

Report for the Administrative Conference of the United States

**RECRUITING AND HIRING AGENCY ATTORNEYS**

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*This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.*

## Project Background

Attorneys serve crucial roles within federal agencies. Attorneys may be responsible for defending, as part of litigation, programs of national significance such as health care laws, financial regulations, and education funding. Attorneys may draft regulations, investigate complaints against federally-funded entities, and decide which documents must be turned over to the public as part of a Freedom of Information Act (FOIA) request and on what terms. These are merely a few examples of the kinds of responsibilities attorneys may have within their agencies. Attorneys underpin nearly all the operations of their agencies, ensuring their smooth functioning.

In Recommendation 2018-6, *Agency Recruitment and Selection of Administrative Law Judges*, the Administrative Conference of the United States (ACUS) examined effective and fair methods for agencies' hiring of administrative law judges (ALJs).<sup>1</sup> ACUS undertook the study that led to the Recommendation, in part, because of a recent executive order that placed ALJs into the excepted service, which changed the rules governing how ALJs are hired by making the process significantly more flexible.<sup>2</sup> Ultimately, the Conference settled on four categories of recommendations for agencies to consider when hiring ALJs. These relate to outreach to potential ALJ candidates; the posting of vacancy announcements; the content of the announcements; and procedures for reviewing applications. In the context of the committee proceedings that preceded adoption of the Recommendation, there were suggestions from several committee members that parallel processes in agency (non-ALJ) attorney hiring might be worth exploring.

Particular concerns were raised about the limited duration of application periods and some agencies' related practice of not considering applicants who apply after the agency receives a certain number of applications (sometimes called "numerical cutoffs"). Because non-ALJ agency attorneys, as with ALJs, are a part of the excepted service and their hiring is governed by rules that are different from those that govern hiring for competitive service employees (which will be described below), a study of attorney hiring practices could likely yield helpful recommendations to agencies' hiring attorneys.

## Scope of Project

The report's research and analysis apply *only* to those attorney positions whose hiring rules stem directly from the statutory provisions in Title 5 of the United State Code,<sup>3</sup> and the corresponding Title 5 of the Code of Federal Regulations (CFR).<sup>4</sup> These are likely the majority of attorney positions in the federal government.<sup>5</sup> The Office of Personnel Management (OPM) has described such positions under the General Schedule pay system in its publication, *Position Classification Standard for General Attorney Series*, GS-0905. Accordingly, this report is limited in scope to

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

<sup>2</sup> Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018).

<sup>3</sup> See 5 U.S.C. §§ 2101–2307.

<sup>4</sup> See 5 C.F.R. §§ 1–1199.

<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016).

the following positions, as listed in the *Position Classification Standard*: “Trial Attorney,” “Attorney-Adviser,” “Attorney-Examiner,” and “General Attorney.” The “Attorney-Examiner” position describes non-ALJ adjudicators (e.g., administrative judges). From here forward, these positions will be referred to as “0905 attorney positions,” in reference to the occupational code that the Office of Personnel Management (OPM) has assigned to these positions.<sup>6</sup> Unless otherwise indicated, when this report refers to “federal hiring,” “civil service hiring,” “the civil service,” or similar terms, it is referring specifically to positions whose hiring rules stem directly from Title 5 of the U.S. Code and the CFR.

This report is not intended to address hiring practices for non-0905 positions that are nonetheless held by attorneys, a fairly common occurrence in government. Such attorneys might include those in the Senior Executive Service, those in the Executive Schedule, those serving in agencies whose attorney hiring authority resides outside of Title 5, and those serving in competitive service positions, such as policy analysts and chief technology officers. Additionally, this report is not intended to address hiring practices for non-0905 positions in the excepted service. Nonetheless, any recommendations that can be gleaned from this report could apply more broadly than to hiring for 0905 attorneys.

## **Reading This Report**

This report consists of two distinct parts. The first section discusses the statutes and regulations that govern federal hiring in general, including hiring for 0905 attorney positions; a literature review of relevant critiques of federal agency hiring practices; and our own critique of 0905 attorney vacancy announcements. The second section is a review of comments made during a roundtable and phone interviews held by ACUS’s Office of the Chairman. Roundtable participants were individuals representing government agencies, private practice lawyers, and public interest groups. Participants were offered anonymity so they could speak freely.

## **Part I**

### **Legal Background on the Civil Service Generally**

#### *Categorization of Civil Service Positions*

Title 5 of the U.S. Code defines civil service positions, “for the purposes of this title,” as all positions in the government, excluding the uniformed services but including the judicial and legislative branches.<sup>7</sup> The phrase “for the purposes of this title” is an important qualifier: not all federal government positions are within Title 5 of the U.S. Code.<sup>8</sup> It divides Title 5 positions into three categories: the competitive service, the excepted service, and the senior executive service.<sup>9</sup>

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<sup>6</sup> Agencies under Title 5 of the U.S. Code but with pay systems other than the General Schedule frequently classify their attorneys as 0905 series. As used in this report “0905” should be read to mean both attorneys under the General Schedule system and under other statutory pay systems.

<sup>7</sup> 5 U.S.C. § 2101 (2016). Elected positions are not included. *Id.*

<sup>8</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-521, *supra* note 5.

<sup>9</sup> 5 U.S.C. §§ 2101a–03 (2016).

By default, all civil service positions are in the competitive service.<sup>10</sup> However, Congress has given the President statutory authority to place any civil service position in the excepted service,<sup>11</sup> as he recently did by executive order in the case of ALJs,<sup>12</sup> or in the senior executive service.<sup>13</sup> Congress has given the President further statutory authority, which the President has exercised, to delegate the authority to place civil service positions in the excepted service to OPM.<sup>14</sup> Under this delegation, OPM may place a position in the excepted service if it has determined that appointment through competitive examination “is not practicable.”<sup>15</sup> A perennial rider to OPM appropriations prohibits OPM from examining attorney positions.<sup>16</sup> Therefore, such positions are exempt from the rules that normally apply to other excepted service positions.<sup>17</sup> Finally, Congress has given the heads of several agencies, including the U.S. Department of Defense and U.S. Department of Veteran Affairs, the authority to create hiring authorities entirely outside of Title 5.<sup>18</sup> These agencies have exercised this authority with respect to some of their positions.

Once OPM has determined that a position falls within the excepted service, it places it within one of four “schedules”: Schedules A through D.<sup>19</sup> A fifth schedule, Schedule E, was added as part of the President’s executive order on ALJs, and includes only the position of “ALJ.”<sup>20</sup> 0905 attorney positions generally fall under “Schedule A” of the excepted service.<sup>21</sup>

### *Rules That Generally Apply to All Career Civil Service Positions, Including 0905 Attorney Positions*

#### Extent of Applicability of Hiring Rules

The federal hiring legal scheme governing career civil service positions is complex and peppered with exceptions. The most widely applicable rules can only be said to “generally” apply to such positions. There is no hiring rule that applies to literally every career civil service position. One could pick any of the following rules and easily find one or more career civil service positions to which it does not apply. However, all of the following rules, as far as our research has disclosed, are the rules that are most generally applicable to federal hiring for career civil service positions, including hiring for 0905 attorney positions.

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<sup>10</sup> *Id.* § 2102.

<sup>11</sup> *Id.* § 3302.

<sup>12</sup> See Exec. Order No. 13,843, *supra* note 2.

<sup>13</sup> 5 U.S.C. § 2101a (2016).

<sup>14</sup> *Id.* § 1104. OPM, in turn, can delegate such functions to heads of agencies in the executive branch and other agencies employing people in the competitive service. If such delegation is made by OPM, OPM shall establish standards and an oversight system that ensures that the agencies’ hiring activities accord with merit system principles and the standards established under other applicable statutory provisions. *Id.*

<sup>15</sup> 5 C.F.R. §§ 213.102, 3101 (2019).

<sup>16</sup> See, e.g., Treasury, Postal Service and General Appropriation Act, 1982, H.R. 4121, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1981).

<sup>17</sup> *Id.* § 213.3102(d).

<sup>18</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-521, *supra* note 5.

<sup>19</sup> 5 C.F.R. § 213.102.

<sup>20</sup> See Exec. Order No. 13,843, *supra* note 2, § 3.

<sup>21</sup> 5 C.F.R. § 213.3102(d) (2019).

## Merit System Principles and Attendant Prohibited Personnel Practices

Career civil service hiring is guided by the “merit system principles” that are spelled out in Section 2301 of Title 5. Section 2302 of Title 5 effects the merit system principles by prohibiting certain personnel actions. Section 2301 states, in relevant part:

Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights . . .

Note that Section 2301 is hortatory and cannot be enforced. However, Executive Order 13,583, *Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce* and its implementing OPM memo, titled *Governmentwide Diversity and Inclusion Strategic Plan*, which are consistent with subsection 1 above, require all agencies that are listed in Section 901(b), Title 31 of the U.S. Code (“the CFO Act agencies”), to establish agency-specific Diversity and Inclusion Strategic Plans that are to be submitted to OPM and the Office of Management and Budget (OMB) for review.<sup>22</sup>

Section 2302 effects the principles laid out in Section 2301 by prohibiting certain personnel practices and providing for a private right of action. Section 2302 is enforceable. This report will not relay all of the practices prohibited by Section 2302, but will note briefly that they include, among other things, discrimination in hiring on the basis of characteristics traditionally protected by federal civil rights law (e.g., race, religion, age, sex, and disability); on the basis of protected conduct, such as certain whistleblowing activity or exercising of judicial remedies;<sup>23</sup> and on the basis of political affiliation.<sup>24</sup>

More vaguely, Section 2302 also prohibits agencies from “grant[ing] any preference or advantage not authorized by law, rule, or regulation to any . . . applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.”

