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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 210, 212, 213, 302, 432, 451, and 752

[Docket ID: OPM-2023-0013]

RIN: 3206-AO56

Upholding Civil Service Protections and Merit System Principles

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing a rule to reinforce and clarify longstanding civil service protections and merit system principles, codified in law, as they relate to the movement of Federal employees and positions from the competitive service to the excepted service, or from one excepted service schedule to another. First, it clarifies that, upon such a move, an employee retains the status and civil service protections they had already accrued by law, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights. Second, it interprets "confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining" to describe positions, generally excepted from civil service protections, in accordance with statutory text, legislative history for that text, and congressional intent, to reinforce the interpretation that this term was intended to mean noncareer, political appointments. Third, it provides specific additional procedures that apply when moving positions from the competitive service to the excepted service, or from one excepted service schedule to another, for the purposes of good administration, to add transparency, and to provide employees with a right of appeal to the Merit Systems Protection Board (MSPB or Board) to the extent any such move purportedly strips employees of their civil service status and protections.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by the following method:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for sending comments.

All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. To ensure that your comments will be considered, you must submit them within the specified open comment period. Before finalizing this rule, OPM will consider all comments within the scope of the regulations received on or before the closing date for comments. OPM may make changes to the final rule after considering the comments received.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at employeeaccountability@opm.gov or by phone at (202) 606-2930.

SUPPLEMENTARY INFORMATION: OPM proposes this rule to clarify and reinforce longstanding civil service protections and merit system principles, which started with the passage of the Pendleton Act of 1883. The Act ended the patronage, or "spoils," system for Federal employment and created the competitive civil service. For the past 140 years, Congress has enacted statutes, and agencies have promulgated rules, that govern actions by Federal agencies and employees, beginning with laws that limited political influence in employment decisions and growing over the years to establish comprehensive laws regulating many areas of Federal employment. These changes were designed to further good government. Subsequent statutes, including, among others, the Veterans' Preference Act of 1944, as amended, and the Civil Service Reform Act of 1978 (CSRA), extended and updated these civil service provisions.

The CSRA, as discussed throughout this rulemaking, was monumental. It "overhauled the civil service system,"[1] creating an elaborate "new framework"[2] of the modern civil service, protecting career Federal employees from undue partisan political influence so that the business of government can be carried out efficiently and effectively, in compliance with the law.

The 2.2 million career civil servants active today are the backbone of the Federal workforce. They are dedicated and talented professionals who provide the continuity of expertise and experience necessary for the Federal Government to function optimally across Presidents and their administrations. These employees take an oath to uphold the Constitution and are accountable to agency leaders and managers who, in turn, are accountable to the President, Congress, and the American people for their agency's performance. At the same time, these civil servants must carry out critical tasks requiring that their expertise be applied objectively (performing data analysis, conducting scientific research, implementing existing laws, etc.).

If a Federal employee refuses to implement lawful direction from leadership, there are appropriate vehicles for agencies to respond through discipline and, ultimately, removal under chapter 75 or, alternatively, if performance related, chapter 43 of title 5, U.S. Code, and other authorities. Under the law, however, mere disagreement with leadership—without defiance of lawful orders—does not qualify as misconduct or unacceptable performance or otherwise implicate the efficiency of the service in a manner that would warrant an adverse action.

Career civil servants generally have a level of institutional experience, subject matter expertise, and technical knowledge that incoming political appointees may lack. Their ability to offer their objective analyses and views in carrying out their duties, without fear of reprisal or loss of employment, contribute to the reasoned consideration of policy options and thus the successful functioning of incoming administrations and our democracy. These rights and abilities must continue to be protected and preserved, as envisioned by Congress when it enacted the

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[1] *See Lindahl v. OPM,* 470 U.S. 768, 773 (1985).
[2] *Id.* at 774; *see United States v. Fausto*, 484 U.S. 439, 443 (1988).

CSRA—and strengthened those protections through other actions, such as the Civil Service Due Process Amendments Act of 1990.[3]

The OPM Director is generally charged with executing, administering, and enforcing the laws governing the civil service.[4] In chapter 75, Congress provided Federal employees with certain procedural rights and provided OPM with broad authority to prescribe regulations to carry out the chapter's purposes.[5] Moreover, OPM regulations, promulgated via delegated authority from the President, govern the movement of positions from the competitive service to the excepted service, or from one excepted service schedule to another.[6] Accordingly, OPM proposes this rule to clarify and reinforce longstanding civil service protections and merit system principles as codified in the CSRA. OPM proposes amending its regulations in 5 CFR chapter I, subchapter B, as follows:

1. Amending 5 CFR part 752 (Adverse Actions) to clarify that employees who are moved from the competitive service to a position in the excepted service, or from one excepted service schedule to another, retain the status and civil service protections they had already accrued unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights.[7] The proposed regulation also conforms part 752 to Federal Circuit precedent regarding the employees eligible for appeal and grievance rights for removal actions and suspensions.
2. Amending 5 CFR part 210 (Basic Concepts and Definitions (General)) to define "confidential, policy-determining, policy-making, or policy-advocating," and "confidential or policy-determining"[8] in 5 CFR 210.102—which would apply throughout

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[3] Pub. L. 101-376, 104 Stat. 461, H.R. 3086 (Aug. 17, 1990); *see also* H.R. Rep. 101-328 (Nov. 3. 1989).
[4] *See* 5 U.S.C. 1103(a)(5)(A).
[5] *See* 5 U.S.C. 7504, 7514.
[6] *See, e.g.,* 5 CFR part 212.
[7] As explained further *infra*, an individual can voluntarily relinquish rights when moving to a position that explicitly results int the loss of, or different, rights. An agency's failure to inform an employee of the consequences of a voluntary transfer cannot confer appeal rights to an employee in a position which has no appeal rights by statute. This is distinguishable from situations where the individual was coerced or deceived into taking the new position different rights. *See Williams v. Merit Systems Protection Board,* 892 F.3d 1156 (Fed. Cir. 2018).
[8] *See* 5 CFR 213.3301, 302.101, 432.102, 451.302, 752.202, 752.401.

OPM's Civil Service Regulations in 5 CFR chapter I, subchapter B[9]—to describe positions generally excepted from chapter 75's protections to reinforce the longstanding interpretation that, in creating this exception to 5 U.S.C. 7511(b), Congress intended to except noncareer,[10] political appointees from the civil service protections.

3. Amending 5 CFR part 302, for the purposes of good administration and transparency, to provide specific additional procedures that apply when moving positions from the competitive service to the excepted service, or from one excepted service schedule to another, and to provide employees encumbering such positions with a right of appeal to the MSPB to the extent any such move purportedly strips employees of their civil service status and protections. The proposed regulation also amends 5 CFR part 212 (Competitive Service and Competitive Status) to further clarify a competitive service employee's status in the event the employee's position is moved to the excepted service.

As further detailed *infra*, this rulemaking will enhance the efficiency of the Federal civil service and promote good administration and systematic application of merit system principles.[11] OPM requests comments on this proposed rule, including on its potential impacts and implementation, to better understand the potential effects of these proposed regulations and to be

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[9] The relevant regulatory language currently varies slightly. For instance, 5 CFR part 752 describes them as positions "of a confidential, policy-determining, policy making, or policy advocating character." But 5 CFR part 213 describes these positions as being "of a confidential or policy-determining character," 5 CFR part 302 uses "of a confidential, policy-determining, or policy-advocating nature," and 5 CFR part 451 uses "of a confidential or policy-making character." In this proposed rule, OPM adopts "confidential, policy-determining, policy making, or policy advocating" and "confidential or policy-determining" as two, interchangeable alternatives to describe these positions.

[10] The term "career employee," as used here, refers to appointees to competitive service permanent or excepted service permanent positions. The terms "noncareer, political appointee" and "political appointee," as used here, refer to individuals appointed by the President or his appointees pursuant to Schedule C (or similar authorities) who serve at the pleasure of the current President or his political appointees and who have no expectation of continuing into a new administration.

[11] OPM's authorities to issue regulations only extend to title 5, U.S. Code. A position may be placed in the excepted service by presidential action, under 5 U.S.C. 3302, by OPM action, under authority delegated by the President pursuant to 5 U.S.C. 1104, or by Congress. These proposed regulations apply to any situation where an agency moves positions from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive order, or an OPM issuance, to the extent that these provisions are not inconsistent with applicable statutory provisions. For example, to the extent that a position is placed in the excepted service by an act of Congress, an OPM regulation will not supersede a statutory provision to the contrary. Similarly, these provisions also apply where positions previously governed by title 5 will be governed by another title going forward, unless the statute governing the exception provides otherwise.

in a position to consider any possible modifications. OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of any final rule.

I. Background

A. The Career Civil Service, Merit System Principles, and Civil Service Protections

Prior to the Pendleton Act of 1883,[12] Federal employees were generally appointed, retained, and terminated or removed based on their political affiliations and support for the political party in power rather than their capabilities or competence.[13] A change in administration often triggered the widespread removal of Federal employees to provide jobs for the supporters of the new President, his party, and party leaders.[14] This patronage, or "spoils," system often resulted in party managers "pass[ing] over educated, qualified candidates and distribut[ing] offices to 'hacks' and ward-heelers who had done their bidding during campaigns and would continue to serve them in government."[15] Theodore Roosevelt, who served as a Civil Service Commissioner before his presidency, described the spoils system as "more fruitful of degradation in our political life than any other that could possibly have been invented. The spoilsmonger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office."[16] George William Curtis, a proponent of a merit-based civil service, described that, under the spoils system, "[t]he country seethe[d] with intrigue and corruption. Economy, patriotism, honesty, honor, seem[ed] to have become words of no meaning."[17] Ethical standards for Federal employees were at a low ebb under this system. "Not only incompetence, but also graft, corruption, and outright theft were common."[18]

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[12] Pub. L. 16; Civil Service Act of 1883, (Jan. 16, 1883) (22 Stat. 403).
[13] U.S. Merit System Protections Board, "What is Due Process in Federal Civil Service," p. 4. (May 2015), https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf
[14] U.S. Office of Personnel Management, "Biography of an Ideal," p. 83 (2003), OPM-Biography-of-an-Ideal-History-of-Civil-Service-2003.pdf (armywarcollege.edu).
[15] *See* Anthony J. Gaughan, "Chester Arthur's Ghost: A Cautionary Tale of Campaign Finance Reform," 71 Mercer L. Rev. 779, at pp. 787-78 (2020), https://digitalcomons.law.mercer.edu/cgi/viewcontent.cgi?article=1313&context=jour_mlr.
[16] U.S. Office of Personnel Management, *supra* note 14 at pp. 182-83.
[17] *Id.* at p. 182. In 1871, Curtis was appointed by President Ulysses S. Grant to chair the first Civil Service Commission. *See id.* at p. 196.
[18] *Id.* at pp. 183-84.

