

Council Substitute Amendment Version (Redline)



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation | December 12, 2019

This document contains proposed Council amendments in the nature of a substitute

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

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

10 This Recommendation offers best practices for the recruitment and hiring of federal
11 agency attorneys in the excepted service (explained below), who comprise the majority of
12 attorneys in the federal government.² The laws applicable to excepted service hiring generally,
13 and to hiring of attorneys particularly, are more flexible than those applicable to hiring other

¹ The Administrative Conference addressed ~~a similar set of hiring~~ practices with respect to administrative law judges (ALJs) in Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016).



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14 [federal employees. This Recommendation suggests ways agencies can structure their recruitment](#)
15 [and hiring to make optimal use of these flexibilities and attract highly-qualified attorneys.](#)

Background on Federal Personnel Law

16 Title 5 of the U.S. Code creates three categories of civil service positions: (1) competitive
17 service, (2) excepted service, and (3) senior executive service.³ Most civil service positions are in
18 the competitive service. [The attorney positions addressed in this Recommendation⁴ are in the](#)
19 [excepted service. As explained below, however, they are not subject to most of the rules](#)
20 [governing the hiring of excepted service positions.](#)

21 Agencies that wish to fill a position in the competitive service must generally offer all
22 U.S. citizens and nationals the opportunity to compete in a public and open examination, ~~and~~
23 ~~those who rank highest are eligible for selection.~~⁵ The procedures that agencies must follow ~~in~~
24 ~~administering this competition and ultimately making selections are extremely detailed and~~
25 ~~complex. Although a full accounting of them is beyond the scope of this Recommendation, they~~
26 include (1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal
27 (hereinafter “USAJobs”); (2) [using minimum qualifications generated by the Office of Personnel](#)
28 [Management \(OPM\) to determine who is qualified for a position;](#) (3) formally assigning
29 numerical ratings to applicants and selecting among the top three candidates ~~(or, alternatively,~~
30 ~~adopting a rating system in which applicants are placed into “categories”);~~ (3) [hiring only from](#)
31 [lists of candidates prepared by an agency delegated examining unit;](#) (4) ~~using Office of Personnel~~
32 ~~Management (OPM) generated “qualification standards” within the vacancy announcement; and~~

³ ~~The senior executive service is not addressed in this Recommendation.~~

⁴ [Those holding these positions are often referred to as “0905 attorneys” in reference to the occupational series that the Office of Personnel Management assigns to those attorneys who are in the General Schedule pay system. Many agencies use “0905” to refer to attorneys performing equivalent functions in other statutory pay systems. All such attorneys are within the scope of this Recommendation. This Recommendation does not apply, however, to \(a\) attorney positions provided for in titles of the U.S. Code other than Title 5, \(b\) attorney positions in the senior executive service, and \(c\) licensed attorneys who serve in non-attorney positions.](#)

⁵ 5 U.S.C. §§ 3304–3319; Civil Service Rule II, VII (5 C.F.R. §§ 2.1, 7.3).



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33 ~~(5)~~⁶; (4) adhering to detailed procedures for giving veterans and certain family members of
34 veterans ~~(hereinafter “preference eligibles”)~~ priority consideration.; and (5) hiring only from lists
35 of candidates prepared by OPM or, if OPM has delegated this function to an agency, by the
36 agency’s own human resources (HR) office (formally called a “delegated examining unit”
37 (DEU)). For most excepted service appointments, the rules are generally the same as the above
38 except that agencies need not post an announcement on USAJobs or use OPM-generated
39 minimum qualifications.⁷

40 ~~Title 5’s civil service~~ Although attorney positions are placed in the excepted service rather
41 than the competitive service when the President or OPM finds that conditions of good
42 administration so warrant or when Congress itself excepts such positions regulations further
43 exempt agencies from the competitive service (which may involve establishing agency specific
44 rules for how positions may be filled). When the President or OPM makes the requisite finding
45 for a position having to be in the excepted service, OPM places it into a “schedule” (of which
46 there are currently five, lettered A through E, within the Code of Federal Regulations (C.F.R.)),⁸
47 based upon the underlying basis for the exception.⁹