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<sup>22</sup> *See id.* at 9.

<sup>23</sup> *Id.*

<sup>24</sup> *See* 5 U.S.C. § 2302 (2016).

This is a separate prohibition from the prohibited conduct identified in the paragraph above. To avoid confusion with other parts of Section 2302, this part will be referred to as the “preference or advantage prohibition.” To understand what, exactly, Section 2302’s preference or advantage prohibition means, it is necessary to understand the historical context of civil service law.

Throughout the early and middle part of the 19<sup>th</sup> century, career civil service positions in the federal government (and in state and local governments) were routinely dispensed as political favors. This was known as “the political spoils system.” The Pendleton Act of 1883 was passed primarily to address this problem. The Act created the Civil Service Commission (CSC), which was given rulemaking, adjudicative, and investigative powers. The Act authorized the President to appoint civil service commissioners, who were to administer competitive examinations; fill vacancies based on these exams; and to otherwise ensure that the political process did not subvert the civil service. The CSC was the forerunner of today’s OPM and Merit Systems Protection Board (MSPB).

The heart of the Pendleton Act, which set the tone for all future civil service reform, was its attack on the political spoils system. The Act attacked this system in two ways: 1) it required the CSC to administer an exam on which the applicant who achieved the highest score was offered the position; 2) it prevented employers from forcing employees to engage in political activities.

The civil service laws in effect today, including the preference or advantage prohibition, stem from the Pendleton Act. Although avoiding political subversion of the career civil service remains a core motivation behind modern civil service laws, including the preference or advantage prohibition, it is not the only motivation.<sup>25</sup> The preference or advantage prohibition must be understood broadly to include not only avoidance of political bias in the career civil service hiring process but also avoidance of offering positions on the basis of all factors that are unrelated to the ability of the candidate to perform the work, including, for example, friendship, sympathy, or loyalty, even if such merit-irrelevant considerations are not otherwise prohibited by law.

A clear example of violating the preference or advantage prohibition would be if a hiring manager were to offer an 0905 attorney position to someone because the hiring manager is close friends with that person but does not have reason to believe the person would succeed in the job.<sup>26</sup> Hiring on this basis is not otherwise prohibited by law (assuming it does not somehow amount to discrimination based on a protected characteristic or conduct) but would still constitute hiring based on a factor unrelated to the ability of the candidate to perform the work and would therefore fall squarely within Section 2302’s preference or advantage prohibition. Perhaps an easy way of thinking about the preference or advantage prohibition is that it is the “catch all” or “safety net” part of Title 5 that prohibits hiring on the basis of all merit-irrelevant considerations that are not otherwise explicitly prohibited by law.

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<sup>25</sup> See Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 127 (2014).

<sup>26</sup> This is not the same as the prohibition on nepotism. Nepotism is defined under federal law as offering a position to a family member and is prohibited by other parts of the U.S. Code. See 5 U.S.C. § 3110 (2016).

Notably, as will be discussed in greater detail below, the laws governing Title 5 hiring, do *not* require agencies to post announcements for 0905 attorney positions or to otherwise accept applications before filling an 0905 attorney position.<sup>27</sup> However, if an agency plans to offer a candidate an 0905 attorney position, it is legally required to ensure that that action is based solely on the merit of the candidate, and not based on friendship, sympathy, loyalty, political affiliation, or any other merit-irrelevant consideration, whether or not it chooses to post an announcement and accept applications. Indeed, it is perfectly consistent with the preference or advantage prohibition for an agency to offer an 0905 attorney position to someone because that person once worked for the agency and established him or herself as a strong attorney, or the hiring manager received positive references from other practitioners regarding the person’s work quality, even if the agency does not post an announcement for the position or otherwise accept applications for the position.<sup>28</sup>

Civil service hiring generally must be consistent with classification standards published by OPM.<sup>29</sup> Federal law requires OPM, after consulting with agencies, to develop and publish standards for placing all civil service positions into “classes” and “grades.”<sup>30</sup> “Classes” describe the kind of occupation (e.g., attorneys), and “grades” determine salary.<sup>31</sup> Civil service positions generally fall within a grade range of GS 1 through GS 15, with increasing levels of complexity and difficulty of the duties performed at each higher grade level.<sup>32</sup> Agencies generally must follow the relevant classification standards when determining who may be hired for any given position and at what grade level.<sup>33</sup> OPM has published its classification standards on its website.<sup>34</sup>

### Priority Consideration of Certain Candidates

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<sup>27</sup> See 5 C.F.R. § 302.101 (2019).

<sup>28</sup> *Id.*

<sup>29</sup> 5 U.S.C. §§ 5107, 5110 (2016).

<sup>30</sup> *Id.* § 5105 (2016).

<sup>31</sup> *Id.* § 5106 (2016); see U.S. OFFICE OF PERSONNEL MGMT., INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS 3–4 (2009), available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/positionclassificationintro.pdf>.

<sup>32</sup> See INTRODUCTION TO THE POSITION CLASSIFICATION STANDARDS, *supra* note 30, at app. 3.

<sup>33</sup> Such documents include, e.g., U.S. OFFICE OF PERSONNEL MGMT., TS-107, THE CLASSIFIER’S HANDBOOK (Aug. 1991), available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/classifierhandbook.pdf> (offering guidance on how to classify white collar positions within the General Schedule); U.S. OFFICE OF PERSONNEL MGMT., HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES (Dec. 2018), available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf> (defining each white collar occupation in Part I).

<sup>34</sup> *Position Classification Standards for White Collar Work*, Classification & Qualifications: Classifying General Schedule Positions, OFFICE OF PERSONNEL MGMT., available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/#url=Standards> (last visited Aug. 19, 2019). The documents OPM maintains on its “Classification and Qualifications” website are used to determine the classification, job grading, and qualifications information used to determine pay plan, series, title, grade, and qualification requirements for “most work in the Federal government.” Qualification standards include years of education and kinds of degrees required; the kind of experience required; age requirements; and other kinds of requirements.

Agencies must generally be mindful of certain statutory and regulatory provisions related to the hiring of “preference eligibles,” which are generally certain veterans and certain family members of veterans. With respect to hiring for 0905 attorney positions, agencies must generally follow the principle of veteran preference “as far as administratively feasible”<sup>35</sup> and upon request of a qualified preference eligible, provide him or her with the reasons for non-selection.<sup>36</sup> The U.S. Department of Justice interprets “as far as administratively feasible” to mean that when a hiring manager is deciding between two equally qualified candidates, the tie should be broken by offering the position to the preference eligible.<sup>37</sup> With respect to hiring for competitive service (i.e., generally non-attorney) positions, as well as some excepted service positions other than attorney positions, there is a far more detailed and stringent set of requirements for the consideration of preference eligibles, which is described in the section immediately below.

Agencies must also generally give priority consideration in hiring to people who were separated or furloughed from the agency, without misconduct, due to a compensable injury. Details of this requirements are beyond the scope of this report; agencies interested in learning more should consult the relevant statutory and regulatory provisions.<sup>38</sup>

### Selective Service Registration

Hiring managers generally may not hire any male born after December 31, 1959 who has not registered for the selective service unless OPM has granted a waiver.<sup>39</sup>

### *Rules That Generally Apply Only to Hiring for Competitive Service Positions and Not to Hiring for 0905 Attorney Positions*

For positions that fall under the competitive service (i.e., generally not 0905 attorney positions), federal law, including OPM regulation, has mandated a number of additional requirements. The following requirements generally **do not** apply to 0905 attorney positions.

As a general rule, agencies must “competitively examine” candidates for the competitive service.<sup>40</sup> OPM’s regulations governing competitive examinations are generally found in 5 CFR Parts 330 and 332. Although the regulations do not define “competitive examination,” they state that “[e]xaminations for entrance into the competitive service shall be open competitive, except that OPM may authorize noncompetitive examinations when sufficient competent persons do not compete.”<sup>41</sup> Essentially, this means that when an agency wishes to fill a competitive service vacancy, it must generally offer all U.S. citizens and nationals the opportunity to “compete” in a

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<sup>35</sup> 5 C.F.R. § 302.101 (2019); see Jack M. Beermann & Jennifer L. Mascott, Research Report on Federal Agency ALJ Hiring after *Lucia* and Executive Order 13843, 25–26, 47 (March 28, 2019) (draft report to the Admin. Conf. of the U.S.) (noting that some agencies apply the standard “as a tie-breaker between two equally qualified candidates”).

<sup>36</sup> 5 C.F.R. § 302.101 (2019).

<sup>37</sup> U.S. OFFICE OF PERSONNEL MGMT., EXCEPTED SERVICE HIRING AUTHORITIES: THEIR USE AND EFFECTIVENESS IN THE EXECUTIVE BRANCH 28 (July 2018).

<sup>38</sup> 5 C.F.R. § 302.103 (2019); *id.* § 302.501; 5 U.S.C. § 8151 (2016).

<sup>39</sup> 5 U.S.C. § 3328 (2016).

<sup>40</sup> 5 C.F.R. § 332.101 (2019).

<sup>41</sup> *Id.*

public and open examination, and the winner of this “competition” is offered a competitive service position. Agencies may choose, precisely, how to administer an examination,<sup>42</sup> so long as the agency’s practices conform to the rules in 5 CFR Part 332, *Recruitment and Selection Through Competitive Examinations*. A complete account of these rules is beyond the scope of this report, but several key requirements are highlighted below.

First, agencies generally must publish announcements for competitive service positions on OPM’s website, USAJobs.gov.<sup>43</sup> There is no requirement for how long an announcement must be posted.