Civil service advocates and then Congress, therefore, sought to establish a Federal nonpartisan career civil service that would be selected based on merit rather than political affiliation.[19] Such a workforce would reinvigorate government, making it more efficient and competent.[20] This reform movement came to a head in 1881 when President James Garfield was shot by a disappointed office seeker who believed he was entitled to a Federal job based on the work he had done for Garfield and his political party.[21]

The Pendleton Act of 1883 reformed the patronage system by requiring agencies to appoint Federal employees covered by the Act based on competency and merit.[22] The Act also established the Civil Service Commission (CSC) to help implement and enforce the government's adherence to merit-based principles.[23]

While the Pendleton Act focused on hiring, bases for removals continued to vary depending on the preferences of the President in office.[24] In 1897, President William McKinley addressed removals by issuing Executive Order 101, which mandated that "[n]o removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense."[25] Congress later codified these requirements in the Lloyd-La Follette Act of 1912[26] to establish that covered Federal employees were to be both hired and removed based on merit. Specifically, section 6 of the Act provided

> that no person in the classified civil service[27] of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for

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[19] *See* Gaughan, *supra* note 15 at p. 787; U.S. Merit System Protections Board, *supra* note 13 at pp. 3-5.
[20] *See* Gaughan, *supra* note 15 at p. 787.
[21] *See* U.S. Merit System Protections Board, *supra* note 13 at pp. 4-5; U.S. Office of Personnel Management, *supra* note 14 at pp. 198-201.
[22] 22 Stat. 403-04 (stating that hiring should be based on an "open, competitive examination" of the employee's "relative capacity and fitness . . . to discharge the duties of the service into which they seek to be appointed.").
[23] *Id.* at 403.
[24] The Act does specify that "no person in the public service is … under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so." *Id* at 404.
[25] U.S. Merit System Protections Board, *supra* note 13 at p. 5.
[26] 37 Stat. 555 (1912).
[27] The "classified civil service" refers to the competitive service. *See* 5 U.S.C. 2102.

> reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges [proffered] against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof.

Thereafter, Congress enacted further requirements and reforms. In 1944, Congress enacted the Veterans' Preference Act,[28] which, among other things, granted federally-employed veterans extensive rights to challenge adverse employment actions, including the right to file an appeal with the CSC and provide the CSC with documentation to support the appeal. Based on the evidence presented, the CSC would issue findings and recommendations regarding the adverse employment action. In short, the Veterans' Preference Act provided eligible veterans with adverse action protections and access to an appeals process.[29] Then, in 1962, President John F. Kennedy issued Executive Order 10988 to extend adverse action rights to the broader civil service.[30]

B. Conduct and Performance under the Civil Service Reform Act of 1978

To synthesize, expand upon, and further codify the patchwork of processes that had developed over almost a century, and to protect civil servants and govern personnel actions, Congress passed the Civil Service Reform Act (CSRA) of 1978[31]—the most comprehensive Federal civil service reform since the Pendleton Act.

The CSRA made significant organizational changes to civil service management, adjudications, and oversight. It abolished the CSC and divided its duties among OPM[32] and the MSPB, which initially encompassed the Office of Special Counsel (OSC). OSC later became a

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[28] 58 Stat. 387 (1944).

[29] Agencies initially were not required to comply with the CSC's recommendations in adverse action appeals, but Congress amended the Veterans' Preference Act in 1948 to require compliance. *See* 67 Stat. 581 (1948); *see also* U.S. Merit System Protections Board, *supra* note 13 at pp. 7-8.

[30] E.O. No. 10988, 27 FR 551 (Jan. 19, 1962) ("The head of each agency, in accordance with the provisions of this order and regulations prescribed by the Civil Service Commission, shall extend to all employees in the competitive civil service rights *identical* in adverse action cases to those provided preference eligibles under section 14 of the Veterans' Preference Act of 1944, as amended.") (Emphasis added).

[31] 92 Stat. 1111 (1978); *see. Fausto*, 484 U.S. at 455 ("The CSRA established a comprehensive system for reviewing personnel action taken against federal employees.").

[32] Congress envisioned that: "OPM would be the administrative arm of Federal personnel management, serve as Presidential policy advisor, . . . promulgate regulations, set policy, run research and development programs, implement rules and regulations, and would manage a centralized, innovative Federal personnel program." 124 Cong. Rec. S27538 (daily ed. Aug. 24, 1978) (bill summary of the CSRA of 1978, S. 2540).

separate agency to which specific duties were assigned.[33] OPM inherited the CSC's policy, managerial, and administrative duties, including the obligation to establish standards, oversee compliance, and conduct examinations as required or requested.[34] OPM was also obligated to, among other things, advise the President regarding appropriate changes to the civil service rules, administer retirement benefits, adjudicate employees' entitlement to these benefits, and defend adjudications at the Board.[35] MSPB adjudicates challenges to personnel actions taken under the civil service laws,[36] among other things, and OSC investigates and prosecutes prohibited personnel practices.[37] Other, more specific enactments confer upon these entities the obligations or authorities to promulgate regulations on specific topics.

The CSRA codified fundamental merit system principles, which had developed since 1883.[38] These principles are summarized here:

Merit System Principles[39]

1. Recruit, select, and advance on merit after fair and open competition.

2. Treat employees and applicants fairly and equitably.

3. Provide equal pay for equal work and reward excellent performance.

4. Maintain high standards of integrity, conduct, and concern for the public interest.

5. Manage employees efficiently and effectively.

6. Retain or separate employees on the basis of their performance.

7. Educate and train employees if it will result in better organizational or individual performance.

8. Protect employees from improper political influence.

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[33] U.S. Government Accountability Office, "Civil Service Reform – Where it Stands Today," at p. 2 (May 13, 1980), https://www.gao.gov/assets/fpcd-80-38.pdf. The Equal Employment Opportunity Commission and Office of Government Ethics also handle duties previously covered by the CSC.
[34] *See* 5 U.S.C. 1103(a)(5), (a)(7).
[35] *Id.*; *see* 5 U.S.C. 8461.
[36] *See* 5 U.S.C. 1204.
[37] *See* 5 U.S.C. 1212.
[38] *See* 47 Cong. Ch. 27 (Jan. 16, 1883), 22 Stat. 403.
[39] *See* 5 U.S.C. 2301.

9. Protect employees against reprisal for the lawful disclosure of illegality and other covered wrongdoing.

Under the CSRA's "elaborate new framework," challenges to non-appealable adverse actions, appealable adverse actions, and "prohibited personnel practices" are channeled into separate procedural tracks.[40] The procedures an agency must follow in taking an adverse action and whether the agency's action is appealable to MSPB depend on the action the agency seeks to impose.

Suspensions of 14 days or less are not directly appealable to MSPB.[41] But an employee against whom such a suspension is proposed is entitled to certain procedural protections, including notice, an opportunity to respond, representation by an attorney or other representative, and a written decision.[42]

More rigorous procedures apply before agencies may pursue removals, demotions, suspensions for more than 14 days, reductions in grade and pay, and furloughs for 30 days or less, assuming the subject of the contemplated action meets the definition of an "employee" under 5 U.S.C. 7511.[43] Incumbents, other than those who are statutorily excepted from chapter 75's protections, receive the full panoply of civil service protections in 5 U.S.C. 7513 after they satisfy the length of service conditions in 5 U.S.C. 7511.[44] Under section 7511(a)(1), "employee" refers to an individual who falls within one of three groups: (1) an individual in the competitive service who either (a) is not serving a probationary or trial period[45] under an initial appointment; or (b) has

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[40] *See Fausto*, 484 U.S. at 443, 445-47; *see* 5 U.S.C. 1212, 1214, 2301, 2302, 7502, 7503, 7512, 7513; *see also* 5 U.S.C. 4303 (review of actions based on unacceptable performance).
[41] 5 U.S.C. 7503; *Fausto*, 484 U.S. at 446.
[42] 5 U.S.C. 7503(b)(1)-(4); 5 CFR part 752, subpart B.
[43] *See* 5 CFR 752.401, 404, 1201.3; *see also* 5 U.S.C. 7504, 7512(1)-(5); *Fausto*, 484 U.S. at 446-47.
[44] 5 U.S.C. 7513(d), 7701(a).
[45] The term "probationary period" generally applies to employees in the competitive service. "Trial period" applies to employees in the excepted service and some appointments in the competitive service, such as term appointments, which have a 1-year trial period set by OPM. A fundamental difference between the two is the duration in which employees must serve. The probationary period is set by law to last 1 year. When the trial period is set by individual agencies, it can last up to 2 years. *See* 5 CFR 315.801 through 806; *see also* U.S. Merit System Protections Board, Navigating the Probationary Period After *Van Wersch* and *McCormick*, (Sept. 2006), https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf.

completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (2) a preference eligible[46] in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive agency; or in the United States Postal Service or Postal Rate Commission; or (3) an individual in the excepted service (other than a preference eligible) who either (a) is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (b) has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.[47]

In the event of a final MSPB decision adverse to the employee, employees may petition the United States Court of Appeals for the Federal Circuit or another appropriate judicial forum to review MSPB's final orders and decisions.[48]

Excepted from these procedural entitlements and rights to appeal conferred on other employees under chapter 75 are employees "whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character."[49] This is true regardless of veterans' preference or length of service in the position. As detailed further *infra*, it is evident that Congress, in using this and similar language in various parts of title 5, U.S. Code, intended this exception to apply only to noncareer, political appointments that carry no expectation of continued employment beyond the presidential administration during which the appointment occurred.[50] The unique responsibilities of political appointees, typically listed under

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[46] The term "preference eligible" refers to specified military veterans and family members with derived preference pursuant to statute, such as an unmarried widow, and the wife or husband of a service-connected disabled veteran. *See* 5 U.S.C. 2108(3) for additional explanation.

[47] 5 U.S.C. 7511(a)(1). Under Federal Circuit case law, as explained further *infra*, whether an employee has completed a probationary or trial period is immaterial to this analysis if in fact the employee has completed the requisite period of continuous employment under subparagraphs (A)(ii) and (C)(ii).

[48] 5 U.S.C. 7503, 7513, 7701-7703, 7703(a)(1), (b)(1)(A).

[49] 5 U.S.C. 7511(b)(2)(b).

