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

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

Title 5 of the U.S. Code and Title 5 of the Code of Federal Regulations (C.F.R.) contain the rules that govern most of the civil service’s hiring. 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.² The phrase “for the purposes of this title” is an important qualifier: not all civil service positions are within Title 5 of

the U.S. Code. It creates three categories of civil service positions: 1) competitive service; 2) excepted service; and 3) senior executive service.\(^3\) By default, all Most civil service positions are in the competitive service. Agencies that wish to fill a position in the competitive service must generally offer all U.S. citizens and nationals the opportunity to “compete” in a public and open examination, and the winner of this “competition” is offered the position. The rules to which procedures that agencies must adhere in administering this competition are extremely detailed and complex. A full accounting of them is beyond the scope of this Recommendation. Several of them are: 1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal (hereafter “USAJobs”); 2) formally assigning numerical ratings to applicants and selecting among the top three candidates (or, alternatively, adopting a rating system in which applicants are placed into “categories”); 3) only hiring from lists of candidates prepared by an agency human resources (HR) department; 4) using Office of Personnel Management (OPM)-generated “qualification standards” within the vacancy announcement; and 5) adhering to detailed procedures for giving veterans and family members of veterans priority consideration.

Title 5’s civil service positions end up in the excepted service, rather than the competitive service, when the President or OPM has so designated a position to be in the excepted service. When a position is in Within the excepted service, OPM places it into one of five “schedules,” lettered A through E within the CFR. OPM has placed Title 5 attorney positions under “Schedule A” of the excepted service. Although there are different hiring rules depending on which schedule an excepted service appointment is in, it is generally true that excepted service appointments are subject to a much less stringent set of requirements than the competitive service. For example, if an agency chooses to post a vacancy announcement for an excepted service position, it need not post it on USAJobs.

\(^3\) The senior executive service will not be discussed in this Recommendation.

\(^4\) Schedule D, referenced below, includes Presidential Management Fellows. The other schedules are not pertinent to the content of this Recommendation.
With this background, it is now possible to understand the scope of the Recommendation. Namely, this Recommendation applies only to agency attorneys who are hired for positions under Schedule A of the excepted service. It does not apply to attorney positions that may be found in parts of the U.S. Code other than Title 5, nor does it apply to people who happen to be attorneys but who serve in some non-attorney capacity positions (e.g., competitive service positions). Attorney positions that are the subject of this Recommendation are the majority of attorney positions in the federal government. Those holding these positions are referred to as “0905 attorneys,” in reference to the occupational code assigned to these positions by OPM.

The laws governing the hiring process for 0905 attorney positions are generally much less restrictive than the laws governing the hiring process for competitive service positions and even the laws governing the hiring process for other excepted service positions. For example, with respect to 0905 attorney positions, agencies need not post announcements on USAJobs, use HR officials to screen applicants, use qualifications established by OPM, or use category or numerical rating systems for hiring.

Still, there are legal requirements to which agencies must generally adhere when hiring 0905 attorneys. These include prohibiting hiring decisions based on: protected characteristics (e.g., race, sex, and national origin); political affiliation; whistleblower activities; and other merit irrelevant considerations such as friendship, sympathy, or loyalty.

They also include allowing agencies to screen applicants, use qualifications established by OPM, or use category or numerical rating systems for hiring.

Commented [DMP4]: This insertion clarifies that it is the positions that are assigned to Schedule A and the attorneys are hired to fill those positions.

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separated or furloughed from the agency, without misconduct, due to a compensable injury;\(^9\)
taking actions to achieve workforce diversity, such as recruiting from a variety of sources that
will likely yield a diverse workforce;\(^10\) hiring only those who have a bar license;\(^11\) generally not
hiring males born after 1959 who have not registered for the selective service;\(^12\) and not
engaging in nepotism.\(^13\)

Despite the less restrictive legal requirements for hiring 0905 attorneys, many agencies
choose to follow 0905 attorney hiring practices that are not legally required, such as
involving HR officials in screening out applicants based on substantive criteria (e.g., number of
years of certain kinds of legal experience) and posting announcements exclusively on USAJobs
without further disseminating them. Although some agencies undertake these practices knowing
they are optional, in other agencies, HR officials and selecting officials (the agency employees
responsible for making the ultimate hiring decision) believe these actions are legally required.