Second, in hiring for competitive service positions, agencies are generally required to use “qualification standards.”<sup>44</sup> Qualification standards include, among other things, the experience, education, or age requirements that an applicant must meet to be eligible to compete for a given position.<sup>45</sup> OPM has created qualification standards for many, but not all, competitive service positions, and these are published on its website.<sup>46</sup> Agencies must include these qualification standards in their vacancy announcements and OPM encourages agencies to supplement these qualification standards with more specific requirements for each position.<sup>47</sup> With respect to those jobs for which OPM has not created qualification standards, agencies must create their own.<sup>48</sup>

Third, in hiring for competitive service positions, agencies generally may only select candidates from a certified list prepared by OPM or, if OPM has delegated this authority, by their own human resources departments.<sup>49</sup> Agencies may use either a numerical ranking system or a category rating system. Under a numerical ranking system, candidates are given a numerical score from 0 to 100 based on how well they meet the qualification standards for the position. Under a category rating system, candidates are not numerically ranked but are placed into one of at least two categories: for example, “best qualified,” “qualified,” and “unqualified.”<sup>50</sup>

In preparing the certification list, OPM or the agency’s human resources department reviews applications to ensure that applicants meet the qualification standards and that “preference eligibles” are accorded the priority consideration required by law (see below).<sup>51</sup> In practice,

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<sup>42</sup> See 5 C.F.R. § 332.101 (2019); *id.* § 250.102 (2019).

<sup>43</sup> 5 U.S.C. §§ 3327, 3330 (2016).

<sup>44</sup> 5 C.F.R. § 338.301 (2019).

<sup>45</sup> See *Overview*, Classification & Qualifications: General Schedule Qualification Standards, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Overview> (last visited Aug. 20, 2019).

<sup>46</sup> See *Group Standards*, Classification & Qualifications: General Schedule Qualification Standards, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Group-Standards> (last visited Aug. 20, 2019).

<sup>47</sup> See *General Policies*, Classification & Qualifications: General Schedule Qualification Policies, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-policies/#url=General-Policies> (last visited Aug. 20, 2019).

<sup>48</sup> *Id.*

<sup>49</sup> 5 U.S.C. § 3317 (2016).

<sup>50</sup> 5 C.F.R. § 302.401 (2019).

<sup>51</sup> *Id.*

OPM rarely conducts this review (other than for positions at OPM itself).<sup>52</sup> Rather, in most instances, it has delegated this authority to the heads of agencies, which in turn have delegated the authority to the human resources components within (or contracted by) their agency.<sup>53</sup> After completing the review, the agency's human resources component (or, in rare cases, OPM itself) prepares a certificate of eligible candidates that an agency may use to select a candidate.<sup>54</sup> If the agency intends to fill the position, then it must generally select a candidate *only* from this list, unless it files an objection with its human resources component (or, rarely, with OPM) and the human resources component (or OPM) sustains the objection "for proper and adequate reason under regulations."<sup>55</sup>

Fourth, in hiring for competitive service positions, agencies generally must take certain steps with respect to candidates considered to be "preference eligibles."<sup>56</sup> As discussed above, federal law generally defines "preference eligibles" as certain veterans and certain family members of veterans.<sup>57</sup> If an agency wishes to hire a qualified non-preference eligible (i.e., someone who is not a veteran or not a family member of a veteran) for a competitive service position over a qualified preference eligible who applied for that position, it must generally satisfy a number of procedural requirements. For example, it must seek approval from its human resources component (or OPM for a non-delegated agency) and, in some cases, notify the preference eligible and allow him or her to submit a response to OPM.<sup>58</sup> The decision of the agency's human resources component or OPM with respect to this matter is final.<sup>59</sup>

## **Review of Critiques of Civil Service Hiring Practices**

Although we did not identify literature with respect to hiring of federal attorneys specifically, there is an abundance of literature on civil service hiring generally. There have been two strands of criticism that pervade the literature on civil service hiring, and they are by no means mutually exclusive. One major strand is that federal hiring is too often "under the radar," geared toward insiders, and lacks fair competition. The other major strand, far more pervasive, is that federal hiring is overly burdened with procedural requirements that make it impossible to fill civil service positions quickly.

### *Critiques that emphasize the lack of fair competition in federal hiring*

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<sup>52</sup> Frequently Asked Questions: Employment, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/FAQs/QA.aspx?fid=de14aff4-4f77-4e17-afaa-fa109430fc7b&pid=5b40e569-a0fe-40f9-bd12-3fa76d318265&result=1> (last visited Aug. 20, 2019) ("Can OPM review my resume/application to determine for which positions I am qualified?").

<sup>53</sup> *See id.*; U.S. OFFICE OF PERSONNEL MGMT., DELEGATED EXAMINING OPERATIONS HANDBOOK: A GUIDE FOR FEDERAL AGENCY EXAMINING OFFICES 6-1 (June 2019).

<sup>54</sup> 5 U.S.C. § 3317(a)(1) (2016); *see generally* DELEGATED EXAMINING OPERATIONS HANDBOOK, *supra* note 54.

<sup>55</sup> 5 U.S.C. § 3318 (2016).

<sup>56</sup> 5 C.F.R. § 302.105 (2019). Agencies may establish their own procedures rather than those prescribed by OPM, but those procedures must ensure that people entitled to priority consideration receive at least as much advantage as they would if they were to follow the procedures laid out in this section.

<sup>57</sup> 5 U.S.C. § 2108 (2016).

<sup>58</sup> *Id.* § 3318.

<sup>59</sup> *Id.*

Those critiques that emphasize the generally lack of fair competition in federal hiring usually claim that agencies do not adequately announce their vacancies.<sup>60</sup> Because competitive service vacancy announcements generally must be posted on USAJobs, imperfect as that website is, there is at least a central resource for the public to go to to know when there is a vacancy. This is not the case with excepted service positions. For excepted service positions, agencies do not always post their positions on USAJobs – sometimes they post them on their own websites, sometimes on USAJobs, sometimes only on professional networking websites, sometimes some combination of these sources, and sometimes they post no vacancy announcement at all.<sup>61</sup> When positions are filled with no announcement at all, or announcements posted in obscure places, there may arise a perception that “only insiders” should concern themselves with federal positions. A broad pool of potential applicants may therefore be deterred from considering federal employment.<sup>62</sup>

Further contributing to the notion that federal hiring is an “insider’s game” is the practice of not informing applicants of the status of their applications. Maintaining communication with applicants during the hiring process contributes to the transparency of the hiring process and furthers the reputation of the agency as a responsible entity that has its affairs in order. Regular communication with applicants is also key to applicant engagement, especially in cases in which the hiring process involves multiple steps and when the agency risks losing applicants to competing private sector employers. Informing applicants of the status of their applications was the subject of a March 1, 2018, Senate Subcommittee on Regulatory Affairs and Federal Management hearing. Testimony from that hearing revealed that the majority of applicants are notified when their applications have been received. However, agencies do not as consistently communicate with applicants at key stages later on in the hiring process.<sup>63</sup>

Although such criticisms of “off the radar hiring” apply mainly to excepted service hiring, competitive service hiring is by no means immune. Recall that there is no requirement for agencies to post competitive service vacancies for any particular length of time. Therefore, an agency can technically comply with the public posting requirement by posting its competitive service vacancy on USAJobs, but leave it open for one day. Second, an agency can post an announcement for “status candidates only,” which means that only current, competitive service employees can apply. Although such an announcement must be posted on USAJobs, the pool of applicants is greatly limited.

#### *Critiques that emphasize the overly procedural nature of federal hiring*

The far more pervasive strand of criticism – again, by no means mutually exclusive with the first strand – is that federal hiring is burdened with procedural requirements that make filling positions quickly nearly impossible. Here, the existing criticisms in the literature apply primarily

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<sup>60</sup> See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, NO TIME TO WAIT, PART 2: BUILDING A PUBLIC SERVICE FOR THE 21<sup>ST</sup> CENTURY 30 (2018).

<sup>61</sup> The authors have records of all of these practices and can supply them upon request.

<sup>62</sup> See PARTNERSHIP FOR PUBLIC SERVICE & BOOZ ALLEN HAMILTON, BUILDING THE ENTERPRISE: A NEW CIVIL SERVICE FRAMEWORK 27 (2014).

<sup>63</sup> See Keeping Applicants Informed Throughout the Federal Hiring Process, Memorandum from Mark D. Reinhold, Associate Director, Employee Services, to Human Resources Directors at U.S. Office of Personnel Mgmt. (April 3, 2018).

to competitive service positions, but these criticisms apply with equal force to excepted service hiring, for reasons that will be discussed below.

As discussed in the section above, federal law requires that, at least for competitive service hiring, agencies use OPM qualification standards and only draw from a certified list of candidates. That certified list is, in most instances, prepared by an agency human resources office and occasionally by OPM itself. Because of the sheer volume of requirements that govern competitive service hiring, human resources' offices have assumed the charge of ensuring the correct application of these requirements, and therefore that only the candidates who meet those requirements make the cert list.<sup>64</sup> This process adds to the hiring timeline. It also shifts power in hiring from hiring managers to human resources components, who are often separate from the day-to-day needs of the workforce.<sup>65</sup>

Excepted service hiring still sees many of the same problems of rigidity that are seen in competitive service hiring. At first, this is puzzling. After all, excepted service hiring is supposed to be much more streamlined than competitive service hiring, with only minimal procedural requirements and should therefore seemingly not require the level of human resources involvement that is seen in competitive service hiring. To understand why excepted service hiring still suffers from the same kinds of procedural burdens seen in competitive service hiring, we need to examine a bit further the nuances of the federal personnel scheme.