[50] *See infra,* Sec. II. Proposed Amendments; 5 CFR 6.2 ("Positions of a confidential or policy-determining character shall be listed in Schedule C"); 213.3301 Schedule C ("positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials"). Political appointees serve at the pleasure of the President or other appointing official and may be asked to resign or be dismissed at any time. They are not covered by civil service removal procedures, have no adverse action rights, and generally have no right to appeal terminations. *See e.g.* 5 U.S.C. 7511(b)(2) (excluding noncareer, political

excepted service Schedule C, allow hiring and termination to be done purely at the discretion of the President or the President's political appointees. This is a narrow, specific exception from the competitive service, and each position listed in Schedule C is revoked immediately upon the position becoming vacant.[51] Agencies may terminate political appointees at any time, often whenever the relationship between the incumbent and the political appointee to whom the incumbent reports ends. This also means that, absent any unique circumstance provided in law or a request to stay by an incoming administration, these positions are vacated following a presidential transition.

Prior to the CSRA, agencies relied only on provisions codified at chapter 75 to remove Federal employees or to change an employee to a lower grade, even if the reason for removal was for unacceptable performance. The CSRA created chapter 43 as an additional, and, in Congress' view, potentially improved process for empowering supervisors to address performance concerns.[52] Accordingly, in addition to using the provisions of chapter 75, agencies can now address performance concerns under chapter 43 of title 5, U.S. Code.

Through various enactments now reflected in chapters 43 and 75, Congress has created conditions under which certain employees (i.e., those with the requisite tenure in continued employment) may gain a property interest in continued employment. Congress has mandated that removal and the other actions described in subchapter II of chapter 75 may be taken only "for such cause as will promote the efficiency of the service."[53] This property interest in continued employment has been a feature of the Federal civil service since at least 1912, when the Lloyd-La Follette Act required just cause to remove a Federal employee. The Supreme Court in *Board*

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appointees from definition of "employees" eligible for adverse action protections); 5 CFR 317.605 ("An agency may terminate a noncareer or limited appointment at any time, unless a limited appointee is covered under 5 CFR 752.601(c)(2)."); 734.104 (listing employees who are appointed by the President, noncareer SES members, and Schedule C employees as "employees who serve at the pleasure of the President."); 752.401(d)(2) (excluding noncareer, political appointees under Schedule C from adverse action protections).

[51] *See* 5 CFR 213.3301.

[52] U.S. Merit System Protections Board, "Addressing Poor Performers and the Law," p. 4. (Sept. 2009), https://www.mspb.gov/studies/studies/Addressing_Poor_Performers_and_the_Law_445841.pdf.

[53] *See* 5 U.S.C. 7503(a), 7513(a); 5 CFR 752.102(a), 752.202(a).

of Regents of State Colleges v. Roth, recognized that restrictions on loss of employment, such as tenure, can create a property right.[54] In *Cleveland Board of Education v. Loudermill*,[55] the Court also held:

> Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.[56]

In short, once a government requires cause for removals, constitutional due process protection will attach to that property interest and determine the minimum procedures by which a removal may be carried out. Any new law addressing the removal of a Federal employee with a vested property interest in the employee's continued employment must, at a minimum, comport with the constitutional concept of due process. This obligation drives some of the procedures in both chapters 43 and 75, while others have been developed in accordance with Congress's assessments of what is good policy.[57] As a matter of law, agencies must follow the procedures specified by Congress, in the circumstances described, to effectuate a removal under those chapters.

Finally, in addition to establishing the requirements and procedures for challenging adverse actions and performance-based actions, the CSRA includes a mechanism for employees in a "covered position" to challenge a "personnel action" that constitutes a "prohibited personnel practice" because it has been taken for a prohibited reason.[58] "Covered position" means any position in the competitive service, a career appointee in the Senior Executive Service, or a position in the excepted service unless "conditions of good administration warrant" a necessary

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[54] 408 U.S. 564, 576-77 (1972). The Court described three earlier decisions – *Slochower v. Board of Education*, 350 U.S. 551 (1956), *Wieman v. Updegraff*, 344 U.S. 183 (1952), and *Connell v. Higginbotham*, 403 U.S. 207 (1971) – where the Court held that due process rights applied to public employment.
[55] 470 U.S. 532 (1985).
[56] *Id.* at 541.
[57] The exact procedures required will turn on the factual situation and may be different from instance to instance.
[58] 5 U.S.C. 2302(a)(1), (a)(2), (b).

exception on the basis that the position is of a "confidential, policy-determining, policy-making, or policy-advocating character."[59]

At 5 U.S.C. 2302(a)(2)(A), Congress lists twelve types of personnel actions that can form the basis of a prohibited personnel practice under 5 U.S.C. 2302(b). Generally, these personnel actions include (1) an appointment; (2) a promotion; (3) an adverse personnel action for disciplinary or non-disciplinary reasons; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation; (9) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation; (10) a decision to order psychiatric testing or examination; (11) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (12) any other significant change in duties, responsibilities, or working conditions.[60]

The CSRA codified a comprehensive list of prohibited personnel practices, summarized here:

Prohibited Personnel Practices[61]

1. Illegally discriminate for or against any employee or applicant, including on the basis of marital status or political affiliation.

2. Solicit or consider improper employment recommendations.

3. Coerce political activity or take action against an employee or applicant for any person's refusal to engage in political activity.

4. Willfully obstruct a person's right to compete for employment.

5. Improperly influence any person to withdraw from competition for a position.

6. Give unauthorized preference or improper advantage to improve or injure a particular person's employment prospects.

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[59] 5 U.S.C. 2302(a)(2)(B), 3302.
[60] 5 U.S.C. 2302(a)(2)(A).
[61] 5 U.S.C. 2302(b).

7. Employ or promote a relative.

8. Act against a whistleblower, whether an employee or applicant.

9. Act against employees or applicants for filing or assisting with an appeal, or cooperating with the Inspector General or Special Counsel.

10. Discriminate on the basis of conduct that does not affect performance.

11. Knowingly violate veterans' preference requirements.

12. Take or fail to take a personnel action where the action or omission violates any law, rule, or regulation that implements or directly concerns the merit system principles.

13. Implement or enforce an unlawful nondisclosure agreement.

14. Access the medical record of another employee or an applicant in furtherance of a prohibited personnel practice.

OSC investigates allegations of prohibited personnel practices brought by an individual and may investigate in the absence of such an allegation to determine if corrective action is warranted.[62] If OSC concludes that corrective action is, in fact, warranted, and if OSC is unable to obtain a satisfactory correction of the practice from the corresponding agency, it may petition MSPB to grant corrective action, and, if OSC proves its claim, MSPB may order the corrective action it deems appropriate.[63]

C. The Competitive, Excepted, and Senior Executive Services

The Federal civil service consists of three services: the competitive service, the excepted service, and Senior Executive Service.[64] In the competitive service, individuals must complete a competitive hiring process before being appointed. This process may include a written test or an

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[62] 5 U.S.C. 1214(a)(1)(A), (a)(5).
[63] *See* 5 U.S.C. 1214(b)(2)(B), (C), (b)(4)(A). But note that, by statute, OSC cannot request corrective action as to 5 U.S.C. 2302(b)(11). *See* 5 U.S.C. 2302(e)(2).
[64] 5 U.S.C. 2102(a)(1) (competitive service); 5 U.S.C. 2103(a) (excepted service); 5 U.S.C. 3132(a)(2) (Senior Executive Service).

equivalent evaluation of the individual's relative level of knowledge, skills, and abilities necessary for successful performance in the position to be filled.[65]

While most government employees are in the competitive service, about one-third are in the excepted service.[66] The excepted service includes all positions in the Executive Branch that are specifically excepted from the competitive service by statute, Executive order, or by OPM regulation.[67] For positions excepted from the competitive service by statute, selection must be made pursuant to the provisions Congress enacted. Applicants for excepted service positions under title 5, U.S. Code, like applicants for the competitive service, are to be selected "solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."[68] Agencies filling positions in the excepted service "shall select … from the qualified applicants in the same manner and under the same conditions required for the competitive service."[69] This means that agencies should generally afford preference in the same manner they would have for the competitive service, though, in a few situations[70] where the reason for the exception makes this essentially impossible, OPM (or the President) has exempted the position from regulatory requirements and imposed a less stringent standard.[71]

The President is authorized by statute to provide for "necessary exceptions of positions from the competitive service" when warranted by "conditions of good administration."[72] The President has delegated to OPM—and, before that, to its predecessor, the CSC—concurrent authority to except positions from the competitive service when it determines that appointments

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[65] *See* 5 U.S.C. 3304 ("An individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination under section 3302 of this title."); *see also* U.S. Office of Personnel Management, "Competitive Hiring," https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/.
[66] *See* Congressional Research Service, "Categories of Federal Civil Service Employment; A Snapshot," at p. 4 (May 26, 2019), https://sgp.fas.org/crs/misc/R45635.pdf.
[67] See 5 U.S.C. 2103; 5 CFR parts 213, 302.
[68] 5 U.S.C. 2301(b)(1).
[69] 5 U.S.C. 3320.
[70] *See infra* notes 139-142.
[71] 5 CFR 302.101(c).
[72] 5 U.S.C. 3302.

thereto through competitive examination are not practicable.[73] The President has further delegated authority to OPM to "decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule."[74]

OPM has exercised its delegated authority, and implemented exercises of presidential authority, by prescribing five schedules for positions in the excepted service, which are currently listed in 5 CFR part 213:

- Schedule A—Includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants, such as attorneys, chaplains, and short-term positions for which there is a critical hiring need.
- Schedule B—Includes positions that are not of a confidential or policy-determining character for which it is not practicable to examine applicants. Unlike Schedule A positions, Schedule B positions require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level. Schedule B positions engage in a variety of activities, including policy analysis, teaching, and technical assistance.
- Schedule C—Includes positions that are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. These positions include most political appointees below the cabinet and subcabinet levels.
- Schedule D—Includes positions that are not of a confidential or policy-determining character for which competitive examination makes it difficult to recruit certain students or recent graduates. Schedule D positions generally require an applicant to satisfy basic qualification standards established by OPM for the relevant occupation and grade level. Positions include those in the Pathways Programs.

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[73] E.O. 10577, sec. 6.1(a) (1954); 5 CFR 6.1(a) (1988) ("The Commission is authorized to except positions for the competitive service whenever it determines that appointments thereto through competitive examination are not practicable" and that "[u]pon the recommendation of the agency concerned, it may also except positions which are of a confidential or policy-determining character.").

[74] E.O. 10577 sec. 6.1(b); 5 CFR 6.1(b); *see* 28 FR 10025 (Sept. 14, 1963) (reorganizing the civil service rules).

