Attorneys serve crucial roles within federal agencies. For example, they defend agencies in litigation, draft regulations, investigate complaints, and resolve legal issues surrounding information disclosure. Attorneys support nearly all the operations of agencies, helping to ensure their fair and successful functioning as well as the legality of their actions. Therefore, it is critical to ensure that agencies hire a highly qualified corps of attorneys.¹

The term “agency attorney” can have many different meanings. To clarify the kind of agency attorneys to which this Recommendation refers, it is necessary to briefly examine the background of the civil service hiring laws.

Title 5 of the U.S. Code creates three categories of civil service positions: (1) competitive service, (2) excepted service, and (3) senior executive service.² Most civil service positions are in the competitive service.

Agencies that wish to fill a position in the competitive service must generally offer all U.S. citizens and nationals the opportunity to compete in a public and open examination, and those who rank highest are eligible for selection.³ The procedures that agencies must follow in

² The senior executive service is not addressed in this Recommendation.
administering this competition and ultimately making selections are extremely detailed and complex. Although a full accounting of them is beyond the scope of this Recommendation, they include (1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal (hereinafter “USAJobs”); (2) formally assigning numerical ratings to applicants and selecting among the top three candidates (or, alternatively, adopting a rating system in which applicants are placed into “categories”); (3) hiring only from lists of candidates prepared by an agency delegated examining unit; (4) using Office of Personnel Management (OPM)-generated “qualification standards” within the vacancy announcement; and (5) adhering to detailed procedures for giving veterans and certain family members of veterans (hereinafter “preference eligibles”) priority consideration.

Title 5’s civil service positions are placed in the excepted service rather than the competitive service when the President or OPM finds that conditions of good administration so warrant or when Congress itself excepts such positions from the competitive service (which may involve establishing agency-specific rules for how positions may be filled). When the President or OPM makes the requisite finding for a position to be in the excepted service, OPM places it into a “schedule” (of which there are currently five, lettered A through E, within the Code of Federal Regulations (C.F.R.)),\(^4\) based upon the underlying basis for the exception.\(^5\)

OPM has placed Title 5 attorney positions under “Schedule A” of the excepted service. Although there are different hiring rules depending on which schedule an excepted service appointment is in, selection for excepted service appointments other than appointments for attorney positions generally must be made “in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of [Title 5].”\(^6\) Included within sections 3308 to 3318 are the detailed procedures, mentioned above, for giving preference

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\(^4\) See Civil Service Rule VI (5 C.F.R. § 6.2).


\(^6\) Id. § 3320.
eligibles priority consideration. OPM’s regulations prescribe procedures on how agencies are to accord preference eligibles priority consideration when filling excepted service positions other than attorney positions.

Congress has restricted OPM from examining authority over excepted service attorney positions through annual appropriations law. Such positions are therefore placed in the excepted service and exempt from most of the rules that otherwise apply to excepted service positions.

This Recommendation applies to agency attorneys who are hired for positions under Schedule A of the excepted service. It does not apply to (a) attorney positions provided for in parts of the U.S. Code other than Title 5; (b) attorney positions in the senior executive service; and (c) attorneys who serve in non-attorney capacities. Attorney positions addressed in this Recommendation are the majority of attorney positions in the federal government. Those holding these positions are often referred to as “0905 attorneys” in reference to the occupational series assigned by OPM to those attorneys who are in the General Schedule pay system.

Because of the exemption from the rules that apply to other excepted service positions under 5 C.F.R. part 302, the laws governing the hiring process for 0905 attorney positions are generally much less restrictive than the laws governing the hiring process for competitive and other excepted service positions. For example, agencies need not post announcements on USAJobs, use human resources (HR) officials to screen applicants, use qualifications established by OPM, or use category or numerical rating systems for hiring. Agencies must, however,