First, it is not entirely accurate to say that excepted service hiring is, across the board, more streamlined than competitive service hiring. Recall that OPM has five "schedules" of excepted service positions: A through E. Each schedule is treated a bit differently under the law.<sup>66</sup> For example, Schedule A positions, including attorneys, are generally not subject to veterans' preference, other than "to the extent feasible." However, other excepted service positions, such as those that fall under Schedule D (e.g., Pathways programs positions), are subject to a level of veterans' preference that, although somewhat different from the competitive service's veteran's preference, is much stricter than "to the extent administratively feasible."<sup>67</sup>

Nowhere is the bureaucratization of federal hiring seen more clearly than in the content of vacancy announcements. As discussed above, all competitive service vacancy announcements are required to be posted on USAJobs. This is not the case with excepted service announcements, but many agencies nonetheless post their excepted service announcements, including 0905 attorney announcements, on USAJobs, either because they believe it to be required or they believe it to be an effective way to recruit attorneys. In an April 2016 hearing on the subject of USAJobs, several witnesses testified that job announcements posted on USAJobs are impenetrable. The typical USAJobs announcement is approximately eight pages of dense human resources jargon and contains confusing and contradictory instructions. The actual description of the position, if the announcement contains one at all, is often relegated to a few sentences and

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<sup>64</sup> See PARTNERSHIP FOR PUBLIC SERVICE & BOOZ ALLEN HAMILTON, *supra* note 63, at 28.

<sup>65</sup> See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 61, at 11.

<sup>66</sup> See 5 C.F.R. § 302.101 (2019).

<sup>67</sup> *Id.*

buried in the midst of dense boilerplate language. Indeed, in one instance, a printed federal job announcement stretched thirteen feet when printed.<sup>68</sup>

In 2003, the MSPB randomly sampled over 10,000 job announcements from USAJobs. MSPB undertook a two-part analysis. First, it looked at agency practices with respect to the length of time announcements are posted and other practices related to the posting of the announcements. Second, it analyzed the content of the announcements. MSPB's analysis illustrates perfectly the problem of rigidity, and to a secondary but still important extent the problem of lack of fair competition in hiring and recruiting.<sup>69</sup>

In the first part of its analysis, MSPB analyzed 10,000 announcements to determine the length of time the announcements were posted. It concluded that announcements are often cancelled before the deadline. Half of vacancy announcements were open for two weeks or fewer and 9% of vacancy announcements did not appear on USAJobs until after the announced opening date for application receipt.<sup>70</sup> Such an analysis lends credence to the criticism that federal hiring is not truly competitive and is skewed toward those with inside knowledge of the process. This is because if an announcement is open for two weeks or fewer, it is very likely that the agency already has a candidate in mind for the position and is posting it on USAJobs merely to achieve pro forma compliance with the public posting requirement for competitive service vacancies.

In the second part of its analysis, which was far more extensive, MSPB analyzed the content of 100 announcements. It found, overall, that vacancy announcements are not crafted to help people understand the nature of the position; they are disorganized; grammatical mistakes abound; they are replete with "human resources jargon"; they include legal boilerplate language that is often inapplicable to the position; they often require unnecessary documentation; and they contain vague and contradictory instructions. MSPB posited that this happens because human resource offices do not work with managers in drafting the announcements.<sup>71</sup>

## **Our Review of Agency Vacancy Announcements**

To determine to what extent MSPB's observations regarding vacancy announcements hold true today – approximately sixteen years after it conducted its study – we analyzed a sample of attorney vacancy announcements. In total, we pulled seventeen announcements. Thirteen of these came from USAJobs. Four were posted on the agencies' websites and did not, to our knowledge, also appear on USAJobs in the same form as posted on their website. All seventeen of these announcements were posted in the late spring and early summer of 2019 and were from agencies that employ at least ten attorneys. We analyzed, in detail, the content of all of these announcements.

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<sup>68</sup> See *The Irrational Escalation of Commitment to USAJobs*, Testimony for the U.S. Senate Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs (April 12, 2016) (statement of Linda E. Brooks Rix, CEO, Avue Technologies Corporation).

<sup>69</sup> See U.S. MERIT SYSTEMS PROTECTION BOARD, *HELP WANTED: A REVIEW OF FEDERAL VACANCY ANNOUNCEMENTS* 8 (2003).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

We found that, for the most part, MSPB’s observations with respect to announcements being disorganized, overly legalistic, replete with inapplicable and at times nonsensical “boilerplate” language, and containing contradictory and confusing instructions largely hold true for 0905 attorney announcements posted on USAJobs today. Two of these announcements appear in the appendix. They do not include any identifying information about the agency. Our annotations highlight the problematic parts of the announcements. These problems may stem from the nature of human resources’ involvement in the hiring process for attorney positions. Additionally, we included two announcements that we believe do not exhibit these problems. These announcements came from the agency websites. Ideally, all attorney announcements would resemble these.

## **Part II**

### **The Roundtable**

To understand how agencies do hire, and should hire, 0905 attorneys, ACUS’s Office of the Chairman convened a roundtable of individuals representing government agencies, private practice lawyers, and public interest groups. Beyond the roundtable, additional conversations were held by phone with five individuals.

#### *Selection of Roundtable Participants*

To develop the final group of participants, we started with all government-affiliated members of ACUS, including both government members and liaison representatives. We then removed agency representatives who were from agencies that fall outside of the Title 5 process. To this list, we added representatives from government organizations that have previously published on government hiring processes and practices. Accordingly, we included representatives from the Merit Systems Protection Board, Office of Personnel Management, Office of Management and Budget, and General Services Administration were included as these agencies play pivotal roles in the federal hiring process or in developing hiring policy.

With respect to people not affiliated with government agencies, we invited people who have particular expertise in federal or attorney hiring. In addition, we specifically contacted certain private sector officials who published in this area or otherwise have particular expertise in federal or attorney hiring.

After developing this list, we reached out to the individuals by email. We requested their participation or the participation of someone at their agency or organization who would be best suited to answer questions about attorney hiring practices. If willing participants were not able to attend the roundtable but still wished to participate, we offered to talk to them by phone. Several participated remotely.

We offered participants anonymity under the Chatham House Rule. That is, “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”<sup>72</sup>

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<sup>72</sup> *Chatham House Rule*, CHATHAM HOUSE, available at <https://www.chathamhouse.org/chatham-house-rule>.

Approximately 12 individuals from government agencies, along with one participant from a law firm, one from a non-governmental organization, and one academic participated in our roundtable. We additionally held phone conversations after the roundtable with roughly five individuals, two of whom also attended the roundtable.

In order to maintain participants' confidentiality, the below information does not refer to speakers' names or affiliations. Additionally, we refer to everyone who spoke with us—both during the roundtable and on the phone afterwards—as “roundtable participants.”

### *Using Hiring Flexibility for Attorney Positions*

Surprisingly, one topic raised by participants during the roundtable was the extent to which agencies should promote a broad applicant pool when hiring 0905 attorneys into the excepted service. This issue arose in a discussion about whether, when hiring someone for an attorney position, it may be advisable to hire a preselected candidate without publicly posting the position. Many participants argued that, despite the streamlined processes permitted when hiring attorneys, agencies should aspire to promote “merit systems principles”<sup>73</sup> and ensure there is a fair opportunity for interested applicants to apply for open positions. For example, they argued that it is prudent to ensure that the posting of federal jobs is standardized across an agency for both competitive and excepted service positions and that all job announcements are publicly posted (on USAJobs or elsewhere). This way, all interested individuals are provided the opportunity to apply and have their applications considered by the agency. The roundtable participants with the above position argued that, even if a hiring manager believes that a certain candidate is the best for a position within the organization, it is advisable to use a process that solicits applications from a broad applicant pool to ensure that the candidate truly is the best candidate above all others, and that no other “better” candidates end up applying. In other words, hiring managers should “trust but verify.”

In addition to ensuring that the best applicant is hired, participants indicated that a process structured in such a way so as to receive applications from a broad applicant pool increases recruitment diversity and may increase diversity within an office.<sup>74</sup> Reviewing who may be qualified for and interested in a position provides a hiring manager the opportunity to ensure that they have thoroughly considered individuals with a variety of backgrounds.

Finally, those articulating this position reiterated that a competitive hiring process would still permit a hiring manager to select their preferred candidate; they would just do so after reviewing other applications.

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<sup>73</sup> Merit systems principles are defined in 5 U.S.C. § 2301(b). Those principles applicable to hiring and recruitment are: “(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.” *Id.* §§ 2301(b)(1)-(2).

<sup>74</sup> *See, e.g.*, Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011).

The roundtable participants who articulated this position generally did not argue for abiding by the full scope of requirements for hiring into the competitive service when hiring 0905 attorneys. As will be discussed later in a section regarding hiring law students, many of the competitive civil service requirements were seen by participants as cumbersome and unduly restrictive on agency hiring.

One individual articulated another perspective: that agencies should hire through the practices required of hiring into the competitive service unless it is, in fact, impracticable to conduct an examination for a specific excepted service position. That is, excepted service hiring should be limited only to situations where the position's responsibilities are so selective that the agency will not receive qualified applicants if they publicly post the position for a significant period of time and heavily advertise. For example, while it is legal for agencies to fill 0905 positions with FOIA responsibilities under excepted services processes, this perspective posits that agencies likely should not as agencies may find examining candidates for FOIA positions practicable; all agencies have FOIA attorneys, so there is already a large pool of potential candidates with this skillset, and it is possible to train attorneys to conduct FOIA review.