- Schedule E—Includes positions of administrative law judges.[75]

As described *supra*, competitive and excepted service incumbents, except those in Schedule C, become "employees" for purpose of civil service protections after they satisfy the length of service conditions in 5 U.S.C. 7511. Excepted service employees, except those in Schedule C and some employees in certain Federal agencies excepted by statute, maintain the same notice and appeal rights for adverse actions and performance-based actions as competitive service employees.[76] However, and as noted here, excepted service employees must satisfy different durational requirements before these rights become available. So-called "preference eligibles"—specified military veterans and family members with derived preference pursuant to statute[77]—in an executive agency, the Postal Service, or the Postal Rate Commission must complete one year of current continuous service to avail themselves of the relevant notice and appeal rights.[78] Employees in the excepted service who are not preference eligibles and (1) are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service, or (2) have completed two years of current or continuous service in the same or similar position, have the same notice and appeal rights as qualifying employees in the competitive service.[79]

Likewise, any employee who is (1) a preference eligible; (2) in the competitive service; or (3) in the excepted service and covered by subchapter II of chapter 75, and who has been

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[75] 5 CFR 6.2.
[76] *See* 5 U.S.C. 4303, 7513(d). There are, however, some notable differences between non-removal protections afforded to competitive service and excepted service employees, such as assignment rights in the event of a reduction in force. *See* 5 CFR 351.501 and 502. Employees who are reached for release from the competitive service during a reduction in force are entitled to an offer of assignment if they have "bump" or "retreat" rights to an available position in the same competitive area. "Bumping" means displacement of an employee in a lower tenure group or a lower subgroup within the same tenure group. "Retreating" means displacement of an employee in the same tenure group and subgroup. Meaning, they are entitled to the positions of employees with fewer assignment rights. Employees in excepted service positions have no assignment rights to other positions unless their agency, at the agency's discretion, chooses to offer these rights to positions. Even with these differences, merit system principles are at the core of civil service protections relating to hiring, conduct, and performance matters as applied to both career competitive and excepted service employees.
[77] *See* 5 U.S.C. 2108(3).
[78] *See* 5 U.S.C. 7511(a)(1)(B).
[79] *See* 5 U.S.C. 7511(a)(1)(C).

reduced in grade or removed under chapter 43, is entitled to appeal the action to MSPB.[80] However, these appeal rights do not apply to (1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under 5 U.S.C 3321(a)(2); (2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed one year of current continuous employment under other than a temporary appointment limited to one year or less; or (3) the reduction in grade or removal of an employee in the excepted service who has not completed one year of current continuous employment in the same or similar positions.[81]

D. The Prior Schedule F

On October 21, 2020, President Donald Trump, through Executive Order 13957, "Creating Schedule F in the Excepted Service," sought to alter the carefully crafted legislative balance that Congress struck in the CSRA.[82] That Executive order, if fully implemented, could have transformed the civil service by purportedly stripping adverse action rights under chapter 75, performance-based action rights under chapter 43, and appeal rights from large swaths of the Federal workforce—thereby turning them into at-will employees—and by eliminating statutory requirements built into the Federal hiring process intended to promote the objective of merit-based hiring decisions. It would have upended the longstanding principle that a career Federal employee's tenure should be linked to their performance, rather than to the nature of the position that the employee encumbers. It also could have reversed longstanding requirements that, among other things, prevent political appointees from "burrowing in" to career civil service jobs in violation of merit system principles. Executive Order 13957 was revoked, and Schedule F was abolished, by President Joseph Biden through Executive Order 14003, "Protecting the Federal Workforce."[83]

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[80] *See* 5 U.S.C. 4303(e).
[81] *See* 5 U.S.C. 4303(f).
[82] 85 FR 67631 (Oct. 21, 2020).
[83] 86 FR 7231 (Jan. 22, 2021).

1. Adverse Action Rights, Performance-Based Action Rights, and Appeals

Section 5 of Executive Order 13957 directed agency heads to review their entire workforces to identify any employees covered by chapter 75's adverse action rules (which apply broadly to employees in the competitive and excepted service) who occupied positions of a "confidential, policy-determining, policy-making, or policy-advocating character"—including positions the agency assessed, for the first time, to arguably include these characteristics—and to petition OPM for its approval to place them in Schedule F, a newly-created category of positions excepted from the competitive service. If these positions had, in fact, been placed in Schedule F, the employees encumbering them would purportedly have been stripped of the adverse action procedural rights under chapter 75 and MSPB appeal rights discussed *supra*, thus allowing them to be terminated at will, by virtue of the placement of the positions they occupied in this new schedule (and regardless of any rights they had already accrued).[84]

An express rationale of this action was to make it easier for agencies to "expeditiously remove poorly performing employees from these positions without facing extensive delays or litigation."[85] This new sweeping authority was purportedly necessary for the President to have "appropriate management oversight regarding" the career civil servants working in positions deemed to be of a "confidential, policy-determining, policy-making or policy-advocating character," and to incentivize employees in these positions to display what presidential appointees at an agency would deem to be "appropriate temperament, acumen, impartiality, and sound judgment," in light of the importance of these functions.[86] Executive Order 13957 did not

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[84] Since performance-based actions under 5 U.S.C. 4303 are tied, in part, to subchapter II of chapter 75, employees would purportedly have also been stripped of performance-based action procedural rights and MSPB appeal rights, had an agency chosen to proceed with an action under chapter 43.

[85] E.O. 13957, sec. 1.

[86] The Executive order provided that "[c]onditions of good administration . . . make necessary excepting such positions from the adverse action procedures set forth in chapter 75 of title 5, United States Code." E.O. 13957, sec. 1. We note that the "conditions of good administration" language appears in 5 U.S.C. 3302. Section 3302 relates only to exclusions of positions from the competitive service when conditions of good administration warrant and does not purport to confer authority on the President to except positions from the provisions of chapter 75. Similarly, chapter 75 itself does not itself purport to confer authority on the President to except positions from the scope of chapter 75. President Trump appeared to be attempting to effectuate the exception by requiring agencies to identify career positions in the competitive or excepted service that are "not normally subject to change as a result of a

acknowledge existing mechanisms to provide "appropriate management oversight," such as chapter 43 and chapter 75 procedures, or the multiple management controls that agencies have in place to escalate matters of importance to agency administrators[87].

Executive Order 13957 instructed agency heads to review existing positions to determine which, if any, should be placed into Schedule F. The Executive order also instructed that, after agency heads conducted their initial review, they were to move quickly and petition OPM by January 19, 2021—the day before Inauguration Day—to place positions within Schedule F. After that, agency heads had another 120 days to petition OPM to place additional positions in Schedule F. In contrast to past excepted service schedules designed to address unique hiring needs upon a determination that appointments through the competitive service was "not practicable,"[88] movement into Schedule F was designed to be broad and numerically unlimited, potentially affecting a substantial number of jobs across all Federal agencies. For example, according to the Government Accountability Office, the Office of Management and Budget petitioned to place 68 percent of its workforce, more than 400 employees, within Schedule F.[89]

2. Hiring

Section 3 of Executive Order 13957 provided that "[a]ppointments of individuals to positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a presidential transition shall be made under Schedule F."[90] The stated rationale for removing these positions from the competitive hiring process (or from other excepted service schedules in which some of these positions were

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Presidential transition" (and thus not encompassed by Schedule C) but that are nevertheless of a "confidential, policy-determining, policy-making, or policy advocating character," to facilitate the movement of such positions to a new Schedule F. In essence, President Trump thought to separate this phrase from its historical context, which was to describe positions normally placed in Schedule C, which positions normally *are* subject to change as a result of a presidential transition.

[87] Matters of importance can be raised to agency administrators in various ways, such as by filing a complaint with an agency's Inspector General, raising concerns with an agency's human resources office, and filing a grievance.

[88] *See infra* notes 137-141.

[89] Government Accountability Office, "Civil Service – Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category for Federal Positions," (Sept. 2022), https://www.gao.gov/assets/gao-22-105504.pdf.

[90] 85 FR 67632.

previously placed) was, again, said to be because of the importance of their corresponding duties, and the need to have employees in these positions that display "appropriate temperament, acumen, impartiality, and sound judgment."[91] The stated purpose was to "provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures"[92] or, presumably, for positions already in the excepted service, without the constraints imposed by 5 CFR part 302. Executive Order 13957 indicated that this change was intended to "mitigate undue limitations on their selection" and relieve agencies of "complicated and elaborate competitive service processes or rating procedures that do not necessarily reflect their particular needs." [93] These changes were to give agencies "greater ability and discretion to assess critical qualities in applicants to fill these positions, such as work ethic, judgment, and ability to meet the particular needs of the agency."[94]

Executive Order 13957 failed to address the fact that the competitive hiring process permits agencies to assess all competencies that are related to successful performance of the job, including appropriate temperament, acumen, impartiality, and sound judgment and fulfill the congressional policy to confer a preference on eligible veterans or their family members entitled to derived preference. The qualifications requirements, specialized experience, interview process and other assessment methodologies available to hiring managers facilitate an agency's ability to identify the best candidate. Executive Order 13957 also failed to address the existence of longstanding rules, grounded in the need to establish lack of unlawful bias in proceedings under Federal anti-discrimination statutes, that require assessment of any such competencies.[95] The summary imposition of new competencies without validating them would be contrary to existing

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[91] 85 FR 67631.
[92] 85 FR 67631.
[93] 85 FR 67632. The procedures Congress has adopted for hiring in the competitive service were designed, in part, to implement the stated congressional policy of veterans' preference. *See* 5 U.S.C. 1302. How this congressional mandate would be realized in these circumstances was not addressed.
[94] 85 FR 67632.
[95] *See* 5 CFR part 300. Validation generally requires that the criteria and methods by which job applicants are evaluated have a rational relationship to performance in the position to be filled.

statutory requirements and could potentially be discriminatory in application, even if that were not the agency's intent.

3. Political Appointees in Career Civil Service Positions

An additional concern relating to Executive Order 13957 was that it could have facilitated burrowing. "Burrowing" occurs when a current (or recently departed) political appointee is hired into a permanent competitive service, nonpolitical excepted service, or career Senior Executive Service position without having to compete for that position or having been appropriately selected in accordance with merit system principles and the normal competitive or excepted service procedures applicable to the position under civil service law. OPM has long required that "politics play no role when agencies hire political appointees for career Federal jobs."[96] Indeed, OPM adopted procedures to review appointments of such individuals for compliance, and Congress has now essentially codified that procedure by requiring OPM to submit periodic reports of its findings.[97] Executive Order 13957 potentially would have allowed agency heads to move current political appointees into new Schedule F positions, or vacancies in existing positions transferred to Schedule F, without competition and in a manner not based on merit system principles—in effect, allowing political appointees on Schedule C appointments, who would normally expect to depart upon a presidential transition, to "burrow" into permanent civil service appointments.