48 OPM has placed Title 5 attorney positions under “Schedule A” of the excepted service.
49 Although there are different hiring rules depending on which schedule an excepted service
50 appointment is in, selection for excepted service appointments other than appointments for
51 attorney positions generally must be made “in the same manner and under the same conditions
52 required for the competitive service by sections 3308–3318 of [Title 5].”¹⁰ Included within

⁶Alternatively, agencies may adopt a system in which they establish two or three rating categories (e.g., “unqualified,” “qualified,” and “highly qualified”) and place each applicant into one of the categories. Agencies may not offer employment to any candidate in a lower category before they offer it to a candidate in a higher category. See 5 U.S.C. § 3319.

⁷ See 5 U.S.C. § 3320; 5 C.F.R. § 302.103 *et seq.*

⁸ See Civil Service Rule VI (5 C.F.R. § 6.2).

⁹ See 5 U.S.C. § 3302.

¹⁰ *Id.* § 3320.



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53 ~~sections 3308 to 3318 are the formally rank applicants, use~~ detailed procedures ~~, mentioned~~
54 ~~above, for giving preference eligibles~~ veterans and their family members priority consideration.¹¹
55 ~~OPM's regulations prescribe procedures on how agencies are to accord preference eligibles~~
56 ~~priority consideration when filling excepted service positions other than attorney positions.~~¹²

57 ~~Congress has restricted OPM from examining authority over excepted service attorney~~
58 ~~positions through annual appropriations law.~~¹³ ~~Such positions are therefore placed in the~~
59 ~~excepted service and exempt from most of the rules that otherwise apply to excepted service~~
60 ~~positions.~~¹⁴

61 ~~This Recommendation applies to agency attorneys who are hired for positions under~~
62 ~~Schedule A of the excepted service. It does not apply to (a) attorney positions provided for in~~
63 ~~parts of the U.S. Code other than Title 5; (b) attorney positions in the senior executive service;~~
64 ~~and (c) attorneys who serve in non-attorney capacities. Attorney positions addressed in this~~
65 ~~Recommendation are the majority of attorney positions in the federal government.~~¹⁵ ~~Those~~
66 ~~holding these positions are often referred to as "0905 attorneys" in reference to the occupational~~
67 ~~series assigned by OPM to those attorneys who are in the General Schedule pay system.~~¹⁶

68 ~~Because of the exemption from the rules that apply to other excepted service positions~~
69 ~~under 5 C.F.R. part 302, , and hire from lists of candidates prepared by OPM or a DEU.~~¹⁷ ~~The~~
70 ~~result is that~~ the laws governing the hiring process for ~~0905~~ attorney positions are generally

¹¹ ~~See, e.g., id. § 3317.~~

¹² ~~See, e.g., 5 C.F.R. § 302.304.~~

¹³ ~~See Memorandum Opinion for the Associate Attorney General, 2 Op. O.L.C. 179 (1978).~~

¹⁴ ~~See 5 C.F.R. § 302.101(e)(8).~~

¹⁵ ~~U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016).~~

¹⁶ ~~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.~~

¹⁷ ~~See 5 C.F.R. § 302.101(c).~~



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71 much less restrictive than ~~the lawsthose~~ governing the hiring process for competitive and other
72 excepted service positions. ~~For example, agencies need not post announcements on USAJobs,~~
73 ~~use human resources (HR) officials to screen applicants, use qualifications established by OPM,~~
74 ~~or use category or numerical rating systems for hiring. Agencies must, however, “follow the~~

75 There are, however, some legal requirements to which agencies must adhere when hiring
76 attorneys. Agencies may not, among other things, make hiring decisions based on protected
77 characteristics (e.g., race, sex, or national origin), nepotism, political affiliation, whistleblower
78 activities, or other factors unrelated to the candidate’s ability to perform the work.¹⁸ Agencies
79 also must “follow the [statutory] principle of veteran preference as far as administratively
80 feasible and, on the request of a qualified and available ~~preference eligible . . . [veteran or family~~
81 member of a veteran who is not selected] . . . furnish him/her with the reasons for his/her
82 nonselection.”¹⁹