However, a majority of roundtable participants argued that it was important for agencies to maintain the legal authority to use, when appropriate, a process to directly hire attorneys rather than use one that is more open, even though the latter process is preferable most of the time. One participant explained that there have been times when she has hired a preferred candidate without an open competition including the posting of a job announcement so as to ensure a position is filled by a specific date, such as the end of a fiscal year or before a hiring freeze becomes effective. Other participants expressed the desire to directly hire former employees who had previously left the agency and would benefit the agency upon their return, as well as promoting attorneys to positions not on their career ladder. These participants and others reiterated the need to do what is in the best interest of the agency in any specific situation.

Finally, one participant argued that agencies should, for the most part, design a hiring process for 0905 attorneys that focuses on the quality of the hire, rather than ensuring that the process was more structured and requires a public announcement (and, in fact, this individual stated that it would be disappointing if hiring managers can, but choose not to, avoid the structured process.) To her, "quality of hire" means that agencies should focus more on selecting candidates who can produce the best work product and create the best environment within the agency.<sup>75</sup> While having a structured process is not incompatible with ensuring a quality hire, she argued that a government hiring process with more steps and structure will disincline quality candidates from applying.

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<sup>75</sup> Although it is outside the scope of this report, this participant explained that providing hiring managers flexibility to hire 0905 attorneys did not mean not holding hiring managers accountable. Rather than providing accountability through the hiring process (*i.e.*, accountability on the front end), she proposed holding hiring managers accountable for the outcomes of the employees they had hired (*i.e.*, accountability on the back end). Specifically, this participant argued that hiring managers should be held accountable through performance reviews, inspector general audits, and Congressional audits that determine whether those who were hired are excelling in their positions. She noted that the audits or reviews must be done carefully so that they are not politicized, and that agencies must collect a variety of clear metrics to determine what "excelling in a position" looks like.

This participant also articulated that the government must redesign its hiring processes to compete in the 21<sup>st</sup> century talent marketplace and utilize its competitive advantage. Specifically, she said that agencies should advertise not only their mission, but also real responsibilities that new attorneys would not have in private practice and the training that comes from that.

#### *Whether to Use USAJobs*

Because excepted service positions may be hired outside of the competitive service process, agencies can avoid using USAJobs entirely for 0905 attorney positions, choosing to advertise openings solely on another website or not advertise at all. Despite this, roundtable participants generally stated that USAJobs was the primary posting method used by their agencies, and some said their agencies engage in no effort other than using USAJobs.

One participant posited that agencies should use USAJobs to ensure that the hiring process for 0905 positions is standardized, trackable, and otherwise fair. Agencies should appreciate USAJobs' ability to receive applications in a standardized manner, maintain a record of applicants' qualifications, and ensure that HR is involved in the process. She mentioned that, if an agency decides not to use USAJobs, it should maintain an official portal for receiving applications to ensure that everything is standardized and trackable. She noted the CIA's "Career Application Center" as an example of an alternate application system that met those requirements.<sup>76</sup>

A second participant articulated that using USAJobs or an alternate application system was useful for agencies to avoid costly litigation. She mentioned that the "worst case scenario" for litigation over hiring non-selection is an agency without an official paper trail, without HR having been involved in the process, and with only an email chain as evidence of why a specific candidate was hired.

Another argument heard for using USAJobs was that *not* using it would diminish the morale of the federal workforce. If workers believe that their coworkers were not the best qualified applicants and hiring managers were selecting candidates based on qualifications other than merit, the argument goes, then morale decreases. In addition, those employees hired through a less open, less structured process are potentially considered "illegitimate" in the eyes of their colleagues.

In response to these comments, some participants indicated that USAJobs was cumbersome to use and the site makes it difficult for hiring managers to sift through applications.<sup>77</sup> Roundtable participants who argued in favor of using USAJobs responded with solutions or workarounds to a variety of these complaints. These will be discussed later in this report. One agency official noted that, while USAJobs wasn't the perfect tool for hiring, it worked sufficiently well for her needs. Most roundtable participants agreed. Several additionally noted that other recruitment tools besides USAJobs may be necessary to obtain a sufficient number of qualified applicants, especially for specific practice areas or geographic locations. However, concern remained

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<sup>76</sup> *Career Application Center*, CENTRAL INTELLIGENCE AGENCY, available at <https://www.cia.gov/ehl/start.do>.

<sup>77</sup> See *Improving the USAJOBS Website: Roundtable Before the S. Subcomm. on Reg. Aff. & Fed. Mgmt.*, 114th Cong. (2016), available at [https://www.hsgac.senate.gov/hearings/roundtable\\_-improving-the-usajobs-website](https://www.hsgac.senate.gov/hearings/roundtable_-improving-the-usajobs-website).

amongst some agency officials that USAJobs may not be the optimal resource for hiring 0905 attorneys.

### *Developing an Announcement*

When developing a job announcement, roundtable participants stated that the hiring manager or hiring office usually develops the responsibilities and qualifications of the position, while Human Resources (HR) ensures the announcement conforms to legal requirements and ensures that the announcement is posted.

Participants articulated the need for hiring managers to consider the knowledge, skills, and abilities (KSAs) of the optimal employee to fill the position, rather than simply reiterating the KSAs of the person who previously held that position. One participant articulated the need to consider diversity of knowledge, skills, and abilities within the office; if an office lacks an attorney with a specific knowledge base, the hiring manager may wish to hire someone with that knowledge even if the person they are replacing did not have it. Another participant explained that the hiring manager should reexamine what GS (or, for some agencies, another scale) level is necessary to effectively do the work required of the position.

To assist agencies in determining the GS level of various positions, OPM has issued the *Handbook of Occupational Groups & Families*.<sup>78</sup> This document “[d]efines occupations and lists the series names and codes used in classifying white collar jobs in the Federal Government,” and provides classification standards for the various occupations. The section on “General Attorney Series, GS-0905” is specifically designed to assist agencies in deciding which grade level is warranted for an attorney with specific responsibilities.

However, participants indicated that agencies may have a variety of constraints—or opportunities—other than just the responsibilities of the position which may affect the GS level at which a position is posted. One agency official indicated that budget constraints often inhibited the ability of her office to hire above a GS-11 or -12. The official described this as “short-sighted,” as the office may need someone with greater experience than a GS-12 would have. However, the official explained that her agency was considered “desirable” and, as a result, attorneys with five or more years of experience would apply for (and be hired into) GS-12 positions rather than the GS-14 or -15 positions for which they may otherwise be qualified.

An extended discussion was held on whether and how hiring managers should distinguish between mandatory and desirable or preferred criteria for a new hire in job announcements (all participants explained that they use mandatory criteria at least to set bare minimum qualifications, such as having a law degree or bar membership.) Nearly all roundtable participants stated they prefer to use desirable qualifications over mandatory when hiring 0905 attorneys because it provides agencies flexibility and discretion. With mandatory criteria (e.g., applicants must have three years of administrative law experience), an agency hiring manager cannot select an applicant with relevant experience to the position but who does not have that

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<sup>78</sup> U.S. OFFICE OF PERSONNEL MGMT., HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES (Dec. 2018), available at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>.

mandatory qualification; a participant indicated that an agency may open itself up to litigation if it did so.

As above, preferred qualifications provide agency hiring managers the ability to explain what qualifications they are looking for in a candidate but not box themselves in. One participant explained that her agency drafts announcements to say that applicants with a certain skillset will be “highly competitive” or “highly preferred” to ensure that the applications they receive are focused on those areas, but also allow themselves the ability to deviate if agency needs change.

Roundtable participants further explained that job applicants view postings with many and/or very specific mandatory criteria as a signal that an agency has a particular candidate in mind. Drafting announcements in this way will lead to a significantly decreased number of applications.

Regarding USAJobs postings, after the hiring manager has drafted the “Responsibilities” and “Qualifications” sections of a posting, the manager sends this information to HR, which drafts language (often from templates) for the rest of the posting (e.g., conditions of employment, benefits, required documents and “how to apply,” the agency’s EEO policy). HR and the hiring manager may go back and forth on language to ensure it is accurate and that the number of years required for the position matches the GS level(s) of the posting. Once HR has put together all the text for the announcement, HR provides the hiring manager the option to review the text of the entire announcement.

Roundtable participants explained that it is very important that hiring managers review the entire announcement (rather than only the sections they drafted or delegating review to someone else) for 0905 postings. In their experience, HR at times has failed to ensure that 0905 postings are listed as excepted service, has used incorrect template language (e.g., using the language for the competitive service for excepted services positions), or has failed to ensure that the correct categories of applicants may apply (e.g., ensuring that current competitive service employees with JDs can apply for excepted service positions).<sup>79</sup>

#### *Options for Posting Announcements on USAJobs*

Because all roundtable participants indicated they use USAJobs for posting most 0905 announcements, this section of the report focuses on strategies for posting announcements on the USAJobs website.<sup>80</sup>

When posting job announcements on USAJobs, agency HR officials have options to limit the number of applications they receive. For example, they may impose a numerical limit on the number of applicants (e.g., the announcement will close after the 150<sup>th</sup> applicant) and limit the time before the posting closes (e.g., the announcement will close after two weeks). Increasing

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<sup>79</sup> Unrelated to the hiring of 0905 attorneys, roundtable participants explained that postings for jobs intended to be limited to current government employees often limit applicants to those in the competitive service, rendering excepted service employees ineligible from applying when hiring managers intend them to be qualified.

<sup>80</sup> The exception is that an official indicated that their agency may decline to post 0905 openings on USAJobs when hiring attorneys into field offices. Instead, the agency will advertise a posting in places where local candidates may see it (see next section) and will solicit applications by email.

these settings will likely increase the number of applications the agency receives, and agencies may modify these settings to meet their needs.