Until 1993, OPM published the Federal Personnel Manual, a compendium of personnel laws that
served as an easy reference guide for agencies; currently, there appears to be a dearth of helpful
guidance on the civil service hiring laws.

Because federal hiring law permits agency discretion regarding the processes used to
select 0905 attorneys, agencies may wish to use different practices for different situations. In
certain circumstances, for example, agencies may wish to attract broad applicant pools, while in
others, they might have presumptive candidates (such as former attorneys formerly employed by
them, former legal interns, or highly recommended candidates) in mind under consideration.

When agencies have presumptive candidates in mind, they may not wish to post or broadcast an announcement at all, and it is legally permissible

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\(^12\) 5 U.S.C. § 3328 (2016).
\(^13\) Id. § 3110 (2016).
for them not to do so. However, when agencies want to have a broad applicant pool, they will likely typically benefit from posting an announcement in locations where likely to reach potential optimal candidates frequent. This may or may not include USAJobs, and agencies would be within their legal rights to decide not to use USAJobs. Although agencies may decide USAJobs is among the best places to post an announcement, there is a monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without further dissemination may be insufficient to produce the optimal applicant pool.

Regardless of whether agencies decide to post on USAJobs or elsewhere, announcements are only effective recruiting tools only if they are written clearly, in a way designed to welcome qualified applicants. Many 0905 attorney announcements appear not to be, and often contain dense, boilerplate language, job responsibilities that are difficult to decipher, and threats of facing jail time or paying fines. It seems that this problem is caused at least in part by how HR officials use USAJobs to post announcements. For example, a selecting official may be the one who drafts the announcement but then sends the announcement to HR to post it on USAJobs. When posting on USAJobs, an HR official may insert boilerplate language, facilitated by USAStaffing, OPM’s website, accessible only to government officials, for posting vacancy announcements on USAJobs. The selecting official might not realize such language was added until after the announcement is posted. The Recommendation addresses this issue by encouraging selecting officials, if they send announcements to HR to post, to review the final versions of all vacancy announcements exactly as they will appear to the public before they are posted.

This Recommendation’s appendix offers two examples of announcements that illustrate the problems discussed above, along with an announcement that is written clearly and in a welcoming manner, which avoids the problems discussed above. There are resources to

Commented [DMP6]: Please see the comment I submitted previously, in which I suggested deleting the examples of what NOT to do.
assist agencies in using plain language, including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*14 and the Federal Plain Language Guidelines.15

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

With respect to former interns, agencies cannot extend an offer of 0905 employment immediately after the student’s graduation. Instead, they have to wait until the person is admitted to a bar,16 a process that can take nearly a year or longer after the person graduates. Agencies that have honors programs can hire such students as honors attorneys immediately after the person graduates and then convert them to 0905 attorneys upon being admitted to a bar. However, not every agency has an honors program. Accordingly, this Recommendation encourages agencies to establish attorney honors programs and offers one additional suggestion for hiring interns after graduation and before admission to a bar: hiring such graduates as Law Clerk Trainees, and then hiring them as 0905 attorneys upon admission to a bar. Law Clerk Trainees need not have a bar license.

Under the PMF Program, agencies can hire people immediately upon graduation from a graduate-level program, including law programs, to work for two years as a PMF. During the employee’s time as a PMF, the employee is within Schedule D of the excepted service. Upon

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16 See POSITION CLASSIFICATION STANDARD, supra note 10.
completion of the two-year program, the agency has the option of converting the PMF to a permanent competitive service employee. The agency does not have the option of converting the PMF to an 0905 attorney, even if that person has been admitted to a bar. Instead, if the agency wishes to hire the PMF as an 0905 attorney, it must complete a separate hiring track. This introduces an additional administrative step that might not always be obvious to agencies.

Accordingly, this Recommendation reminds agencies that they can offer successful PMFs who have been admitted to a bar 0905 attorney positions.

The Administrative Conference recognizes that specific attorney positions may require additional criteria. One of these is Among those are non-ALJ adjudicators. As discussed above, the Administrative Conference addressed the hiring of ALJs in Recommendation 2019-2. At the very least, these individuals must be impartial. There may be additional criteria agencies need to apply to screen for this quality and others specific to adjudicator positions.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional For Hiring Attorneys in the Excepted Service

1. The Office of Personnel Management (OPM) (in conjunction with the Merit Systems Protection Board and the Office of Special Counsel as necessary) should provide training for agencies on the minimum procedural requirements in statute, regulations, and executive orders for hiring 0905 attorneys. This would clarify the distinction between excepted service hiring for attorneys and competitive service hiring and would explain the alternative processes and flexibilities available to excepted service hiring. Such

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17 See note 1, supra.  
training could take any number of forms, including written materials and in-person presentations or webinars.