83 ~~There are other legal requirements to which agencies must generally adhere when hiring~~
84 ~~0905 attorneys. These include prohibiting hiring decisions based on protected characteristics~~
85 ~~(e.g., race, sex, and national origin), nepotism, political affiliation, whistleblower activities, and~~
86 ~~other non-merit considerations.~~²⁰ ~~They also include affording priority consideration to people~~
87 ~~who were separated or furloughed from the agency, without misconduct, due to a compensable~~
88 ~~injury~~²¹ ~~and generally not hiring males born after 1959 who have not registered for the selective~~
89 ~~service.~~²²

¹⁸ See 5 U.S.C. § 2302. Among other restrictions on agencies’ hiring practices, agencies must not recruit in a way that results in an unlawful disparate impact based on race, sex, or certain other protected characteristics under federal law. See 42 U.S.C. § 2000e-2(k)(1)(A).

¹⁹ 5 C.F.R. § 302.101(c)(8).

²⁰ 5 U.S.C. § 2302.

²¹ *Id.* § 8151.

²² *Id.* § 3328.



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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 Practices in Hiring Attorneys

Distinguishing Between Optional and Mandatory Hiring Practices

90 Many agencies adopt additional hiring practices that are not legally required. They
91 include involving HR officials in screening out applicants based on substantive criteria (e.g.,
92 nature of legal experience) and posting announcements exclusively on USAJobs without further
93 disseminating them.²³ Although some agencies undertake these practices knowing they are
94 optional, ~~in other agencies, adopt them because~~ HR and hiring officials ~~and selecting officials~~
95 ~~wrongly/mistakenly~~ believe ~~these actions they~~ are legally required.²⁴ A possible reason ~~for this~~
96 ~~confusion~~ is that, in 1993, OPM stopped publishing the *Federal Personnel Manual*, a
97 compendium of guidance that served as ~~an easy~~ a reference guide for agencies; ~~successor~~
98 Successor publications ~~take~~ have taken the form of discrete handbooks and operating manuals
99 ~~and that~~ are not ~~published systematically~~ updated regularly.

100 ~~Because federal hiring law actually is quite flexible regarding the processes~~
101 ~~used~~ Considering Whether to select 0905 attorneys, agencies Attract Broad or Discrete Applicant
102 Pools

103 Agencies may benefit from availing themselves of the flexibility the law affords them in
104 hiring attorneys by using different practices in different situations. ~~In certain circumstances, for~~
105 ~~example, Sometimes~~ agencies may wish to attract broad applicant pools, ~~whereas in others, they~~
106 ~~might have more discrete candidate pools (such as attorneys who used to work for the agency,~~
107 ~~former legal interns, presidential management fellows, or highly recommended candidates) under~~
108 ~~consideration. In such situations, agencies may not want to post or broadcast an announcement,~~

²³ See Todd Phillips & Todd Rubin, Recruiting and Hiring Agency Attorneys 18 (report to the Admin. Conf. of the U.S.), www.acus.gov/report/recruiting-and-hiring-agency-attorneys-final-report (Dec. 4, 2019).

²⁴ *Id.*



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109 ~~and it is generally permissible for them not to do so.~~²⁵ ~~However, when agencies want to have a~~
110 ~~broad applicant pool, in which case~~ they will typically benefit from posting an announcement in
111 locations likely to reach a large number of qualified potential ~~optimal~~ candidates. ~~This may or~~
112 ~~may not include USAJobs, which agencies generally need not use for excepted service hiring.~~²⁶
113 ~~Although agencies~~ candidates. Agencies that wish to do so may decide USAJobs is among to
114 post the ~~best places to post an announcement, there is~~ position on USAJobs. There is, however, a
115 monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without
116 further dissemination may ~~be insufficient to~~ not produce the optimal applicant pool. At other
117 times, agencies might wish to attract discrete candidate pools, consisting of, for example,
118 attorneys who previously worked for the agency, former legal interns, presidential management
119 fellows, or highly recommended candidates. This might be the case when, for example, an
120 agency requires a unique set of skills. In such cases, agencies may not want to post or broadcast
121 an announcement (which the law generally permits).²⁷