Agency officials indicated that they may impose a limit on the number of applications they receive because not doing so will result in more submitted applications than they wish to review. One roundtable participant indicated that the problem at her agency was receiving “too many” qualified applications, rather than receiving a sufficient number of qualified applicants. Others agreed that their announcements may receive an overwhelming number of applications and were looking for ways to decrease the number of applicants. One participant said that potential applicants count the number of days an application is open to decide whether to apply on the understanding that the agency likely has a preferred candidate in mind when the announcement is posted for a week or less. One participant posited that agencies may receive a large number of applications without relevant experience because the hiring manager did not articulate the desired requirements or qualifications sufficiently.

One official indicated that her office recently began implementing a numerical cutoff; when asked about observed results, that official said she believes the agency is not receiving enough qualified applicants when limiting applications to 50. In that vein, one participant indicated that a small numerical cutoff obviously results in a smaller applicant pool, which may hurt efforts to increase diversity under Executive Order 13,583 and also efforts to diversify the specific skillsets of attorneys within a specific legal office (e.g., the Office of General Counsel, Enforcement Division).

However, several roundtable participants indicated that agency needs may necessitate a numerical cutoff in order to get someone on board as soon as possible.

Relatedly, agency officials indicated that getting someone hired quickly may also necessitate a shortened duration for the posting. They indicated that, for higher-level positions, it may be imperative that the agency get the position filled quickly so important decisions may be made. In addition, hiring managers may need to consider factors outside of their control. Officials indicated that hiring managers must be cognizant of whether they may lose the funding to hire a new attorney at the end of the fiscal year or whether a hiring freeze will be imposed in the near term. To many of the roundtable participants, quickly getting a sufficiently qualified applicant in a seat may be more important than searching for the best qualified attorney and being unable to hire her, depending on the situation.

That said, several roundtable participants indicated that their agencies have policies dictating for how long an announcement must be posted. Some agency officials speculated that contractors performing HR responsibilities may enforce limited timeframes (even when not in the customer-agency’s best interests) because of the contractor’s own internal policies or timeframes.<sup>81</sup> Additionally, officials posited that collective bargaining agreements may dictate minimum

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<sup>81</sup> The theory here is that agency contracts require HR providers to provide certificates of eligibility within a certain timeframe after an announcement closes. In order to ensure the provider can meet the contracted timeframe, they limit the number of announcements that close in any given period and may therefore limit the time any given announcement is up.

posting durations, though none of the agency officials participating in the roundtable were bound by such an agreement.

In addition to placing a numerical limit on the number of applications an agency receives or restricting the duration of a posting, one agency official stated that USAJobs has a number of other options for receiving applications that agencies can use. For example, vacancy announcements may be held open until the agency indicates that the position has been filled. Using this option, hiring managers can choose to receive applications on a rolling basis (i.e., as they are submitted) or receive them on a periodic basis (e.g., weekly, monthly). Finally, agency officials stated that those agencies that use vacancy announcements posted without time limit (i.e., until the position is filled) may hire multiple individuals off a single announcement.

#### *Advertising Experienced Attorney Announcements*

Roundtable participants universally agreed that agencies pursue different methods for advertising positions for experienced attorney positions than for entry-level positions.

When posting an opening for an experienced attorney, agency officials generally indicated that it was important to do more advertising than simply publishing the announcement on USAJobs. They generally agreed that publicizing the announcement is important for ensuring that individuals who may be interested in applying are aware that the opening is available. Several indicated that they try to advertise or circulate announcements the day they are listed.

When publicizing a position that is listed on USAJobs, the advertisements will reiterate much of the information on USAJobs and will direct interested candidates to apply for positions on the USAJobs website.

Depending on the position, roundtable participants indicated that they may circulate or advertise attorney announcements through the following channels:

- Professional or informal contacts of agency personnel (e.g., friends, colleagues);
- Professional legal associations (e.g., American Bar Association, Federalist and American Constitution Societies, Environmental Law Institute, Women's Bar Association); and
- Groups who have advocated and/or litigated on specific issues before (e.g., Heritage Foundation, Public Citizen)

Officials said that 0905 attorney announcements could be circulated to any and all of these depending on needs of the agency and the position itself.

One person indicated that her agency at one point attempted to pay to advertise the agency's openings in publications or specialty recruitment boards but found this was not cost-effective.

Another official indicated that she uses different strategies for filling attorney positions in field offices compared with Washington, DC. Specifically, attorneys outside of DC may not know to look at USAJobs for openings, so advertising to local bar associations or other local groups is necessary to get a sufficient number of high-quality candidates.

One agency official noted that agencies may consider using Presidential Management Fellows (PMFs) with JDs, either during or after their PMF service. PMFs are two-year appointments within the federal government for individuals with graduate degrees, with the potential for conversion to a permanent, competitive service position upon completion.<sup>82</sup> The official stated that during their two-year appointments, agencies may use PMFs on legal projects so long as the PMFs are barred attorneys. In addition, the roundtable participant stated that, while PMFs are generally converted to competitive service positions following their two-year appointments, agencies may hire eligible PMFs (i.e., those who are law school graduates and are state-barred) into 0905 attorney positions. One agency official stated that approximately 20 percent of her agency's Office of the General Counsel attorneys are PMF converts.

Roundtable participants discussed the varied reasons for hiring PMFs, including that they are a highly qualified pool of candidates, they have already worked in federal service and are "government-socialized," and they are motivated by public service. Agencies may find interested PMFs through lists held by OPM and through PMF job fairs for agency hiring managers.

Lastly, several individuals indicated that agencies should be sure to consider internal candidates for positions. Specifically, they stated that agencies should employ mentoring programs and engage in targeted training to develop expertise and qualifications for management and other higher-level positions.

#### *Advertising Entry-Level Attorney Announcements*

The discussion about advertising entry-level attorney positions focused on two different but related issues: advertising to rising 3Ls and recent law school graduates and building a pipeline for transitioning interns into employees.

Roundtable participants stated that advertising to rising 3Ls and recent law school graduates takes much the same form as some private sector hiring. Some agencies will participate in the On-Campus Interview (OCI) process for rising 3Ls, focusing on schools where they have previously had positive responses. Similarly, many agency officials said that their agencies contact law schools through formal and informal channels. Agency counsel offices will draft a notice and distribute it to an email list of schools. Then, individual agency lawyers will flag the notices for the career offices at their alma maters and perhaps provide supplemental information to the official notice.

Agencies appear to split into three groups: those that only conduct OCI interviews for hiring entry-level attorneys, those that only use USAJobs, and those that use both. Officials from those agencies that hire from both OCI and USAJobs noted the difficulty in doing so and indicated that they require even those individuals who had an OCI interview to submit a follow-up USAJobs application (for recordkeeping purposes). One official explained that her agency sees a significant drop-off in interest for those applicants who interview during OCI who also must submit a USAJobs application.<sup>83</sup> This official also noted the lag in time between when OCI

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<sup>82</sup> See *Presidential Management Fellows*, OFFICE OF PERSONNEL MANAGEMENT, available at [www.pmf.gov](http://www.pmf.gov).

<sup>83</sup> This point also applies to hiring of interns during OCI. One agency official said that, after the agency stopped paying its summer interns, law students would not sign up for OCI interviews and were less interested in working for the agency.

occurs and when the agency will finally make a hiring decision (i.e., much later than firms). In response, one agency official argued that agencies should not be concerned about students not applying through USAJobs, noting that if someone cannot bother to complete the application then she is not that interested in the agency and the agency should prefer candidates who express interest in the agency. Also, the agency can modify its USAJobs announcement in a variety of ways to make it easy for applicants to complete the application (e.g., post announcements as open until filled, receive applications on a rolling basis, and post announcements during recruiting season). Another individual noted that agencies could make presentations at law schools about how to apply for positions on USAJobs.

Most of the discussion over hiring entry-level lawyers revolved around the desire of agencies to hire former interns/law clerks as attorneys, and its general infeasibility. Roundtable participants generally favored the concept of hiring interns; being able to observe interns for a summer or semester provides agencies with clear understandings of how candidates perform. Before reviewing the roundtable discussion, it is important to provide an overview of the two internship opportunities for federal agencies: Volunteer internships and Pathways internships.

Pathways internships are time-limited, paid positions within the federal government for current students.<sup>84</sup> They may result in the conversion to competitive service positions for interns upon graduating, depending on the needs of employing agencies. Because Pathways internships are paid, they are a part of the competitive service and competitive service hiring regulations—such as public notice and veteran’s preference—apply. This is true even for law student interns because the excepted service regulations do not explicitly exempt law students from the competitive service.<sup>85</sup>

Volunteer internships are time-limited, unpaid positions within the federal government for current students.<sup>86</sup> These positions are not permitted to be converted to competitive positions upon completion of the internship. Because volunteer internships are unpaid, agencies need not adhere to competitive service hiring practices (though there may be other requirements to be followed, including those in 5 U.S.C. § 3111, which provides the requirements for agency acceptance of volunteer service).

Agency officials at the roundtable said that they generally would prefer to use Pathways internships if it were more feasible. Because these positions are paid, there is more interest in them by law students than for Volunteer internships; many law students cannot afford an unpaid internship.

However, there was near unanimity that the Pathways program is cumbersome and restrictive, due to its being in the competitive service. In addition, although the Pathways program was designed to help get interns into competitive service positions upon graduating, officials with

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<sup>84</sup> See 5 C.F.R. Part 362.