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7 See, e.g., id. § 3317.
8 See, e.g., 5 C.F.R. § 302.304.
10 See 5 C.F.R. § 302.101(c)(8).
12 Although the occupational series “0905” refers specifically to attorneys under the General Schedule pay system, as used in this Recommendation, it includes attorneys performing equivalent functions in other statutory pay systems.
“follow the principle of veteran preference as far as administratively feasible and, on the request of a qualified and available preference eligible . . . furnish him/her with the reasons for his/her nonselection.”\textsuperscript{13}

There are other legal requirements to which agencies must generally adhere when hiring 0905 attorneys. These include prohibiting hiring decisions based on protected characteristics (e.g., race, sex, and national origin), nepotism, political affiliation, whistleblower activities, and other non-merit considerations.\textsuperscript{14} They also include affording priority consideration to people who were separated or furloughed from the agency, without misconduct, due to a compensable injury\textsuperscript{15} and generally not hiring males born after 1959 who have not registered for the selective service.\textsuperscript{16}

Despite the less restrictive legal requirements for hiring 0905 attorneys, many agencies choose to follow 0905 attorney hiring practices that are not legally required, such as involving HR officials in screening out applicants based on substantive criteria (e.g., nature of legal experience) and posting announcements exclusively on USAJobs without further disseminating them.\textsuperscript{17} Although some agencies undertake these practices knowing they are optional, in other agencies, HR officials and selecting officials wrongly believe these actions are legally required.\textsuperscript{18}

A possible reason for this confusion is that in 1993, OPM stopped publishing the \textit{Federal Personnel Manual}, a compendium of guidance that served as an easy reference guide for agencies; successor publications take the form of discrete handbooks and operating manuals and are not published systematically.

\textsuperscript{13} 5 C.F.R. § 302.101(c)(8).
\textsuperscript{14} 5 U.S.C. § 2302.
\textsuperscript{15} \textit{Id.} § 8151.
\textsuperscript{16} \textit{Id.} § 3328.
\textsuperscript{18} \textit{Id.}
Because federal hiring law actually is quite flexible regarding the processes used to select 0905 attorneys, agencies may benefit from using different practices in different situations. In certain circumstances, for example, agencies may wish to attract broad applicant pools, whereas in others, they might have more discrete candidate pools (such as attorneys who used to work for the agency, former legal interns, presidential management fellows, or highly recommended candidates) under consideration. In such situations, agencies may not want to post or broadcast an announcement, and it is generally permissible for them not to do so.\textsuperscript{19} However, when agencies want to have a broad applicant pool, they will typically benefit from posting an announcement in locations likely to reach potential optimal candidates. This may or may not include USAJobs, which agencies generally need not use for excepted service hiring.\textsuperscript{20} Although agencies may decide USAJobs is among the best places to post an announcement, there is a monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without further dissemination may be insufficient to produce the optimal applicant pool.

Regardless of whether agencies decide to post on USAJobs or elsewhere, announcements are effective recruiting tools only if they are written clearly and in a way designed to welcome qualified applicants. Too often, however, 0905 attorney vacancy announcements contain dense, boilerplate language, descriptions of job responsibilities that are difficult to decipher, and warnings of jail time or fines for false statements.\textsuperscript{21} It seems that this problem is caused at least in part by how HR employees craft their vacancy announcements. (Agencies generally have discretion concerning the language used in the announcement.) For example, a selecting official may be the one who drafts the announcement but may then send it to HR for posting on USAJobs. As an HR employee is posting the announcement on USAJobs, that employee may insert inapplicable boilerplate language, facilitated by USASStaffing (an applicant tracking system created by OPM and accessible only to government officials to post vacancy announcements and

\textsuperscript{19} Recruitment “should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society,” 5 U.S.C. § 2301(b)(1), and must not result in an unlawful employment practice based on disparate impact, 42 U.S.C. § 2000e-2(k)(1)(A).

\textsuperscript{20} 5 U.S.C. § 3330.

\textsuperscript{21} For examples of such announcements, see Phillips & Rubin, supra note 17, at 28–30.
track applicants on USAJobs). The selecting official might not realize that such language was
inserted until after the announcement has been posted. This Recommendation addresses this
issue by encouraging selecting officials, if they send announcements to HR to post, to review the
final versions of all vacancy announcements exactly as they will appear to the public before they
are posted.