122 ~~Regardless of whether~~ Drafting Announcements

123 Whatever approach agencies ~~decide to post on USAJobs or elsewhere, take, it is~~
124 important that their job announcements are ~~effective recruiting tools only if they are~~ written
125 clearly and in a way designed to ~~welcome~~ attract qualified applicants. Too often, however, ~~0905~~
126 attorney vacancy announcements contain dense, ~~boilerplate~~ language, and descriptions of job
127 responsibilities that are difficult to decipher, ~~and warnings of jail time or fines for false~~
128 ~~statements.~~²⁸ ~~It seems that this.~~²⁹ This problem is caused at least in part by how HR employees
129 craft their vacancy can arise when hiring officials send announcements. ~~(Agencies generally~~

²⁵ 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).

²⁶ 5 U.S.C. § 3330.

²⁷ 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).

²⁸ For examples of such announcements, see Phillips & Rubin, *supra* note 17, at 28–30.

²⁹ For examples of such announcements, see Phillips & Rubin, *supra* note 10, at 28–30.



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130 ~~have discretion concerning the language used in the announcement.) For example, a selecting~~
131 ~~official may be the one who drafts to HR after they draft the announcement but may then send it~~
132 ~~to HR for posting on USAJobs. As an HR employee is posting position's description. Once HR~~
133 ~~employees receive the announcement on USAJobs, that employee may announcements, they~~
134 ~~sometimes insert inapplicable boilerplate language that does not apply to hiring attorneys (e.g.,~~
135 ~~language, facilitated by USAStaffing (an applicable only to competitive service hiring). In~~
136 ~~addition, when HR employees post the announcement through an applicant tracking system~~
137 ~~created by OPM and accessible only to (that is, a system that allows government officials to post~~
138 ~~vacancy announcements and track applicants on USAJobs). The selecting official), the system~~
139 ~~automatically populates additional language inapplicable to the hiring of attorneys, which HR~~
140 ~~officials do not remove. Hiring officials might not realize that such inapplicable language was~~
141 ~~been inserted until after the announcement has been posted. This Recommendation addresses this~~
142 ~~issue by encouraging selecting officials, if they send announcements to HR to post, to review the~~
143 ~~final versions of all vacancy announcements exactly as they will appear to the public before they~~
144 ~~are have been posted.~~

145 This Recommendation's appendix offers an example of a ~~0905~~an attorney announcement
146 that is written clearly ~~and in a welcoming manner, which avoids the problems discussed above.~~
147 Resources exist to ~~assist~~help agencies draft position announcements in ~~using~~ plain language,
148 including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory*
149 *Drafting*,³⁰ and the *Federal Plain Language Guidelines*.³¹

Recruiting Interns and Using Honors Programs

150 Agencies' recruitment efforts might include recruiting former interns to work as ~~0905~~
151 attorneys. Hiring these candidates allows agencies to employ those who have previously worked

³⁰ Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

³¹ PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. 2011), <http://www.plainlanguage.gov/guidelines/>.



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152 in the agency and have proved that they can successfully carry out the ~~position's responsibilities.~~
153 ~~agency's work.~~ Such hiring is akin to summer associate programs at some law firms, in which
154 firms hire students to work for the summer after their second year of law school and ~~then~~, after
155 observing the students' work, may offer them permanent employment upon graduation.

156 Agencies, however, cannot extend an offer of employment as ~~a 0905~~an attorney to an
157 applicant until after he or she has been admitted to a bar, which can take nearly a year or longer
158 after graduation from law school. If an agency wishes to hire an applicant for an attorney
159 position before he or she has been admitted to a bar, the agency must hire him or her as a "~~0904~~
160 law clerk trainee"~~under Schedule A.~~" The ~~0904~~law clerk trainee position is a temporary
161 excepted service appointment in which a candidate for an attorney position could serve while
162 waiting to be admitted to a bar. The appointment can last ~~only 14 months.~~³² ~~OPM takes the~~
163 ~~position that the appointment procedures of 5 C.F.R. part 302 apply.~~³³ ~~no more than 14 months.~~³⁴