<sup>85</sup> The regulations do exempt “Law clerk trainee positions.” See *id.* § 213.3102(e) (“Appointments under this paragraph shall be confined to graduates of recognized law schools or persons having equivalent experience and shall be for periods not to exceed 14 months pending admission to the bar.”).

<sup>86</sup> See 5 U.S.C. § 3111 (2016).

agencies that use Pathways interns said they rarely were able to offer those interns permanent positions.

Participants stated that the volunteer internship program is much more flexible for agencies than Pathways internships. There is no requirement to post openings on USAJobs and veteran's preference does not apply. However, because volunteer internships are unpaid, they are only accessible to wealthier students or students from top schools with programs that subsidize students in public service summer internships. One official from an agency that switched from paid interns to unpaid interns said the transition resulted in decreased diversity (in terms of socioeconomic status, race, and geographic location) of legal interns.

In terms of hiring former interns, agency officials generally said that former interns were welcome to apply for 0905 positions after graduation and were looked upon favorably. However, there could be no guarantee of hiring any or all interns due to long-term planning and resource issues (e.g., the office will not know how many 0905 attorneys it will need the next fall or how much money it will have to hire new attorneys, management wants to fill open 0905 attorney FTEs sooner than at the end of the next summer). Some offices keep a spreadsheet of former legal interns to whom they send all relevant opening announcements.

#### *Reviewing Applications and Conducting Interviews*

Once an announcement closes, the hiring manager must review applications (or delegate that responsibility to a subordinate) and conduct interviews for selected individuals.

All agency officials at the roundtable said that they bypass HR's review of applications and instead have all applications sent directly to the hiring manager, a flexibility that is possible due to the streamlined hiring requirements for attorney positions. Some expressed a concern that receiving many applications would overwhelm the hiring manager, but also that limiting the number of applicants would inhibit the agency from receiving the applications of qualified candidates.

One participant suggested that agencies use occupational questionnaires to limit the number of applications the hiring manager receives, just as is done in the competitive service. When other participants argued that HR would not send them the kinds of candidates they would want to hire (as they have experienced for non-attorney positions), the initial official asserted that hiring managers need to spend more time thinking about the qualities and experiences they want in a candidate and must ensure those qualities are reflected in the questionnaire so that HR knows what to look for.

Another official stated that his agency has a panel review all received applications, rather than leaving it to just the hiring manager or the hiring manager's designee. He said that his agency does this to ensure there are checks and balances throughout every step of the hiring process. If only one person reviews the applications, the candidates selected for an interview can be skewed in favor of that person's biases.

For conducting interviews, all agency officials indicated that their offices use interview panels. The makeup of panels is dependent on a variety of factors, including the size of the agency, the location of the interview, and the GS level of the opening.

All participants indicated that having a diverse panel is important, not only to ensure that a variety of perspectives is represented, but also to ensure that candidates are provided an opportunity to “see themselves” in the agency’s workforce. In this instance, officials stated that agencies could consider having panelists of varying lengths of service, types of work experiences, and ethnic backgrounds. Similarly, a panel could include someone from another office who works closely with the hiring office and a mix of managers and non-managers.

Only one agency official (on a post-roundtable phone call) provided a start-to-finish description of how her agency hires 0905 attorneys. The agency’s Office of the General Counsel (OGC) creates a hiring committee comprised of six to eight individuals from various OGC branches that receives all applications that met the minimum requirements. The committee divides into “teams” of two or three that are provided a set of applications to review. Each team selects five to six top applicants from its set and conducts phone interviews with them. That team will then conduct reference checks of the candidates it wants to continue in the process. Then, each team will put forward up to three (including zero) candidates to the whole hiring committee. The committee will then meet, and each team will “sell” their applicants to the whole. The committee members will each individually rank the applicants (tier 1, tier 2, and tier 3). HR will select the top candidates from each committee member for in-person interviews with the hiring committee, the hiring manager, and at least one person from the head OGC office. The hiring manager would then select a candidate and make an offer. This process takes several months from when the USAJobs announcement closes.

#### *Role of and Interaction with Human Resources*

Much of the roundtable conversation involved discussion of how agencies work with (or do not work with) HR. Most participants expressed exasperation at their HR offices for not being an asset to hiring managers and said they would try to keep HR out of the attorney hiring process as much as possible, though often that would be impossible.

At one agency, HR must approve all announcements, including those posted on USAJobs and those issued informally through employee networks. HR ensures the language is accurate and the qualifications are fairly described. In this case, HR will pass along to the hiring official all applications that met the qualifications.

In another agency, HR is kept out of the 0905-hiring process entirely, except at the very end. After the hiring manager has made a selection, HR must ensure the selected candidate meets the mandatory qualifications (e.g., has graduated from law school and is state barred) prior to issuing the offer letter.

In a third agency with a rather large General Counsel’s office, OGC has its own HR office. This HR office plays an administrative role in the process (e.g., collecting applications, removing applicants who do not meet the basic qualifications, and setting up meetings). OGC’s HR also tells the hiring manager’s selected candidates that they have been selected. However, following

this, OGC's HR will provide the applicant's information to the agency-wide HR, which will conduct the background check, negotiate GS level and pay, etc. In this case, OGC cannot make an offer without the agency HR's approval.

Several agency officials stated that there are issues with HR not understanding the differences between the competitive and excepted service hiring practices. They said that several times they have received only a ranked list or a Best Qualified list of applicants (à la the competitive service), rather than simply all applications. Similarly, the officials said that they have several times gone back and forth with HR regarding stock language in their USAJobs announcements as the language HR tries to put in does not apply. Officials indicated the problems are even worse when the agency has contracted with private providers for HR services.

During the conversation, several of the participants stated that it is possible for HR offices to play a useful role in the attorney hiring process. First, there are activities and processes for which HR officials are trained, and can be more easily accomplished by HR than by hiring managers, such as setting pay and benefits. Second, HR involvement can be useful or even necessary to ensure that agencies are following the law when hiring. Finally, officials indicated that HR can and should work to ensure corporate and strategic needs are met.

However, it became clear that agency officials, in general, saw HR as an impediment to hiring, rather than as a partner.

Roundtable participants believed that, at least with regard to attorney hiring, the HR function should be that of an agent to the hiring manager, where HR effectuates the decision-making needs. As such, participants expressed a desire for better training of HR officials so they can offer the support needed by hiring managers. For example, participants said that HR needs to be able to explain to hiring managers the reasons why specific courses of action are required and be able to explain whether there is a valid policy or legal reason for the action or whether it is an old HR habit. Similarly, participants expressed the desire for HR to be able to advise hiring managers how to accomplish their goals within the framework at hand, rather than simply saying "no." HR needs to be better attuned to hiring managers' needs.

In general, participants explained that agency HR professionals need a stronger knowledge base of HR policies and the reasons for them. One agency official stated that there were few required trainings or certifications required for HR positions in the federal government, that there is no formal curriculum for HR professionals in the federal government, and that much of the training agency HR officials receive comes from on-the-job experience.

Another official lamented that the Federal Personnel Manual (FPM) is no longer maintained. According to a 2014 OPM guide, the FPM was an OPM "system for publishing personnel regulations, policy, and issuing instructions to Federal agencies," and was abolished in 1993.<sup>87</sup> According to roundtable participants, it contained a history of federal personnel policies; users could trace policies back to their origins to understand why they were enacted. One official

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<sup>87</sup> U.S. OFFICE OF PERSONNEL MGMT., THE GUIDE TO PROCESSING PERSONNEL ACTIONS 35-5 (Update 67) (Nov. 2014), *available at* <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/processing-personnel-actions/update67.pdf>.

called the FPM the “encyclopedia of human capital” in the federal government. Without the FPM, roundtable participants explained that HR professionals rely on fact sheets and one-pagers that may detail a policy but do not explain its history and development. Participants argued that without this knowledge, HR professionals are more likely to be ridged in their interpretations of HR policy, and therefore be less likely to work with hiring managers to help the managers accomplish their hiring goals.

Similarly, officials suggested that HR officials should receive formal training in the laws around federal hiring beyond what guidance may be issued by OPM. This training should include review of the statutory and codified language of the OPM and personnel sections of the U.S. Code and the Code of Federal Regulations. This would provide them with the underpinnings of government hiring so they could understand why HR policies are in place and help hiring managers accomplish their goals.

APPENDIX 1: EXCERPTED SECTIONS FROM PROBLEMATIC 0905 ATTORNEY  
VACANCY ANNOUNCEMENTS

**Vacancy 1**

**Qualifications**

Applicants with fewer than five (5) years of experience practicing law must submit a copy of their law school transcript and grade point average or class ranking as part of the application package.

Qualifications by Cut-off Dates: Unless otherwise noted, you must meet all qualification and eligibility requirements by 11:59 P.M. Eastern Standard Time by the cut off dates listed in the "**How You Will be Evaluated**" section order to be considered for that cut-off period. Please note that qualification claims will be subject to verification.

The above text will likely confuse applicants. The requirement to submit “a copy of their law school transcript and grade point average or class ranking” is not a “qualification,” even though it appears under “Qualifications.” It is a document-submission requirement.

**Suitability:** If you receive a conditional offer of employment for this position, you will be required to complete an [Optional Form 306, Declaration for Federal Employment](#), and to sign and certify the accuracy of all information in your application, prior to entry on duty. False statements on any part of the application may result in withdrawal of offer of employment, dismissal after beginning work, fine, or imprisonment.

For the above text, it is not clear why the agency believes it is necessary to inform applicants that they may be fined or imprisoned for submitting false information. This sort of threatening language does not seem included to welcome applicants and appears unnecessary, especially if the agency has not encountered systemic problems with this before.