Ultimately, Executive Order 13957 was rescinded before any positions could be placed into Schedule F. As noted above, on January 22, 2021, President Joseph Biden issued Executive Order 14003, "Protecting the Federal Workforce," stating that "it is the policy of the United States to protect, empower, and rebuild the career Federal workforce," and that the Schedule F

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[96] OPM, "Guidelines on Processing Certain Appointments and Awards During the 2020 Election Period," https://chcoc.gov/sites/default/files/2020%20Appointments%20and%20Awards%20Guidance%20Attachments_508.pdf.

[97] *See* The Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvement Act of 2015. Pub. L. 114-136 (Mar. 18, 2016), which requires OPM to submit these reports to Congress.

policy "undermined the foundations of the civil service and its merit system principles."[98] Executive Order 14003 rescinded Executive Order 13957 and abolished Schedule F.[99]

E. OPM's Authority to Regulate

The OPM Director has direct statutory authority to execute, administer, and enforce all civil service rules and regulations as well as the laws governing the civil service. [100] The Director also has authorities Presidents have conferred on OPM pursuant to the President's statutory authority.[101]

As explained here, in enacting the CSRA, Congress conveyed broad regulatory authority over Federal employment directly to OPM throughout title 5.[102] In addition, many of these specific statutory enactments, including chapter 75, expressly confer on OPM authority to regulate. Pursuant to 5 U.S.C. 7514, OPM may issue regulations to carry out the purpose of subchapter II of chapter 75, and pursuant to 5 U.S.C. 7504, OPM may issue regulations to carry out the purpose of subchapter I of chapter 75.

The same is true with respect to chapter 43. Pursuant to 5 U.S.C. 4305, OPM may issue regulations to carry out subchapter I of chapter 43.

Prior to the reorganization proposal[103] approved by Congress that created OPM, the CSC exercised its broad authorities, in part, to establish rules and procedures concerning the terms of being appointed in the competitive or excepted service and of moving between the competitive and excepted service. Since its inception in 1978, OPM has leveraged that same authority—

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[98] E.O. 14003, 86 FR 7231, 7231 (Jan. 22, 2021) https://www.federalregister.gov/documents/2021/01/27/2021-01924/protecting-the-federal-workforce.

[100] *See* 5 U.S.C. 1103(a)(5)(A). This authority does not include functions for which either MSPB or OSC is primarily responsible. Among other authorities, MSPB has specific adjudicative and enforcement authority upon the satisfaction of threshold showings that an employee has established appeal rights. It also has authority to administer statutory provisions relating to adjudication of adverse action appeals. OSC has specific and limited investigative and prosecutorial authority. *See* 5 U.S.C. 1213-1216.

[101] *See* Presidential rules codified at 5 CFR parts 1 through 10.

[102] *See, e.g.,* 5 U.S.C. 1103, 1302, 3308, 3317, 3318, 3320; Chapters 43, 53, 55, 75.

[103] President Jimmy Carter, *Reorganization Plan* No. 2, sec. 101 and 102 (May 23, 1978). The plan specifies in section 102 that "Except as otherwise specified in this Plan, all functions vested by statute in the United States Civil Service Commission, or the Chairman of said Commission, or the Boards of Examiners established by 5 U.S.C. 1105 are hereby transferred to the Director of the Office of Personnel Management."

including from Executive Order 10577,[104] as amended, as well as from statutory authorities such as 5 U.S.C. 1103(a)(5) and 5 U.S.C. 1302—to establish rules and procedures concerning the effects on an employee of being appointed in the competitive or excepted service and of moving between the competitive and excepted service. OPM has used these authorities to create government-wide rules for Federal employees regarding a wide range of topics, such as hiring, promotion, performance assessment, pay, leave, political activity, retirement, and health benefits.[105] For instance:

- 5 CFR part 6 requires OPM to publish in the *Federal Register* on a regular basis the list of positions that are in the excepted service.[106]

- 5 CFR 212.401(b), promulgated in 1968,[107] well before the CSRA, provides that "[a]n employee in the competitive service at the time his position is first listed under Schedule A, B, or C remains in the competitive service while he occupies that position." This regulation was intended to preserve competitive service status and rights for employees who were initially appointed to positions in the competitive service and whose positions were subsequently moved into the excepted service (such as administrative law judges).[108]

- 5 CFR 302.102, promulgated in part to implement 5 U.S.C. 3320, provides that when an agency wishes to move an employee from a position in the competitive service to one in the excepted service, the agency must: "(1) Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service while he/she occupies the position; and (2) Obtain from the employee a written statement that he/she

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[104] 87 FR 7521 (Nov. 22, 1954).
[105] *See, e.g.,* 5 CFR parts 2, 6, 212, 213, 335, 430, 550, 630, 733, 734, 831, 890.
[106] 5 CFR 6.1(c), 6.2; *see* 28 FR 10025 (Sept. 14, 1963), as amended by E.O. 11315; E.O. 12043, 43 FR 9773 (Mar. 10, 1978); E.O. 13562, 75 FR 82587 (Dec. 30, 2010); *see also* E.O. 14029, 86 FR 27025 (May 19, 2021).
[107] *See* 33 FR 12408 (Sept. 4, 1968).
[108] *Id.*

understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service."[109]

- 5 CFR part 432 sets forth the procedures to be followed, if an agency opts to pursue a performance-based action against an employee under chapter 43 of title 5, U.S. Code. As with the adverse action rules in part 752, the rules applicable to performance-based actions apply broadly to employees in the competitive and excepted service, with narrowly defined exceptions that include political appointees.[110]

- 5 CFR part 752 implements chapter 75 of title 5, U.S. Code and establishes the procedural rights that apply when an agency commences the process for taking an adverse action against an "employee," as defined in 5 U.S.C. 7511. These regulations apply broadly to employees in the competitive and excepted service meeting the section 7511 criteria.[111]

Moreover, the President, pursuant to his own authorities under the CSRA, as codified at 5 U.S.C. 3301 and 3302, has explicitly delegated a variety of these authorities to OPM concerning execution, administration, and enforcement of the competitive and excepted services. For example, under Civil Service Rule 6.1(a), "OPM may except positions from the competitive service when it determines that . . . appointments thereto through competitive examination are not practicable."[112] And under Civil Service Rule 6.1(b), "OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule."[113]

OPM has other regulatory authority, for example, under 5 CFR parts 5 and 10, to oversee the Federal personnel system and agency compliance with merit system principles and supporting laws, rules, regulations, Executive orders, and OPM standards. OPM also administers

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[109] *See* 55 FR 9407 (Mar. 14, 1990), as amended at 58 FR 58261 (Nov. 1, 1993).
[110] *See* 54 FR 26179 (June 21, 1989), redesignated and amended at 54 FR 49076 (Nov. 29, 1989), redesignated and amended at 58 FR 65534 (Dec. 15, 1993); 85 FR 65982 (Oct. 16, 2020); 87 FR 67782 (Nov. 10, 2022).
[111] *See* 74 FR 63532 (Dec. 4, 2009), as amended at 85 FR 65985 (Oct. 16, 2020); 87 FR 67782 (Nov. 10, 2022).
[112] 5 CFR 6.1(a).
[113] 5 CFR 6.1(b).

the statutory provisions governing the rights of Federal employees in connection to adverse agency actions.[114]

II. Proposed Amendments

OPM proposes amending its regulations in 5 CFR chapter I, subchapter B, as summarized below to clarify and reinforce longstanding civil service protections and merit system principles.

A. Civil Service Protections

Adverse action protections and related eligibility and procedures are covered in 5 U.S.C. chapter 75. subchapter I covers suspensions for 14 days or less and 5 U.S.C. 7501 defines "employee" for the purposes of adverse action procedures for suspensions of this duration. Under 5 U.S.C. 7504, OPM may prescribe regulations to carry out the purpose of subchapter I. Subchapter II covers removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less. In this subchapter, 5 U.S.C. 7511 defines "employee" for the purposes of entitlement to adverse action procedures. Under 5 U.S.C. 7514, OPM may prescribe regulations to carry out the purposes of subchapter II except as it concerns any matter where MSPB may prescribe regulations.

OPM proposes amending 5 CFR part 752 (Adverse Actions) to reflect OPM's longstanding interpretation of 5 U.S.C. 7501 and 5 U.S.C 7511 and the congressional intent underlying the statutes, including exceptions to civil service protections outlined in 5 U.S.C. 7511(b). OPM proposes to clarify that employees who are moved from the competitive to the excepted service, or from one excepted service schedule to another, retain the status and civil service protections they had already accrued. On the other hand, an employee may relinquish such rights or status by voluntarily applying for, accepting, and then encumbering a position that explicitly results in the loss of, or different, rights.

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[114] *See* 5 U.S.C. 7514 (granting OPM the authority to "prescribe regulations to carry out the purpose of" subchapter II of chapter 75 of title 5); *see also* 5 U.S.C. 7511(c), 7513(a), *see also infra*, Sec. II.A.

OPM also proposes revising its regulations at subpart B of 5 CFR part 752 (Regulatory Requirements for Suspension for 14 Days or Less) to conform this subpart with statutory language in 5 U.S.C. 7501. The proposed revisions are intended to reinforce which employees are covered by subpart B when an agency decides to take an action under this subpart for such cause as will promote the efficiency of the service.

OPM proposes revising subpart D of 5 CFR part 752 (Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less) to clarify that employees in the competitive and excepted services (except for positions in Schedule C) who have fulfilled their probationary or trial period requirement or the durational requirements under 5 U.S.C. 7511 will retain the rights conferred by subchapter II if moved from the competitive service to the excepted service or from within excepted service to a new excepted service schedule, except in the case where an employee relinquishes such rights or status by voluntarily seeking, accepting, and encumbering a position that explicitly results in a loss of, or different, rights.

Performance-based actions under chapter 43 and related eligibility and processes are covered in 5 U.S.C. 4303. Section 4303(e) defines when an employee is entitled to appeal rights to MSPB. Notably, chapter 43 cross-references chapter 75, providing that any employee who is a preference eligible, in the competitive service, or covered by subchapter II of chapter 75, and who has been reduced in grade or removed under section 4303 is entitled to appeal the action to MSPB under 5 U.S.C. 7701. Under 5 U.S.C. 4305, OPM may issue regulations to carry out subchapter I of chapter 43.