164 Some agencies ~~have routinized the~~regularly use ~~of~~ the law clerk trainee hiring authority
165 by hiring ~~attorneys~~ through honors programs, which are generally two-year employment and
166 training programs for recent law school graduates. Applicants generally apply to an honors
167 program in their final year of law school or during a clerkship and, if they are accepted ~~to the~~
168 ~~honors program~~, may join the agency ~~with the official position designation~~ "~~0904~~ as a "law clerk
169 trainee" if they are not yet admitted to a bar. ~~Law Licensed attorneys supervise law~~ clerk trainees
170 in honors programs ~~serve under the supervision of licensed attorneys~~ until they are admitted to a
171 bar, at which time they may be appointed to ~~0905~~attorney positions. ~~This Recommendation~~
172 ~~suggests that agencies with honors programs encourage successful interns to apply to them and~~
173 ~~that agencies without honors programs nonetheless consider hiring successful interns as law~~

³² ~~5 C.F.R. § 213.3102(d).~~

³³ ~~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.~~

³⁴ ~~5 C.F.R. § 213.3102(d).~~



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174 clerk trainees and then appoint them to 0905 attorneys upon admission to a bar before the end of
175 14 months.

176 Another facet of the hiring process is the use of the period before adverse action rights
177 accrue to observe the appointee's performance and determine whether to retain the appointee.
178 After an individual is appointed to a 0905 position, the person must continuously serve for two
179 years before he or she accrues adverse action rights (or one year, if the person is a preference
180 eligible). During this period the attorney can be dismissed from federal service with minimal
181 procedural protections.³⁵ In the competitive service, there is a period called "the probationary
182 period," during which agencies are required "to determine the fitness of the employee and shall
183 terminate his services . . . if he fails to demonstrate fully his qualifications for continued
184 employment."³⁶ The preliminary period during which 0905 appointees serve before they become
185 "employees" with adverse action rights may be used for the same purpose.³⁷ This
186 Recommendation encourages agency HR officials to send reminders to supervisors when this
187 period will soon be ending, and encourages supervisors to make a considered decision whether to
188 retain the employee while the ability to do so without additional procedures is still available.

189 The Administrative Conference recognizes that agencies filling

190 Accruing Merit Systems Protection Board (MSPB) Rights

191 Once an attorney is hired, he or she must continuously serve for two years (or one year, if
192 the person is a veteran or a family member of a veteran) before accruing the right to challenge a
193 termination before the MSPB.³⁸ Supervisors may evaluate the appointee's performance during
194 this period and decide whether to retain the appointee.

³⁵ See 5 U.S.C. § 7511.

³⁶ 5 C.F.R. § 315.803.

³⁷ See, e.g., U.S. DEP'T OF COMMERCE, DAO 202-315, PROBATIONARY AND TRIAL PERIODS (2017).

³⁸ See 5 U.S.C. § 7511. There is a similar period in the competitive service called the "probationary period," which generally lasts for one year, during which agencies "shall . . . determine the fitness of the employee and shall terminate his services . . . if he fails to demonstrate fully his qualifications for continued employment." 5 C.F.R. § 315.803.



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Hiring Procedures for Non-ALJ Adjudicators

195 The Administrative Conference recognizes that specific attorney positions may require
196 additional ~~criteria~~; procedures to screen for certain attributes. One ~~such position is important~~
197 example arises when an attorney hired as a non-ALJ agency hires an adjudicator. ~~As discussed~~
198 ~~above, the Administrative Conference addressed the hiring of ALJs in Recommendation 2019-2.~~
199 ~~At the very least, like ALJs, attorneys hired as non~~ other than an administrative law judge (ALJ).
200 Non-ALJ adjudicators, like ALJs, must demonstrate an ability to discharge the duties of an
201 adjudicator with impartiality.³⁹ There may be additional ~~criteria~~procedures agencies need to
202 ~~apply~~adopt to screen for this ~~quality~~attribute and others specific to attorneys hired as non-ALJ
203 adjudicators.

