. PERFORMANCE REVIEW BOARDS.....	134
D. USING THE RESULTS OF APPRAISALS.....	135
II. STATUTORY BASIS FOR PERFORMANCE APPRAISAL; PERFORMANCE REVIEW BOARDS.....	136
III. LEGISLATIVE HISTORY.....	138
IV. OPM REGULATIONS.....	140
A. APPRAISAL.....	140
B. PERFORMANCE APPRAISAL CERTIFICATION PERMITTING HIGHER PAY.....	145
V. OPM GUIDANCE.....	151
A. FEDERAL REGISTER NOTICE: CERTIFIED APPRAISAL SYSTEMS.....	151
B. <i>SES GUIDE</i> : APPRAISAL PROCESS AND PERFORMANCE REVIEW BOARDS.....	154
CHAPTER EIGHT: AWARDS	157
I. ROLE OF AWARDS.....	157
II. STATUTORY BASIS.....	158
A. PERFORMANCE AWARDS.....	158
B. RANK DESIGNATIONS AND AWARDS.....	159
III. LEGISLATIVE HISTORY.....	159
IV. OPM REGULATIONS.....	160
A. PERFORMANCE AWARDS.....	160
B. RANK AWARDS.....	161
V. OPM GUIDANCE.....	162
A. PRESIDENTIAL ELECTION PERIOD.....	171
CHAPTER NINE: REMOVAL OF PROBATIONERS; PROBATIONARY FALLBACK RIGHTS; REMOVAL OF NONCAREER APPOINTEES	173
I. REMOVAL DURING THE PROBATIONARY PERIOD.....	173
A. STATUTE.....	173
B. OPM REGULATIONS.....	173
1. Performance Issues.....	173
2. Conduct Issues.....	174
3. Preappointment Conditions.....	174
4. Removal of Probationers by Reduction in Force.....	174
5. Limitations Upon Removals of Probationary Appointees; Moratorium.....	175
6. Appeals of Removals of Probationary Appointee.....	176
II. FALLBACK RIGHTS FOR CAREER APPOINTEES WHO ARE REMOVED DURING PROBATION.....	176

A.	STATUTE.....	176
B.	OPM REGULATIONS.....	177
III.	REMOVAL OF NONCAREER OR LIMITED APPOINTEES; REEMPLOYED ANNUITANTS.....	179
A.	STATUTE.....	179
B.	OPM REGULATION.....	180
CHAPTER TEN: REMOVAL FOR UNACCEPTABLE PERFORMANCE		183
I.	STATUTORY PROVISIONS.....	183
A.	REMOVALS.....	183
B.	FALLBACK RIGHTS.....	184
II.	REGULATIONS.....	185
A.	OPM REGULATIONS.....	185
B.	OPM GUIDANCE.....	187
III.	MSPB INFORMAL HEARING.....	188
A.	STATUTE.....	188
B.	OPM REGULATIONS.....	188
C.	MSPB REGULATIONS.....	189
IV.	LITIGATION CONCERNING PERFORMANCE-BASED ACTIONS.....	190
A.	PERFORMANCE ACTIONS ARE NOT CONVERTED INTO MISCONDUCT-BASED ACTIONS IF THE PERFORMANCE COULD BE CHARACTERIZED AS MISCONDUCT.....	190
B.	PRECLUSION OF REVIEW OF A PERFORMANCE RATING OR PERFORMANCE-BASED REMOVAL THROUGH AN MSPB REGULATION IMPLEMENTATION REVIEW PROCEEDING.....	194
C.	MSPB JURISDICTION TO CONSIDER A STAY ACTION INITIATED BY THE OFFICE OF SPECIAL COUNSEL AS TO A RETALIATORY PERFORMANCE RATING.....	196
CHAPTER ELEVEN: MISCONDUCT ACTIONS		199
I.	OVERVIEW.....	199
A.	THE STATUTE.....	200
B.	LEGISLATIVE HISTORY.....	201
C.	OPM REGULATIONS.....	202
D.	2008 PROPOSED RULES.....	205
E.	OPM GUIDANCE.....	208
1.	OPM <i>Presidential Transition Guide to Federal Human Resources Management</i>	208
2.	<i>SES Guide</i>	209
II.	STATUTORY STANDARDS FOR MSPB REVIEW OF ADVERSE ACTIONS.....	210
III.	LITIGATION CONCERNING MISCONDUCT ACTIONS.....	210
A.	HIGH STANDARD OF CONDUCT.....	210
B.	MITIGATION.....	211
C.	ACTIONABLE MISCONDUCT NEED NOT BE INTENTIONAL.....	211
D.	DISPUTES CONCERNING THE CLASSIFICATION OF AN ACTION.....	214
E.	REFUSAL TO ACCEPT REASSIGNMENT; CONSULTATIONS PRIOR TO REASSIGNMENT.....	217
F.	REPRISAL AGAINST WHISTLEBLOWERS.....	219
1.	Agency Actions Against Executives.....	219
2.	Appeals by Executives Who Claim Reprisal.....	226
G.	INAPPROPRIATE PERSONAL CONDUCT.....	227
H.	REFUSAL TO ACCEPT REASSIGNMENT.....	230
I.	CONSTRUCTIVE ADVERSE ACTIONS.....	233
J.	CASES BROUGHT BY THE OFFICE OF SPECIAL COUNSEL.....	235
1.	Statutes.....	235
2.	Limitations Upon the Scope of Authority of the Office of Special Counsel to Bring Disciplinary Actions; Civil Service Regulations.....	239
3.	Reprisal Against Whistleblowers.....	244
4.	Improper Personnel Actions Directed to Confer Unwarranted Advantage on Another Employee.....	244