OPM proposes the following changes to 5 CFR part 752:

Part 752—Adverse Actions, Subpart B

As a preliminary matter, subpart B of part 752 applies to suspensions for 14 days or less. Chapter 75 of title 5, U.S. Code, provides a straightforward process for agencies to use in adverse actions involving suspensions of this duration. The proposed changes conform this

subpart with statutory language to clarify which employees are covered by subpart B when an agency decides to take an action under this subpart for such cause as will promote the efficiency of the service.

Section 752.201 Coverage.

Section 752.201(b) outlines which employees are covered by subpart B. OPM is proposing to modify the language in § 752.201(b) to further clarify when an employee has or retains coverage under the procedures of this subpart.

OPM proposes to revise subpart B of part 752 to conform to the decisions of the Federal Circuit in *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002). These cases now guide the way MSPB applies 5 U.S.C. 7511(a)(1), which defines employees who have the right to appeal major adverse actions, such as removals, to MSPB. *Van Wersch* addressed the definition of "employee" for purposes of nonpreference eligibles in the excepted service and, a few years later, *McCormick* addressed the meaning of "employee" for purposes of the competitive service. As explained *supra*, section 7511(a)(1) states that "employees" include individuals who meet specified conditions relating to the duration of their service or, for nonpreference eligibles, relating to their probationary or trial period status. The Federal Circuit explained that the word "or," here, refers to alternatives: some individuals who traditionally had been considered probationers with limited rights are actually entitled to the same appeal rights afforded to non-probationers if the individuals meet the other requirements of section 7511(a)(1), namely (1) their prior service is "current continuous service," (2) the current continuous service is in the "same or similar positions" for purposes of nonpreference eligibles in the excepted service, and (3) the total amount of such service meets a one or two-year requirement, and was not in a temporary appointment limited to one or two years, depending on the service.[115]

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[115] *See McCormick*, 307 F.3d at 1341-43; *Van Wersch*, 197 F.3d at 1151-52.

In a prior rulemaking,[116] OPM modified its regulations for appealable adverse actions in 5 CFR part 752, subpart D, to align with *Van Wersch* and *McCormick* and statutory language. OPM has consistently advised agencies regarding 5 U.S.C. 7501 in light of the Federal Circuit's interpretation of similar statutory language in 5 U.S.C. 7511. In this rule, OPM proposes to modify language in 5 CFR 752.201(b)(1) to conform with the statutory language in 5 U.S.C. 7501. OPM's proposed revision to § 752.201(b)(1) prescribes that, even if an employee in the competitive service who has been suspended for 14 days or less is serving a probationary or trial period, the employee retains the procedural rights provided under 5 U.S.C. 7503 if the individual has completed one year of current continuous employment in the same or similar position under other than a temporary appointment limited to one year or less.

OPM also proposes to amend § 752.201(b)(1) through (b)(6) to clarify that individuals retain their status as covered employees if they are moved involuntarily from the competitive service to the excepted service, unless specifically prohibited by law.

Finally, OPM proposes to add a new 5 CFR 752.201(c)(7) to further clarify that employees in positions determined to be of a confidential policy-determining, policy-making, or policy-advocating character as defined in 5 CFR 210.102 are excluded from coverage under subpart B of part 752 because, as explained *infra*, Congress intended these positions to mean noncareer, political appointments.

Part 752—Adverse Actions, Subpart D

Subpart D of part 752 applies to removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less. This includes, but is not limited to, adverse actions based on misconduct or unacceptable performance. The proposed changes are intended to reinforce the civil service protections that apply when an agency pursues certain adverse actions for the efficiency of the service, under chapter 75.

Section 752.401 Coverage.

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[116] OPM, "Career and Career-Conditional Employment and Adverse Actions," 73 FR 7187 (Feb. 7, 2008).

Section 752.401(c) outlines which employees are covered by subpart D. OPM is proposing to modify the language in § 752.401(c) to further clarify when an employee has or retains coverage under the procedures of this subpart.

The proposed changes add language to provide that an employee who occupies a position that is moved from the competitive service into the excepted service, or from one excepted service schedule to another, is covered by the regulatory requirements for removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less.

The proposed changes to § 752.401 reflect the impact of statutory requirements—namely, that once an employee meets certain conditions, the individual gains certain statutory procedural rights and civil service protections which cannot be taken away from the individual by simply moving the employee's position into the excepted service, or within the excepted service, as long as the employee continues to occupy the same or similar position. These proposed regulatory changes are consistent with how similar statutory rights have been interpreted by Federal courts and MSPB when employees change jobs by moving to a different Federal agency.[117]

In addition, OPM proposes to update § 752.401(c)(2)(ii) to reflect the repeal of 10 U.S.C. 1599e, effected December 31, 2022.[118] Prior to the repeal, certain individuals hired at the Department of Defense were subject to a two-year probationary period. The repeal restores a one-year probationary period for covered Department of Defense employees.

Finally, OPM proposes to modify 5 CFR 752.401(d)(2) to further clarify that political appointees intended to work on matters of a confidential policy-determining, policy-making, or policy-advocating character, as defined in § 210.102, are excluded from coverage under subpart D of part 752.

B. Positions of a Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character

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[117] *See, e.g.*, *McCormick*, 307 F.3d at 1341-43; *Greene v. Def. Intel. Agency*, 100 M.S.P.R. 447 (2005).
[118] *See* Pub. L. 117-81, Sec. 1106(a)(1).

OPM proposes to amend 5 CFR part 210 (Basic Concepts and Definitions (General)), to add a definition for the terms "confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining." Positions of this nature are excepted from the chapter 75 protections described above. OPM proposes to define these terms to make explicit OPM's interpretation of this exception in 5 U.S.C. 7511(b), which is that Congress intended to except from chapter 75's civil service protections individuals in positions of a character exclusively associated with a noncareer, political appointment that is both (a) identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and (b) that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

Specifically, OPM proposes to add this definition for "confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining" to 5 CFR 210.102, which applies throughout OPM's Civil Service Regulations in 5 CFR chapter I, subchapter B. OPM is proposing to define these terms as descriptors for the positions held by noncareer, political employees because the terms are currently used in the regulations to describe, among other things, a "position" or the "character" of a position. OPM is also proposing conforming changes to 5 CFR 213.3301, 302.101, 432.101, 451.302, 752.201, and 752.401 to standardize the phrasing used to describe this type of position.

As explained more fully later in this section, Congress has been careful to strike a balance between career employees—who are covered by civil service protections under chapter 75 because of the need for a professional civil service no matter whether they are in the competitive or excepted service—and political appointees who serve as confidential assistants and advisors to the President and to key appointed officials who have direct responsibility for carrying out the Administration's political objectives. These political appointees are not required to compete for their positions in the same manner as career employees, serve at the pleasure of their superiors,

and have no expectation of continued employment beyond the presidential administration during which their appointment occurred.

When Congress created the adverse action protections under chapter 75, it excluded employees appointed by the President, with or without Senate confirmation, and employees in the excepted service "whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character."[119] Likewise, Congress specifically excluded from the positions safeguarded against prohibited personnel practices under 5 U.S.C. 2302(a)(2)(B)(i) any position that is "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character."

As explained *infra*, these narrow exceptions have long been interpreted to apply to noncareer, political appointees typically listed in Schedule C. Political appointees have long been considered a powerful, but narrow, cross section of Executive Branch leadership. These positions "are relatively few in number" and consist "of only the highest positions,"[120] and, in practice, a limited number of confidential staff to support the work of the individuals in such positions.

The context in which the CSRA was enacted bolsters the interpretation that "confidential, policy-determining, policy-making, or policy-advocating" positions, and their exclusion from civil service protections, refers to political appointees and not career civil servants. Congress revised parts of the CSRA immediately following the Supreme Court's decision in *Elrod v. Burns*,[121] where the Court addressed the constitutionality of political patronage-based dismissals from government employment under the First Amendment. The Court explained that "a nonpolicymaking, nonconfidential government employee" cannot be "discharged or threatened

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[119] *See* 5 U.S.C. 7511(b)(2).
[120] *See* "Report of the President's Committee, Administrative Management in the Government of the United States," p. 8 (Jan. 1937).
[121] 427 U.S. 347, 354 (1976) (explaining that "strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act").

with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."[122]

Consistent with this background, the CSRA's legislative history explains the exclusion for "confidential, policy-determining, policy-making, or policy-advocating" employees from section 7511 as "an extension of the exception for appointments confirmed by the Senate" and covering political appointee positions, *i.e.*, those currently placed in Schedule C (positions at GS-15 and below) or filled by Non-career Executive Assignment (GS-16, -17, and -18).[123] It states that "[t]he concept of tenure and protection against dismissal is contrary to the confidential relationship of incumbent and supervising official, and the commitment to Administration policy objectives required by those filling such positions."[124]

Congress made significant amendments to section 7511 through the Civil Service Due Process Amendments Act of 1990, which expanded MSPB jurisdiction to excepted service employees who historically were not entitled to adverse action rights. The legislative history of the 1990 Act confirms that the intent was to expand appeal rights for excepted service employees but retain the exclusion for political appointees. It states:

> The bill generally extends procedural rights to attorneys, teachers, chaplains, and scientists, but not to presidential appointees. … [T]he key to the distinction between those to whom appeal rights are extended and those to whom such rights are not extended is the expectation of continuing employment with the Federal Government. Lawyers, teachers, chaplains, and scientists have such expectations; presidential appointees and temporary workers do not.
> …
> Schedule C, positions of a confidential or policy-determining character. … are political appointees who are specifically excluded from coverage under section 7511(b) of title 5. H.R. 3086 does not change the fact that these individuals do not have appeal rights. The bill explicitly denies procedural protections to presidential appointees, individuals in Schedule C positions and individuals appointed by the President and confirmed by the Senate. Employees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed. They

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[122] *Id.* at 375 (1975) (Stewart and Blackmun, JJ., concurring in the judgment); *see, e.g.*, *Carver v. Dennis*, 104 F.3d 847, 850 n.5 (6th Cir. 1997) (explaining that "[t]he three-justice plurality opinion and two-justice concurrence in *Elrod*" so held).
[123] S. Rep. No. 95-969, at 48 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2770.
[124] Legislative History of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service, House of Representatives, Volume No. II, Committee Print No. 96-2, 96th Congress, 1st Session (Mar. 17, 1979).