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

RECOMMENDATION

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

- 206 1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems
207 Protection Board (MSPB) and the Office of Special Counsel as necessary, should provide
208 training for agencies on the minimum procedural requirements in statutes, regulations,
209 and executive orders for hiring ~~0905~~-attorneys. That training should, in particular, clarify
210 the distinction between ~~excepted service~~-hiring ~~for~~ attorneys and ~~other~~-hiring ~~and would~~
211 other kinds of employees and explain the alternative processes and flexibilities available

³⁹ See Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).



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212 ~~to such positions. for hiring attorneys.~~ Such training could take any number of forms,
213 including providing written materials and in-person presentations or webinars.

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

- 214 2. When hiring ~~0905~~-attorneys, agencies should recognize that they have flexibility in
215 recruiting. They ~~may exercise broad or targeted~~ should recognize that, among other
216 things, they can employ recruitment strategies designed to reach either a broad or narrow
217 pool of applicants as they deem appropriate.
- 218 3. When seeking broad applicant pools for ~~0905~~-attorney positions, agencies ~~are encouraged~~
219 ~~to should~~ post vacancy announcements in multiple locations where they are likely to reach
220 qualified applicants. Options for posting include agencies' own websites, job recruiting
221 websites, or USAJobs. gov, the federal hiring portal. In addition to ~~publicly~~-posting
222 announcements, agencies should widely disseminate such announcements to a variety of
223 sources, such as bar associations, other professional legal associations, law school career
224 offices, ~~non-profit organizations~~professional listservs, former and current agency
225 employees and interns, other agencies, and other professional networks.
- 226 4. ~~If When seeking narrower applicant pools,~~ agencies ~~have smaller groups of potential~~
227 ~~candidates under consideration, they may choose not~~ should consider whether to post
228 announcements at all or otherwise ~~disseminate~~ advertise the ~~announcements~~
229 ~~widely~~vacancy.

Drafting Vacancy Announcements ~~for 0905 Attorney Positions~~

- 230 5. Agencies should ensure that ~~selecting hiring~~ officials (~~i.e., those agency officials who~~
231 ~~make the ultimate hiring decision~~) draft and review vacancy announcements for ~~0905~~
232 attorney positions.
- 233 6. ~~Announcements for 0905 attorney vacancies~~ Attorney vacancy announcements should be
234 written in plain language, adhering closely to the principles ~~from~~ Administrative
235 Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*, and the
236 *Federal Plain Writing Guidelines*.



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- 237 7. Announcements should specify exactly and clearly which documents are required to
238 constitute a complete application; distinguish between mandatory and desirable criteria;
239 and include under mandatory criteria only essential elements, such as bar membership
240 and citizenship status, ~~as applicable~~.
- 241 8. Announcements should not ~~contain inapplicable boilerplate~~ include language, ~~such as that~~
242 ~~is applicable only to~~ competitive service ~~rules positions or that do not apply is otherwise~~
243 ~~inapplicable~~ to ~~0905 attorneys~~ attorney positions.
- 244 9. If agencies intend ~~not to limit~~ ~~consider additional~~ applications ~~to after receiving~~ a certain
245 number, the announcement should ~~say so~~ ~~indicate~~ and specify ~~what the limit is~~.
- 246 10. Agencies should recognize that they have the option of requiring a conventional ~~resume~~
247 ~~résumé~~ from applicants instead of requiring ~~the applicant~~ applicants to create a USAJobs
248 ~~resumerésumé~~. Agencies that ~~want to~~ require a conventional ~~resumerésumé~~ should ~~so~~
249 state ~~this clearly~~ in the vacancy announcement.
- 250 11. **If, after drafting a vacancy announcement, ~~selecting hiring~~ officials send the**
251 **announcement to human resources (HR) officials to be posted on USAJobs or elsewhere,**
252 **~~selecting hiring~~ officials should ~~ask collaborate with~~ HR officials to ~~see review and~~**
253 **~~approve the final~~ version of the announcement exactly as it will appear to the public.**
254 **~~Selecting Hiring~~ officials should ~~then carefully~~ review the announcement to ensure that it**
255 **~~is consistent with Paragraphs 6 through 9-10~~ before it is posted.**
- 256 12. ~~Selecting Hiring~~ officials should continue to review open-ended or long-term vacancy
257 announcements to ensure they do not become outdated.
- 258 ~~13. When feasible, agencies should ensure applicants are notified that their applications have~~
259 ~~been received and if they were not selected.~~