CHAPTER TWELVE: REDUCTIONS IN FORCE AND FURLOUGHS245

I. REDUCTION IN FORCE 248

 A. STATUTORY PROVISIONS 248

 1. Fallback Rights 248

 B. OPM REGULATIONS 249

 1. Reduction in Force..... 249

 a. Procedures for Career Appointees..... 249

 b. Nonprobationary Career Appointees 251

 c. Probationers..... 252

 2. Fallback Rights 253

 3. Career Transition Assistance Plans..... 255

 C. OPM GUIDANCE 256

 1. *SES Guide* 256

 2. *Severance Pay: OPM Presidential Transition Guide to Federal Human Resources Management* ... 258

II. FURLOUGHS..... 259

 A. STATUTORY PROVISIONS 259

 B. OPM REGULATIONS 259

III. LITIGATION CONCERNING REDUCTION IN FORCE..... 260

 A. ORIGIN OF RIF PROCEDURES 260

 B. TRANSFERS OF FUNCTION 261

 C. APPLICABILITY OF MORATORIUMS..... 265

 D. SIGNIFICANCE OF PERFORMANCE APPRAISALS ON RETENTION STANDING..... 267

 E. COMPETITIVE AREA DETERMINATIONS AND AGENCY PLACEMENT EFFORTS 269

 F. FURLOUGHS..... 274

 G. MISCELLANEOUS 274

CHAPTER THIRTEEN: MORATORIUMS.....275

I. STATUTES 275

 A. REASSIGNMENT..... 275

 B. PERFORMANCE APPRAISAL..... 276

 C. REMOVAL 276

II. LEGISLATIVE HISTORY 277

III. OPM REGULATIONS 277

 A. REASSIGNMENTS 277

 B. PERFORMANCE APPRAISAL..... 278

 C. PERFORMANCE-BASED ACTIONS 278

 D. ACTIONS AGAINST PROBATIONERS..... 279

IV. OPM GUIDANCE 280

 A. *OPM PRESIDENTIAL TRANSITION GUIDE TO FEDERAL HUMAN RESOURCES MANAGEMENT* 280

 B. REASSIGNMENTS 283

 C. PERFORMANCE APPRAISALS 285

 D. PERFORMANCE ACTIONS..... 286

 E. ACTIONS AGAINST PROBATIONERS..... 286

 F. OTHER ADVERSE PERSONNEL ACTIONS 286

 G. REDUCTION IN FORCE 286

V. LITIGATION CONCERNING MORATORIUMS 286

 A. CALCULATION OF MORATORIUM PERIOD..... 286

 B. TREATMENT OF DETAILS..... 287

 C. REDUCTION IN FORCE 287

CHAPTER FOURTEEN: LEAVE PROVISIONS289

I. STATUTE..... 289

II. OPM REGULATIONS 290

III. OPM GUIDANCE 292

A.	OPM <i>PRESIDENTIAL TRANSITION GUIDE TO FEDERAL HUMAN RESOURCES MANAGEMENT</i>	292
B.	<i>SES GUIDE</i>	294
CHAPTER FIFTEEN:	REINSTATEMENT AND FALLBACK RIGHTS	295
I.	REINSTATEMENT RIGHTS	295
A.	THE STATUTE.....	296
B.	LEGISLATIVE HISTORY	296
C.	OPM REGULATIONS	296
D.	OPM GUIDANCE	299
1.	<i>Presidential Transition Guide to Federal Human Resources Management</i>	299
2.	<i>SES Guide</i>	301
II.	FALLBACK RIGHTS	302
A.	THE STATUTE.....	302
B.	OPM REGULATIONS	303
C.	OPM GUIDANCE	305
REFERENCES		307