This Recommendation’s appendix offers an example of a 0905 attorney announcement
that is written clearly and in a welcoming manner, which avoids the problems discussed above.
Resources exist to assist agencies in using plain language, including Administrative Conference
Recommendation 2017-3, Plain Language in Regulatory Drafting22 and the Federal Plain
Language Guidelines.23

Agencies’ recruitment efforts might include recruiting former interns to work as 0905
attorneys. Hiring these candidates allows agencies to employ those who have previously worked
in the agency and have proved that they can successfully carry out the position’s responsibilities.
Such hiring is akin to summer associate programs at some law firms, in which firms hire students
to work for the summer after their second year of law school and, after observing the students’
work, may offer them permanent employment upon graduation.

Agencies, however, cannot extend an offer of employment as a 0905 attorney to an
applicant until after he or she has been admitted to a bar, which can take nearly a year or longer
after graduation from law school. If an agency wishes to hire an applicant for an attorney
position before he or she has been admitted to a bar, the agency must hire him or her as a “0904
law clerk trainee” under Schedule A. The 0904 law clerk trainee position is a temporary excepted
service appointment in which a candidate for an attorney position could serve while waiting to be

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22 Admin. Conf. of the U.S., Recommendation 2017-3, Plain Language in Regulatory Drafting, 82 Fed. Reg. 61,728
(Dec. 29, 2017).

23 PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. 2011),
http://www.plainlanguage.gov/guidelines/.
admitted to a bar. The appointment can last only 14 months. OPM takes the position that the appointment procedures of 5 C.F.R. part 302 apply.

Some agencies have routinized the use of the law clerk trainee hiring authority by hiring attorneys through honors programs, which are generally two-year employment and training programs for recent law school graduates. Applicants generally apply to an honors program in their final year of law school or during a clerkship and, if they are accepted to the honors program, may join the agency with the official position designation “0904 law clerk trainee” if they are not yet admitted to a bar. Law clerk trainees in honors programs serve under the supervision of licensed attorneys until they are admitted to a bar, at which time they may be appointed to 0905 attorney positions. This Recommendation suggests that agencies with honors programs encourage successful interns to apply to them and that agencies without honors programs nonetheless consider hiring successful interns as law clerk trainees and then appoint them to 0905 attorneys upon admission to a bar before the end of 14 months.

Another facet of the hiring process is the use of the period before adverse action rights accrue to observe the appointee’s performance and determine whether to retain the appointee. After an individual is appointed to a 0905 position, the person must continuously serve for two years before he or she accrues adverse action rights (or one year, if the person is a preference eligible). During this period the attorney can be dismissed from federal service with minimal procedural protections. In the competitive service, there is a period called “the probationary period,” during which agencies are required “to determine the fitness of the employee and shall terminate his services . . . if he fails to demonstrate fully his qualifications for continued

24 5 C.F.R. § 213.3102(d).
25 The appointment procedures of 5 C.F.R. part 302, although different from the competitive service’s appointment procedures, are still very detailed and complex. They require, among other things, that agencies adhere to a set of detailed procedures for according preference eligibles priority consideration. See, e.g., 5 C.F.R. § 302.304. They also require agencies to establish qualification standards for excepted service positions. See, e.g., id. § 302.202.
employment.”

The preliminary period during which 0905 appointees serve before they become “employees” with adverse action rights may be used for the same purpose. This Recommendation encourages agency HR officials to send reminders to supervisors when this period will soon be ending, and encourages supervisors to make a considered decision whether to retain the employee while the ability to do so without additional procedures is still available.

The Administrative Conference recognizes that agencies filling specific attorney positions may require additional criteria. One such position is an attorney hired as a non-ALJ adjudicator. As discussed above, the Administrative Conference addressed the hiring of ALJs in Recommendation 2019-2. At the very least, like ALJs, attorneys hired as non-ALJ adjudicators must demonstrate an ability to discharge the duties of an adjudicator with impartiality. There may be additional criteria agencies need to apply to screen for this quality and others specific to attorneys hired as non-ALJ adjudicators.