Improving ~~USA Staffing for 0905 Attorney Positions~~ OPM's Applicant Tracking System

- 260 ~~14.13.~~ OPM should include a notice on ~~USA Staffing~~ (a ~~commonly used~~ its applicant
261 tracking system ~~(that is, the system that allows agencies to post announcements on~~
262 ~~USAJobs and track applications)~~) that encourages agencies to specify exactly and clearly
263 which documents are required to constitute a complete application; distinguish between



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264 mandatory and desirable criteria; and include under mandatory criteria only essential
265 elements, such as bar membership and citizenship status, as specified in Paragraph 7.

266 ~~15.14. _____ Wherever boilerplate language relating to competitive service hiring practices~~
267 ~~appears in USAStaffing, OPM should make clear clearly inform agencies that it does not~~
268 ~~apply any language inapplicable to 0905 attorney hiring, and that automatically populates~~
269 ~~in its tracking system~~ should be excluded ~~in 0905 from~~ attorney vacancy announcements.

270 ~~16.15. _____~~ OPM should include a link on ~~USAStaffing its applicant tracking system~~ to the
271 *Plain Language Guidelines* and to Administrative Conference Recommendation 2017-3,
272 *Plain Language in Regulatory Drafting*, and encourage agencies to apply all relevant
273 provisions ~~of them~~ to their drafting of vacancy announcements, as specified in Paragraph
274 6.

275 ~~17.16. _____~~ OPM should make clear in the instructions for ~~USAStaffing its applicant tracking~~
276 ~~system~~ that agencies have the option of requiring applicants to submit a conventional
277 ~~resume~~ résumé instead of ~~the resume~~ a résumé generated by USAJobs.

Evaluating Applicants for ~~0905~~ Attorney Positions

278 ~~18.17. _____~~ Agencies should develop policies or processes ~~covering~~ governing how attorney
279 applications will be reviewed and assessed. These policies or processes may include
280 creating teams to select applicants for interviews or recommend applicants for
281 appointment.

282 ~~19.18. _____~~ Agency leadership should decide which responsibilities HR officials should have
283 in ~~the process of~~ evaluating applications. If HR officials will screen applicants,
284 ~~selecting hiring~~ officials should determine the screening criteria ~~HR officials will use~~ and
285 clearly communicate ~~the criteria it~~ to ~~them~~ the screeners.

~~Evaluating 0905 Attorneys During The Period Before Adverse Action Rights Accrue~~

286 ~~19. If feasible, agencies should ensure applicants are notified when their applications have~~
287 ~~been received and when the agency has made a hiring decision.~~



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

Using Law Clerk Trainee Positions and Honors Programs to Hire ~~0905~~ Attorneys

298 21. Agencies with honors programs should encourage successful interns to apply to them.
299 Agencies without honors programs should consider hiring high-performing legal interns
300 after graduation but before they have been admitted to a bar, using the authority to hire a
301 ~~0904~~ law clerk trainee who can be appointed to ~~a 0905~~ an attorney position upon
302 admission to a bar, ~~assuming the agency wishes to do so. Agencies should note that OPM~~
303 ~~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

304 22. Agencies' guidelines and procedures for ~~the hiring of~~ attorneys who will act as non-ALJ
305 adjudicators should be designed and administered to ensure ~~the hiring of applicants who~~
306 ~~that those hired~~ will ~~both carry out the functions of the office with impartiality act~~
307 impartially and maintain the appearance of impartiality, as suggested in Recommendation
308 2018-4, Recusal Rules for Administrative Adjudicators.



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APPENDIX

~~As indicated above in the preamble at page 6, below~~The following is an example of an attorney job announcement that is written ~~clearly and in a welcoming manner~~in a way that is consistent with this Recommendation.



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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 (OFCIO) 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.