Helping Agencies Recruit Qualified Attorney Applicants

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

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

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

Drafting Vacancy Announcements

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

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

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

Commented [DMP10]: I suggest saying “adhering” as a more commonly used word in this context.
8. Announcements should not contain inapplicable boilerplate language, such as competitive status rules that do not apply to 0905 attorneys.

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

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

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

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

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

**Improving USAsStaffing**

14. OPM should include a notice on USAsStaffing that encourages agencies to specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status, as specified in Paragraph 7.

15. Wherever boilerplate language relating to competitive service hiring practices appears in the USAJobs employer interface (USAsStaffing), OPM should make clear that this boilerplate language does not apply to excepted service 0905 attorney hiring, and should be excluded in excepted service attorney vacancy announcements.

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

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

Evaluating Applicants for Attorney Positions

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

19. Agencies (perhaps through political appointees or in partnership between hiring and HR offices) should decide which responsibilities, if any, HR officials are to have in the process of evaluating applications. If HR officials will screen applicants, selecting officials should determine the screening criteria they will use and clearly communicate the criteria to HR officials. Screening criteria should be easy for non-attorneys to manage, such as citizenship status and bar membership, rather than more amorphous criteria such as possessing a certain number of years of experience in a particular subject area.

Helping Agencies Evaluate Attorneys During Their Trial Period

20. HR officials should send reminders to supervisors approximately 90 days before the end of an 0905 attorney’s two-year trial period informing them that the period will soon end. Supervisors should make affirmative decisions about whether attorneys will be employed after the trial period.

Creating a Pathway From Legal Internship to 0905 Attorney Employment

21. Agencies should consider a variety of options for hiring high-performing legal interns after graduation, both before they have been admitted to a bar and after. Intern

Commented [TR14]: Comment from Todd Rubin: This recommendation (along with number 10 above) should be revisited. Agencies are allowed to require applicants to submit a “conventional” resume. All they have to do is include an instruction within a vacancy announcement that an applicant must submit a resume that does/does not include x, y, and z. For example, if an agency decides that a “conventional” legal resume does not contain salary information, all the agency needs to do is write, somewhere within the announcement, something to the effect of: “Please submit a resume does not include your salary information.” The USAJobs interface allows applicants to submit whatever attachments they would like (subject to file size limitations) as part of their application, so to comply with this instruction, an applicant simply needs to upload a resume that does not have salary information. It would be more sensible to recommend that agencies include such an instruction within their announcements, rather than asking OPM to give agencies an option they already have.
supervisors should encourage successful interns to apply to their agencies’ attorney honors programs. Agencies without honors programs should consider establishing them. Agencies should also consider hiring successful interns as Law Clerk Trainees upon such students’ graduation from law school, and then hiring them as 0905 attorneys immediately after admission to a bar.

Hiring Presidential Management Fellows as 0905 Attorneys

Agencies should consider hiring Presidential Management Fellows (PMFs) who hold law degrees as 0905 attorneys upon admission to a bar and successful completion of the PMF program.

Ensuring Impartiality of Non-Administrative Law Judge (ALJ) Adjudicators

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

Page 5 of the preamble reads, in part, “[m]any 0905 attorney announcements . . . often contain dense, boilerplate language, job responsibilities that are difficult to decipher, and threats of facing jail time or paying fines.” The below language, excerpted from two recently posted vacancy announcements, demonstrates these problems.

VACANCY 1

SUMMARY
The incumbent serves as an attorney providing legal advice, research, analysis and interpretation of federal, state and local laws, as well as oral and written opinions, memoranda, pleadings, briefs and legal support of all [agency] programs and litigation, and performs other legal services as assigned.

RESPONSIBILITIES
Provides written and oral legal advice to [agency] officials in connection with the day-to-day operations of their programs.

Commented [DMP18]: Please see the comment I submitted previously, in which I suggested deleting the examples of what NOT to do.
Reviews . . . grants proposed to be made under various [agency] . . . programs to ensure legal sufficiency . . .

Conducts and assists with litigation involving . . . programs, and officials, including preparing pleadings, interviewing witnesses, conducting depositions, and negotiating with opposing parties.