The paragraphs below are all intended to apply specifically to 0905 attorney positions, even when this limitation is not specifically noted.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional for Hiring 0905 Attorneys

1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems Protection Board and the Office of Special Counsel as necessary, should provide training for agencies on the minimum procedural requirements in statute, regulations, and executive orders for hiring 0905 attorneys. That training should, in particular, clarify the distinction between excepted service hiring for attorneys and other hiring and would

27 5 C.F.R. § 315.803.


explain the alternative processes and flexibilities available to such positions. Such training could take any number of forms, including written materials and in-person presentations or webinars.

**Helping Agencies Recruit Qualified Applicants for 0905 Attorney Positions**

2. When hiring 0905 attorneys, agencies should recognize they have flexibility in recruiting. They may exercise broad or targeted recruitment strategies.

3. When seeking broad applicant pools for 0905 attorney positions, agencies are encouraged to post vacancy announcements in multiple locations where they are likely to reach qualified applicants. Options for posting include agencies’ own websites, job recruiting websites, or USAJobs. In addition to publicly posting announcements, agencies should widely disseminate such announcements to a variety of sources, such as bar associations, other professional legal associations, law school career offices, non-profit organizations, former and current agency employees and interns, other agencies, and other professional networks.

4. If agencies have smaller groups of potential candidates under consideration, they may choose not to post announcements or otherwise disseminate the announcements widely.

**Drafting Vacancy Announcements for 0905 Attorney Positions**

5. Agencies should ensure that selecting officials (i.e., those agency officials who make the ultimate hiring decision) draft and review vacancy announcements for 0905 attorney positions.

6. Announcements for 0905 attorney vacancies should be written in plain language, adhering closely to the principles from Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*, and the *Federal Plain Writing Guidelines*.

7. Announcements should specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria;
and include under mandatory criteria only essential elements, such as bar membership and citizenship status, as applicable.

8. Announcements should not contain inapplicable boilerplate language, such as competitive service rules that do not apply to 0905 attorneys.

9. If agencies intend to limit applications to a certain number, the announcement should say so and specify what the limit is.

10. Agencies should recognize that they have the option of requiring a conventional resume from applicants instead of requiring the applicant to create a USAJobs resume. Agencies that want to require a conventional resume should state this clearly in the vacancy announcement.

11. If, after drafting a vacancy announcement, selecting officials send the announcement to human resources (HR) officials to be posted on USAJobs or elsewhere, selecting officials should ask HR officials to see the version of the announcement exactly as it will appear to the public. Selecting officials should then carefully review the announcement to ensure that it is consistent with Paragraphs 6 through 9 before it is posted.

12. Selecting officials should continue to review open-ended or long-term vacancy announcements to ensure they do not become outdated.

13. When feasible, agencies should ensure applicants are notified that their applications have been received and if they were not selected.

**Improving USAStaffing for 0905 Attorney Positions**

14. OPM should include a notice on USAStaffing (a commonly used applicant tracking system) that encourages agencies to specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status, as specified in Paragraph 7.
15. Wherever boilerplate language relating to competitive service hiring practices appears in USAStaffing, OPM should make clear that it does not apply to 0905 attorney hiring, and should be excluded in 0905 attorney vacancy announcements.

16. OPM should include a link on USAStaffing to the Plain Language Guidelines and to Administrative Conference Recommendation 2017-3, Plain Language in Regulatory Drafting, and encourage agencies to apply all relevant provisions of them to their drafting of vacancy announcements, as specified in Paragraph 6.

17. OPM should make clear in the instructions for USAStaffing that agencies have the option of requiring applicants to submit a conventional resume instead of the resume generated by USAJobs.

Evaluating Applicants for 0905 Attorney Positions

18. Agencies should develop policies or processes covering how attorney applications will be reviewed and assessed. These policies or processes may include creating teams to select applicants for interviews or recommend applicants for appointment.