> explicitly serve at the pleasure of the President or the presidential appointee who appointed them.[125]

In a case concerning the application of 5 U.S.C. 2302(a)(2)(B)(i) (related to prohibited personnel practices), which also contains an exception for positions of a "confidential, policy-determining, policy-making, or policy-advocating character," MSPB interpreted this legislative history to indicate that the exclusion of civil service protections at section 2302(a)(2)(B)(i) was intended to cover "political appointees," as is the case with section 7511(b)(2). In *O'Brien v. Office of Independent Counsel*, 74 M.S.P.R. 192 (1997), the Board stated:

> Schedule C, the only category to include positions of a confidential or policy-determining character, authorizes appointments to positions "which are policy-determining or which involve a close and confidential working relationship with the head of the agency or other key appointed officials." 5 C.F.R. § 213.3301. This regulation, while using the same language as 5 U.S.C. § 2302(a)(2)(B), adopts a narrow definition of a position of "a confidential or policy-determining nature," i.e., involving "a close and confidential working relationship with the head of an agency or other key appointed officials." 5 C.F.R. § 213.3301(a). The word "confidential" in that regulation does not necessarily refer to matters that are to be kept secret but instead to the nature of the relationship between the employee and the head of the agency or other key appointed officials.
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> Further support for the notion that the terms of the exception found at 5 U.S.C. § 2302(a)(2)(B)(i) are a shorthand way of describing "political appointee" positions can be found in the legislative history of the 1990 Civil Service Due Process Amendments to the CSRA, which extended adverse action appeal rights to a broader class of excepted service employees than had previously been covered. 5 U.S.C. § 7511. The Act retained the exclusions found at 5 U.S.C. § 7511(b), however, and the legislative history describes excepted service employees as those in either Schedule A, Schedule B, or Schedule C and states that Schedule C positions of a confidential or policy-determining character are "political appointees who are specifically excluded from coverage under 5 U.S.C. § 7511(b)." H.R.Rep. No. 328, 101st Cong., 2d Sess. 4–5 (1989), reprinted in 1990 U.S.C.C.A.N. 698–99. Although the Board in certain cases has considered the question of who is excluded under 5 U.S.C. § 7511(b) as a "confidential, policy-determining, policy-making or policy-advocating" employee, it did not resolve those cases on that issue. *See Thompson v. Department of Justice*, 61 M.S.P.R. 364, 368 (1994); *Briggs v. National Council on Disability*, 60 M.S.P.R. 331, 333–36 (1994). Both 5 U.S.C. § 2302(a)(2)(B)(i) and 5 U.S.C. § 7511(b) use the phrase "confidential, policy-determining, policy-making, or policy-advocating" to exclude certain positions. We know of no reason why Congress would intend that it be interpreted differently in each of the two parts of Title 5.[126]

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[125] H.R. Rep. No. 101-328, 4-5 (1989), reprinted in 1990 U.S.C.C.A.N. 695, 698-99.
[126] 74 M.S.P.R. at 207-08.

Improperly applying the term "of a confidential, policy-determining, policy-making, or policy-advocating character" to describe positions held by *career* employees, who have an expectation of continuing employment beyond the presidential administration during which they were appointed, and to strip them of civil service protections, would be contrary to congressional intent and decades of applicable case law and practice. Congress carefully balanced the need for long-term employees who have knowledge of the history, mission, and operations of their agencies with the need of the President for individuals in positions who will ensure that the specific policies of the Administration will be pursued. An "excessive preoccupation with the meaning of [this] term in isolation distorts the purpose of the exception."[127] The term has long been interpreted as "a shorthand way of describing positions to be filled by political appointees," including any appointment required or authorized to be made by the President, or by an agency head when there are "indications that the appointment was intended to be, or in fact was, made with any political considerations in mind."[128]

In this proposed rule, therefore, OPM is making explicit this longtime, consistent understanding that positions of a "confidential, policy-determining, policy-making, or policy-advocating character" refer to noncareer, political appointments. Specifically, OPM is proposing to modify 5 CFR 210.102 to define the terms "Confidential, policy-determining, policy-making, or policy-advocating" and "Confidential or policy determining" as they are used through the Civil Service Regulations in 5 CFR chapter I, subchapter B, to describe positions that are: "of a character exclusively associated with a noncareer, political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred."

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[127] *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 231–32 (1986).
[128] *O'Brien v. Off. of Indep. Counsel*, 74 M.S.P.R. 192, 206 (1997) (quoting *Special Counsel*, 31 M.S.P.R. at 231).

C. Agency Procedures for Moving Employees

OPM proposes revising 5 CFR part 302 (Employment in the Excepted Service) to require that Federal agencies follow specific procedures upon moving positions from the competitive service to the excepted service or, if the position is already in the excepted service, to a different excepted service schedule following a direction from the President, Congress, OPM, or their designees.[129] This proposed rule describes the procedures an agency must follow before taking these actions and outlines the notice requirements that apply when the positions are encumbered. Further, and consistent with the civil service protections outlined *supra*, OPM proposes to modify 5 CFR part 212 (Competitive Service and Competitive Status) regarding the effect of an employee's competitive service status when the employee's position is moved to the excepted service.

1. Procedures for Moving Positions

In enacting the CSRA, Congress made certain findings relevant to the proposed changes discussed here. It noted that the merit system principles, many of which have existed since 1883,[130] "shall govern in the competitive service" and that these principles, and the prohibited personnel practices should be "expressly stated" in statute to "furnish guidance to Federal agencies."[131] As explained previously, it then proceeded to divide functions previously performed by the CSC among OPM, MSPB, and OSC. It found that the function of filling positions in the Executive Branch should be delegated to agencies "in appropriate cases" but that OPM should maintain control and oversight "to protect against prohibited personnel practices and the use of unsound management practices by the agencies."[132]

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[129] There are only three possible sources of a direction to move a position from the competitive service to the excepted service or from one schedule of the excepted service to another. The direction may come from the President, 5 U.S.C. 3302; from OPM, *id.*; *see* 5 CFR part 6.1(a); or from Congress, via an enactment that creates an exception to the default rules established under 5 U.S.C. 3301 and 3302. If an agency purported to act at its own initiative, that effort would be unauthorized and thus contrary to law.

[130] *See supra* note 38.

[131] Pub. L. 95-454, sec. 3.2.

[132] *Id.* at sec. 3.5

As noted in section I.E., the CSRA, as codified, imposed upon OPM both authority and an obligation to, among other things, "execut[e], administer[], and enforce[]…the civil service rules and regulations of the President and the Office and the laws governing the civil service."[133] The President, pursuant to his own authorities under the CSRA, as codified at 5 U.S.C. 3301 and 3302, has also delegated a variety of these authorities to OPM concerning execution, administration, and enforcement of the competitive and excepted services. Among other things, the President has authorized OPM to "promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in title 5, United States Code, the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office,"[134] and to collect information and records regarding matters falling within the civil service laws, rules, and regulations.[135]

OPM has concluded that imposing additional safeguards when agencies move positions from one service to another, or one excepted service schedule to another, will help OPM determine whether appointments to the competitive service are "not practicable,"[136] protect against prohibited personnel practices, secure appropriate enforcement of the law governing the civil service, and avoid unsound management practices with respect to the civil service. It is important to the effective administration of the civil service that exceptions from the competitive service norm be enforced within the terms of the specific authority creating them and that employees who are said to have voluntarily accepted positions that affect their rights both understand that the move is, in fact, voluntary and that they are aware of the potential consequences of those moves.

Some background demonstrates why these proposed changes are important. Positions in the Federal Government are, by default, placed in the competitive service. As noted by the D.C.

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[133] 5 U.S.C. 1103(a)(5).
[134] 5 CFR 5.1, 6.1, 6.2.
[135] 5 CFR 5.4.
[136] 5 CFR 6.1.

Circuit, 5 U.S.C. 3301 and 3302 "make it clear . . . that 'competitive service [is] the norm rather than the exception.'"[137] The President, however, is authorized by Congress to provide for "necessary exceptions of positions from the competitive service" whenever warranted by "conditions of good administration."[138] The President, in turn, has delegated to OPM the authority to except positions from the competitive service, which means either the President or OPM may except positions, as situations warrant.[139] It has been a long-standing practice under these authorities for the President, and for OPM exercising its delegated authority, to permit positions that would otherwise be in the competitive service to be filled through excepted service appointments where conditions of good administration warrant exceptions from competitive examining procedures (*e.g.*, for people with disabilities and students). In some cases, positions have been placed in the excepted service because it is not practicable to examine in light of the position itself. For example, a perennial rider to OPM appropriations prohibits OPM—and before that, its predecessor CSC—from examining for attorney positions.[140] This appropriations bar makes examinations not practicable, and attorney positions have been placed in Schedule A of the excepted service since at least 1947.[141] In all these cases, OPM is subject to the standard that any departure from the competitive norm must be warranted by conditions of good administration.

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[137] *Nat'l Treasury Employees Union v. Horner*, 854 F.2d 490, 493 (D.C. Cir. 1988); *accord*, *Dean v. Off. of Personnel Mgmt.*, 115 M.S.P.R. 157, ¶15 (2010).
[138] 5 U.S.C. 3302.
[139] 5 CFR 6.1(a).
[140] *See e.g.*, Treasury, Postal Service and General Appropriation Act, 1982, H.R. 4121, 97th Cong., 1st Sess. (1981); *Fiorentino v. United States*, 607 F.2d 963, 965-66 (Ct. Cl. 1979) ("It has long been known . . . that the Congress has been always opposed to Civil Service Commission (CSC) testing and examining of attorney positions in the Executive branch under the competitive system. … Defendant cites as the enacted expression of this [opposition] the annual prohibition against appropriated funds of the CSC being used for the Commission's Legal Examining Unit. An unbroken series of such clauses runs from the Act of June 26, 1943, Pub. L. No. 90, 57 Stat. 169, 173, to the Act of October 10, 1978, Pub. L. No. 95—429, 92 Stat. 1001, 1007. The President had set up a Board of Legal Examiners (Legal Examining Unit), by E.O. 9358, July 1, 1943. By E.O. 9830, 12 Fed. Reg. 1259 (1947), the President in s 6.1 provided that positions in Schedule A and B should be excepted from the competitive service. Section 6.4 is Schedule A. Item IV therein is 'attorneys.' Whether the legislative intent is obvious to 'outsiders,' it certainly has been to the Executive branch, which has never, since May 1, 1947, put attorney positions anywhere but in the excepted service.").
[141] *Fiorentino*, 607 F.2d at 965-66.

Traditionally, the President has exercised this authority through Executive order.[142] OPM has also authorized excepted service hiring to address urgent needs of agencies,[143] such as the need to bring on staff quickly to respond to the COVID-19 pandemic.[144] When OPM exercises such authority, it determines the characteristics of the position make it impracticable to use the processes associated with conducting a competitive examination.[145] For example, the qualification requirements established for competitive service positions cannot be used because the series has been newly created. In other instances, OPM determines a full-blown open competition is not conducive to filling certain positions because the applicant pool is very narrow.