Conducts legal research to ensure that advice provided is based upon a sound understanding of the law and facts, and anticipates foreseeable consequences of advice provided.

Recommends actions to ensure that decisions made and actions taken are practical, effective, and legally sound and defensible.

Reviews and prepares various kinds of legal documents for general and specific use, including documents related to contracts, real property transactions, and other commercials transactions.

QUALIFICATIONS

Mastery of statues, regulations, and legal precedents related to major [agency] program areas or relevant subject matter expertise to provide expert legal advice in regard to the assigned program area, develop or recommend litigation strategies and procedures, aid the [agency] in the trial of important or precedent-setting cases, and negotiate or participate in negotiating settlements on behalf of the [agency].

Mastery of a large and complex body of law in which precedents are frequently conflicting or non-existent to make determinations and reach conclusions which guide the Department or the Agency in resolving subsequent, similar problems; provide legal advice to heads of programs and Agencies on complex and difficult legal questions or factual issues; and write opinions and case assessment memoranda after conducting detailed factual and legal research.

Mastery of the principles and techniques of legal analysis and practice in order to prepare pleadings, motions, briefs, litigation reports, and related documents in connection with suits by and against the Government and determine in each case the nature of action or defense, the legal issues
involved, the most effective course of action, and optimal strategies and tactics to be employed.

Comprehensive knowledge and understanding of missions and functions of the [agency] and its agencies or relevant subject matter expertise, as appropriate in order to provide legal services in support of [agency] programs and activities that are consistent with the strategic goals of [agency] and the priorities of the [agency head].

Mastery of the principles and techniques of written and oral communication to speak and write with clarity and tact to provide guidance on complex legal issues, secure acceptance of recommendations, prepare complex legal opinions, and effectively represent the [agency] in a variety of external interactions.

SPECIALIZED EXPERIENCE

Applicants should have demonstrated specialized experience in legal research, excellent writing and communication skills, and a strong academic record. This experience should be clearly documented in the cover letter and resume.

GS-12: One year of specialized experience, equivalent to the (GS-11) level in the Federal service or equivalent responsibility in the private sector/pay systems that has equipped you with the particular competencies to successfully perform as an Attorney Advisor. Examples of such experience include: Providing legal advice, research, analysis and interpretation of federal, state, and local laws; Writing opinions, memoranda, pleadings, briefs, and legal support of agency/organization programs and litigation; Performing other legal services as assigned; Rendering of legal advice, oral or written, to administrative officials in connection with the day-to-day operations of programs; preparing various kinds of legal documents, both for specific case use and for general use; Ability to conduct substantial research to handle cases involving the Department's programs; Ability to apply creative legal analysis and sound legal judgment to find appropriate precedent or distinguish applicable law or facts to support or justify legal positions.
If you are relying on your education to meet qualification requirements: You MUST submit a copy of your transcript if you want to substitute your education for experience. If you claim qualifications based on education, and do not submit a transcript, your education will not be used in making a qualification determination and you may be found "not qualified".

Education must be accredited by an accrediting institution recognized by the U.S. Department of Education in order for it to be credited towards qualifications. Therefore, provide only the attendance and/or degrees from schools accredited by accrediting institutions recognized by the U.S. Department of Education.

You will be evaluated based on your qualifications for this position as evidenced by the education, experience, and training you described in your application package, as well as the responses to the Occupational Questionnaire to determine the degree to which you possess the knowledge, skills, abilities and competencies listed below:

Legal, Government, and Jurisprudence
Written Communication
Oral Communication
Problem Solving

Your application, including the online Assessment Questionnaire, will be reviewed to determine if you meet (a) minimum qualification requirements and (b) the resume supports the answers provided to the job-specific questions. Your resume must clearly support your responses to all the questions addressing experience and education relevant to this position. Those determined to be in the best qualified category will be referred to the selecting official for consideration.

VACANCY 2

OTHER

Before hiring, an agency will ask you to complete a Declaration for Federal Employment to determine your suitability for Federal
employment and to authorize a background investigation. The agency will also ask you to sign and certify the accuracy of all the information in your application. If you make a false statement in any part of your application, you may not be hired; you may be fired after you begin work; or you may be fined or jailed.

Page 5 of the preamble reads, in part, “[t]his Recommendation’s appendix offers [an example] of . . . an announcement that is written clearly and in a welcoming manner.” Below is such an announcement.
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 F&A and 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.