19. Agency leadership should decide which responsibilities HR officials should have in the process of evaluating applications. If HR officials will screen applicants, selecting officials should determine the screening criteria HR officials will use and clearly communicate the criteria to them.

Evaluating 0905 Attorneys During The Period Before Adverse Action Rights Accrue

20. Supervisors should be aware of the length of the period during which newly hired 0905 attorneys (for most, but not all, two years) may be removed without affording them adverse action rights. Supervisors should evaluate attorneys during this period. HR officials should send reminders to supervisors approximately three to six months before the end of this period informing the supervisors that the period will soon end. Before the end of this period, supervisors should decide or make a recommendation about whether attorneys should be retained before this period elapses. The decision should be made in
sufficient time to take any necessary action before the attorney attains tenured
employment with adverse action rights.

**Using Law Clerk Trainee Positions to Hire 0905 Attorneys**

21. Agencies with honors programs should encourage successful interns to apply to them.

22. Agencies without honors programs should consider hiring high-performing legal interns
after graduation but before they have been admitted to a bar, using the authority to hire a
0904 law clerk trainee who can be appointed to a 0905 attorney upon admission to a bar,
assuming the agency wishes to do so. Agencies should note that OPM takes the position
that 5 C.F.R. part 302 procedures will apply.

**Ensuring Impartiality of 0905 Attorneys Hired as Non-Administrative Law Judge (ALJ) Adjudicators**

23. Agencies’ guidelines and procedures for the hiring of attorneys who will act as non-ALJ
adjudicators should be designed and administered to ensure the hiring of applicants who
will both carry out the functions of the office with impartiality and maintain the
appearance of impartiality.
APPENDIX

As indicated above in the preamble at page 6, below is an example of an attorney job announcement that is written clearly and in a welcoming manner.

OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF GENERAL COUNSEL
GENERAL ATTORNEY

Full-time, Permanent, GS-12/15 (Excepted Service)

The Office of Management and Budget (OMB) Office of General Counsel (OGC) is pleased to invite talented and enthusiastic attorneys to apply for a position in our office to serve as the lead attorney for matters involving the Office of the Federal Chief Information Officer (OFClO) and the United States Digital Service (USDS). A successful candidate will have at least three years of focused experience with information technology laws and government contracting.

This position is a permanent position with a promotion potential to GS-15.

What Do We Do?

OMB OGC attorneys enjoy dynamic, exciting and fast-paced work, which includes regularly meeting with and advising staff and policy officials in the White House, OMB, and other agencies outside the Executive Office of the President (EOP).

OMB OGC provides legal advice and assistance on a full range of government-wide and agency-specific matters, including litigation matters and other consultation with the Department of Justice’s litigation divisions and the Office of Legal Counsel. OMB OGC’s practice spans the breadth of Federal practice, including novel and complex legal issues related to high-profile actions and important ethics law questions, legislative proposals, budget and appropriations, procurement policy, grants policy, financial management policy, cybersecurity, national security, trade policy, information technology, privacy, and litigation matters. The office also works on in-house legal matters, including personnel, compliance, ethics, and the Freedom of Information Act.

Position Summary

The attorney in this position will counsel OMB leadership, managers, and staff at all levels across OMB regarding a broad range of matters, including the Federal Information Systems Management Act (FISMA), the Federal Information Technology Reform Act (FITARA), and the Privacy Act, among others. The portfolio includes reviewing policy proposals for legality, soundness, advisability, legislative, fiscal, and programmatic implications; and overall effect on the operation of the Executive Branch.

The successful candidate will have experience in government procurement of information technology and software, including R&D contracts and those for sustainment and maintenance. He/she will also have knowledge of intellectual property licensing and data rights in government contracts, and a strong understanding of emerging issues in government contracting, IT procurement, and software development. A degree in computer science or other technical subject matter is desirable.

The successful candidate must be energetic, creative, and enjoy challenging and interesting legal challenges, and have the ability to work harmoniously with diverse groups of individuals.