**Trial Period:** New attorneys to the Federal government will be required to serve a trial period of 2 years.

The above phrase “trial period of 2 years” will likely not be clear to first-time applicants to the government. If the announcement writers wish to include this information, they should also explain what a “trial period” is and what happens after two years.

## How You Will Be Evaluated

You will be evaluated for this job based on how well you meet the qualifications above.

You will be evaluated for this job based on how well you meet the qualifications above. Your resume and supporting documentation will be reviewed to ensure you meet the minimum qualification requirements

This Open Continuous announcement allows acceptance of applications through the closing date. The intent of this announcement is to establish a standing register of qualified candidates and refer them for job consideration when vacancies occur. Applicants will be considered for a maximum of three (3) locations as indicated on the occupational questionnaire. The first cut-off date for receipt of applications to be considered will be **November 16, 2018**; subsequent cut-off dates will be **April 1, 2019**; **July 1, 2019**; and **September 30, 2019**.

Your resume and supporting documentation will be thoroughly reviewed to ensure that you meet the minimum qualification requirements. Your resume, cover letter, and other applicant information should reflect the breadth of your experience, expertise, demonstrated ability, and/or training.

All the information you provide may be verified by a review of the work experience and/or education as shown on your application forms, by checking references and through other means, such as the interview process. This verification could occur at any stage of the application process. Any exaggeration of your experience, false statements, or attempts to conceal information may be grounds for rating you ineligible, not hiring you, or for firing you after you begin work.

We find a number of issues with the above text. First, the needlessly repeated sentence about “being evaluated for this job based on how well you meet the qualifications above” refers back to a “Qualifications” section of the announcement that does not, in fact, list any qualifications at all. As noted, the text that appears under the title “Qualifications” refers to a document-submission requirement (i.e., submission of transcript and GPA), not a qualification. Perhaps this paragraph is referring to the text that appears under the title “Responsibilities,” which does, in fact, contain a list of substantive skills, but this might not be clear to applicants. Further, we believe it is unnecessary to include this last sentence at all, much less twice in the same announcement. This threatening language, especially when repeated multiple times in the same announcement, may convey the impression that the agency is more interested in looking to penalize applicants rather than assess relevant skills.

## Next steps

Once you submit your application, and a review of your complete application is made, you will be notified of your rating and/or if you were referred to the hiring official for further consideration and interviews. We will notify you by email the outcome after each of these steps has been completed. Your status will also be updated on your USAJOBS account throughout the process.

Applicants will likely not know what “notified of your rating means.” The announcement should explain what the various rating possibilities are (e.g., “eligible and ineligible,” “qualified,” “well qualified,” and “best qualified.”), assuming that the agency does, in fact, rate applicants in this manner and has not just lifted this boilerplate language from a competitive service announcement.

## Vacancy 2

This second vacancy had problems similar to those identified in Vacancy 1 above, and we will therefore not relay them again here. Additionally, Vacancy 2 contained an additional problem that we did not encounter in Vacancy 1: in two locations, the announcement details how it considers veterans’ preference, and details them in a contradictory way. It is likely that the first is template language for competitive service positions that was inserted carelessly into this announcement.

**Referral:** Professional Order will be used to refer and select eligible candidates. Veterans' preference is applied after applicants are assessed. Preference-eligibles will be listed at the top of the certificate in alphabetical order and considered before non-preference-eligibles. All other candidates will be listed in alphabetical order and be listed below those with preference.

**VETERANS' PREFERENCE DOCUMENTATION:** There is no formal rating system for applying veterans' preference to attorney appointments in the excepted service; however, the Office of Chief Counsel considers veterans' preference eligibility as a position factor in attorney hiring. If you are claiming veterans' preference, you must submit a copy of your Certificate of Release or Discharge from Active Duty, DD-214 (Member 4 copy), or other official documentation from a branch of the Armed Forces or the Department of Veterans Affairs showing dates of service and type of discharge. Ten-point preference eligibles must also submit an [Application for 10-point Veteran Preference, SF-15](#), along with the required documentation listed on the back of the SF-15 form. For more information on veterans' preference, view [FedsHireVets](#).

## APPENDIX 2: EXEMPLAR VACANCY ANNOUNCEMENTS

### Office of Management and Budget:

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.

## Requirements

### Conditions of Employment

- Must be a US Citizen or National
- Selective Service registration if a male born after December 31, 1959
- At least 18 years old
- Be able to obtain and maintain a Top Secret security clearance
- Subject to pre-employment and random drug test
- Direct Deposit is required
- Relocation expenses will not be paid
- May be required to successfully complete a probationary period
- Must be a graduate from a full course study in a School of Law accredited by the American Bar Association and be a member in good standing of the bar of a state, territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico

Veterans: There is no formal rating system for applying veterans' preference to attorney appointments in the excepted service; however, the Executive Office of the President considers veterans' preference eligibility as a positive factor in attorney hiring. Applicants eligible for veterans' preference must include the information in their cover letter or resume and attach supporting documents (e.g., DD-214, Certificate of Release or Discharge from Active Duty) to their submissions. Although the "point" system is not used, per se, applicants eligible to claim 10-point preference must submit an SF-15, Application for 10-Point Veteran Preference, and the supporting documents required for the specific type of preference claimed. Visit [https://www.opm.gov/forms/pdf\\_fill/SF15.pdf](https://www.opm.gov/forms/pdf_fill/SF15.pdf) for a copy of the SF-15 and a list of required supporting document(s).

OMB Diversity and Inclusion Statement: OMB is committed to creating a multicultural and supportive work environment and strongly encourages applications from candidates who can contribute to the diversity and excellence of the organization.

Schedule A: The EOP welcomes and encourages applications from individuals with disabilities. The federal government has a streamlined hiring process for individuals with disabilities, known as Schedule A. To learn more about Schedule A and eligibility requirements please visit: <https://www.opm.gov/policy-data-oversight/disability-employment>.

OMB Financial Disclosure: This position is subject to the confidential financial disclosure requirements of the Ethics in Government Act of 1978 (Public Law 95-521). If selected, you will be required to complete a Confidential Financial Disclosure Report (OGE Form 450) to determine whether a conflict or an appearance of a conflict exists between your financial

interest and your prospective position with OMB. Providing this information will be an annual requirement.

Why Should I Apply?

You should apply if you enjoy working on novel and fascinating legal issues and counseling senior officials in a dynamic environment. We welcome applicants who are interested in an exciting legal career, working across the EOP and Federal agencies on important matters.

Our office is collegial, with great EOP perks, workplace flexibility, good colleagues, and interesting legal questions.

Interested?

Send a cover letter, resume, and writing sample to [OMBOGCJOBS@omb.eop.gov](mailto:OMBOGCJOBS@omb.eop.gov).

## Central Intelligence Agency:

### Litigation Attorney

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The Office of the General Counsel (OGC) is part of the CIA's Enterprise Functions, which provides governance and oversight to the business of intelligence effort across the Agency at Headquarters and in locations worldwide. OGC is an independent office of the CIA that provides legal advice and guidance to the Agency and to the Director of the CIA. [Learn more about the Office of General Counsel.](#)

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Description

Qualifications

How to Apply

US citizenship required (dual-national US citizens eligible). All positions require relocation to the Washington, DC metro area.

**MINIMUM QUALIFICATIONS:**

- Juris Doctor (JD) degree from an ABA-accredited law school
- Active bar membership from any of the 50 states, District of Columbia, Puerto Rico, or the US Virgin Islands
- GPA of at least a 3.0 on a 4-point scale
- Minimum of three (3) years of substantive civil or criminal litigation experience
- Ability to handle complex litigation in a fast-paced and demanding environment

**DESIRED QUALIFICATIONS:**

- Prior litigation experience in the national security law arena

**ALL APPLICANTS MUST SUCCESSFULLY COMPLETE:**

- A thorough medical and psychological exam
- A polygraph interview
- A comprehensive background investigation

To be considered suitable for Agency employment, applicants must generally not have used illegal drugs within the last 12 months. The issue of illegal drug use prior to 12 months ago is carefully evaluated during the medical and security processing.

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Qualifications

How to Apply

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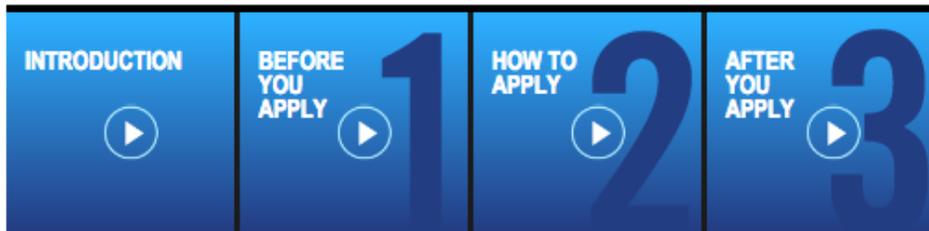
DO NOT submit multiple applications; this will only slow the review of your application and delay processing. Please read the Application Instructions carefully before you begin the online application process.

**Important application instructions for this position:**

The following items must be attached to your on-line application (PDF format preferred):

- Resume
- Unofficial law school transcript
- A cover letter in which you specify your qualifications for this position. Please address why you want to work in this role and what differentiates you from other applicants.
- Legal writing sample
- Three (3) legal references with full names and contact information

*Important Notice: Friends, family, individuals, or organizations may be interested to learn that you are seeking employment with the CIA. Their interest, however, may not be benign or in your best interest. Once you reveal your interest you lose control of that information. We ask all applicants to exercise discretion and good judgment in disclosing your interest in a position with the CIA. You will receive further guidance on this topic as you proceed through your CIA employment processing.*



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