Sometimes, excepted service determinations are prescriptive, and agencies need only execute the operational tasks necessary to implement the direction of the President or OPM (for example, Schedule A attorneys, Schedule E administrative law judges, or any number of other positions specifically identified for excepted service status, such as through Executive Orders 5560 and 6655). In other circumstances, either the President or OPM establishes standards and conditions for agencies to apply in deciding which positions should be moved into the excepted service (for example, Schedule D appointments for students and recent graduates and Schedule A appointments related to the COVID-19 pandemic). In the latter category, the determination of whether to place a position in the excepted service has typically occurred prior to the position being filled. In other words, with the notable exceptions of Schedule E, established by Executive Order 13843,[146] and of the prior Schedule F established by the now revoked Executive Order 13957, these are intended to be used as hiring authorities. It is notable that, in the case of the

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[142] *See, e.g.*, E.O. 13562, 75 FR 82583 (Dec. 30, 2010) (establishing Schedule D for the Pathways program); E.O. 13843, 83 FR 32755 (July 10, 2018) (establishing Schedule E for administrative law judges).
[143] 5 CFR part 213.
[144] *See* OPM Memorandum, "Coronavirus (COVID-19) Schedule A Hiring Authority," (March 20, 2020).
[145] Even in those cases, however, OPM has provided that "the principle of veteran preference" must be followed "as far as administratively feasible." 5 CFR 302.101(c). In practice, this standard has been held to be satisfied by using veterans' preference as a plus factor, and thus a tie-breaker, in comparing candidates at similar levels of knowledge, skills, and abilities. *See Patterson v. Dep't of Interior*, 424 F.3d 1151 (Fed. Cir. 2005).
[146] 83 FR 32755 (July 10, 2018).

creation of Schedule E, the President noted the exigency presented by pending litigation as one of the motivations, and expressly provided that incumbents who were in the competitive service as of the date of enactment, would remain in their current positions.[147]

When the President or OPM has chosen to establish standards for agencies to apply in creating new positions or moving existing positions into the excepted service (rather than specifically directing that certain positions be excepted service positions), they have also routinely required agencies to follow certain procedures subject to OPM oversight. With respect to the now-revoked Schedule F, Executive Order 13957 required agencies to petition OPM to move positions into Schedule F, and provided for the petition to "include a written explanation documenting the basis for the agency head's determination that such position should be placed in Schedule F."[148] Section 6 of that Executive order directed agencies to "establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5, United States Code, with respect to any employee or applicant for employment in Schedule F of the excepted service."[149]

The rules for the Pathways programs,[150] established by President Barack Obama in Executive Order 13562, are more prescriptive. For example, under 5 CFR part 362, agencies seeking to use the Pathways programs to hire students and recent graduates into excepted service positions must adhere to various policies and procedures. Among other things, agencies must enter into a memorandum of understanding with OPM that addresses several obligations and procedures that are conditions of the agency's authority to use the programs. There are rules governing how agencies must use the Pathways programs as part of a larger workforce planning effort, the procedures that are conditions of the agency's use of the programs, how Pathways positions are to be announced, and various other rules applying to eligibility for the program.[151]

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[147] 83 FR 32755-56.
[148] 85 FR 67633.
[149] 85 FR 67634
[150] OPM has proposed revisions to the rules governing the Pathways programs. 88 FR 55586 (Aug. 16, 2023).
[151] *See* 5 CFR 362.105.

OPM has the authority to cap Pathways hiring[152] and can even shut down an agency's ability to use Pathways altogether.[153]

Based on this history and experience, OPM is proposing to establish appropriate safeguards—i.e., a floor of procedures—that would apply whenever an agency is executing discretion to move any position or positions from the competitive service to the excepted service, or from one excepted service schedule to another, under authority executed by the President or OPM. In each instance, the agency would have to adhere to the following procedures:

1. Identify the types, numbers, and locations of positions that the agency proposes to move into or within the excepted service;

2. Document the basis for its determination that movement of the position or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees, as applicable;

3. Obtain certification from the agency's Chief Human Capital Officer (CHCO)[154] that the documentation is sufficient and movement of the position or positions is both consistent with the standards set forth by the President, Congress, OPM, or their designees, as applicable, and advances sound merit system principles;

4. Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority;

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[152] *See* 5 CFR 362.108.

[153] *See* 5 CFR 362.104(b).

[154] The Chief Human Capital Officers Act of 2002, enacted as part of the Homeland Security Act of 2002, established the role of the CHCO in the Federal Government. CHCOs advise and assist in carrying out agencies' responsibilities for selecting, developing, training, and managing a high-quality, productive workforce in accordance with merit system principles. *See* 5 U.S.C. 1401-02. They are also responsible for "implement[ing] the rules and regulations of the President, the Office of Personnel Management (OPM), and the laws governing the civil service within an agency." 5 CFR 250.202. OPM has delegated various responsibilities directly to CHCOs. *See e.g.*, OPM, "Personnel Management in Agencies" 81 FR 89357 (Dec. 12, 2016) (tasking CHCOs with developing a Human Capital Operating Plan); OPM, "Human Resources Management in Agencies," 73 FR 23012 (Apr. 28, 2008) (implementing regulations for agencies and CHCOs regarding the strategic management of the Federal workforce); 5 CFR 337.201 (giving CHCOs the ability to request direct-hire authority when OPM determines there is a hiring need).

5. Use the excepted service authority only after obtaining written approval from the OPM Director to do so; and

6. Initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the *Federal Register*, to include the types, numbers, and locations of the positions moved to the excepted service.

Specifically, OPM proposes the following regulatory changes to 5 CFR parts 212 and 302:

Part 302—Employment in the Excepted Service, Subpart F

OPM is proposing a new subpart F titled, "Moving Positions into and Within the Excepted Service." In the event of a direction by the President, Congress, OPM, or their designees, to move a position from the competitive service to the excepted service, or from one excepted service schedule to the same or similar position in another, this new subpart would describe the processes and procedures an agency must follow to carry out such a move.

Section 302.601 "Scope."

Proposed 5 CFR 302.601 Scope would describe the scope of the positions that would be subject to the new procedures in subpart F.

Section 302.602(a) "Basic Requirements."

Proposed 5 CFR 302.602(a) Basic Requirements would require an agency to take certain steps after a direction from the President, Congress, OPM or their designees (hereafter "the directive") to move a position from the competitive service to the excepted service, or from one excepted service schedule to the same or similar position in another.

Proposed § 302.602(a)(1) states that, if the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that list, and their location within the organization.

Proposed § 302.602(a)(2) states that, if the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must, upon

OPM's request, provide a list of the positions to be moved in accordance with those criteria, those positions' location in the organization, and an explanation of how these criteria are relevant.

Proposed § 302.602(a)(3) states that, if the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move, then the agency, in addition to supplying a list and the locations in the organization, must supply the objective criteria to be used and an explanation of how they were developed.

Proposed § 302.602(b) describes the steps agency management must take, independent of the impacted employees, with respect to such moves.

Proposed § 302.602(b)(1) requires an agency to identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

Proposed § 302.602(b)(2) requires the agency to document the basis for its determination that movement of the position or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

Proposed § 302.602(b)(3) requires the agency to obtain certification from the agency's CHCO that the documentation is sufficient and movement of the position or positions is both consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable, and with merit system principles.

Proposed § 302.602(b)(4) requires the agency to submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority.

Proposed § 302.602(b)(5) specifies that OPM shall then review the CHCO certification and supporting documentation, and the agency shall be able to use the excepted service authority only after obtaining written approval from the OPM Director to do so.

Proposed § 302.602(b)(6) specifies that OPM shall publish any such authorizations in the *Federal Register*, to include the types, numbers, and locations of the positions moved to the excepted service and that the agency is not permitted to initiate any hiring actions under the excepted service authority until such publication occurs.

2. Notice Rights for Encumbered Positions

OPM is proposing that additional rules would apply when one or more of the positions the agency wishes to move from the competitive service to the excepted service, or from one excepted service schedule to another, is encumbered by an employee. In that case, no less than 30 days prior to moving the position, the agency must provide written notification to the employee of the intent to move the position. The notice must provide the employee with the following information: (1) the authority for moving the position; (2) the rationale for moving the position; (3) the proposed timing of moving the position; and (4) a representation that the employee maintains their civil service status and any accrued protections notwithstanding the movement of the position.

Proposed § 302.602(c) describes the interactions and communication an agency must have with an employee whose position is being moved from the competitive service and placed in the excepted service, other than in Schedules D or E, or with an excepted service employee whose position is moved to another excepted service schedule, other than Schedules D or E.[155]

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[155] OPM is omitting Schedules D and E from this proposed regulatory change because these schedules, for the Pathways programs participants and Administrative Law Judges (ALJs), *see* 5 CFR 6.2, respectively, have specific and unique requirements regarding eligibility and entrance into these positions. In particular, the Pathways programs, which were created by the President, not OPM, already have highly reticulated schemes for conversion of the appointee from the excepted service to the competitive service following the successful conclusion of the initial excepted service appointment. It is unlikely that the initial time-limited appointments to the excepted service would be appropriate vehicles for conversion to a different excepted service position, and, in any event, the incumbent would likely not yet have accrued adverse action rights in the excepted service positions they encumbered. Even if such rights had accrued, these appointees would enjoy such rights only for the balance of the original time-limited appointment. ALJ appointments were changed in light of ALJs' significant responsibilities in "taking testimony," "conducting trials," "enforcing compliance with their orders," and in some cases issuing "the final word [for] the agencies they serve." *See* E.O. 13843. Those specific duties, carried out with "significant discretion," combined with a desire to eliminate any constitutional concerns regarding the method of ALJ appointments, were the reasons that ALJs were placed in the excepted service by the President as a matter of "sound policy," which allowed agencies to "assess critical qualities in ALJs candidates" to "meet the particular needs of the agency," such as subject matter expertise relevant to the agency's work. *Id.* In addition, special chapter 75 procedures apply to incumbent ALJs, and they can be removed from ALJ positions only by the employing agency at the conclusion of a specified proceeding at MSPB.

Proposed § 302.602(c)(1) requires that, 30 days prior to the effective date an agency intends to move a position, the agency must provide written notification to the employee of the intent to move the position.

Proposed § 302.602(c)(2) requires that the written notification required by § 302.602(c)(1) inform the employee that the employee maintains their civil service status and any accrued protections notwithstanding the movement of the position.

Of course, employees who are in the competitive service—and who the agency is not planning to move—may wish to apply for a new position in the excepted service and potentially relinquish accrued rights (such as a voluntary move from a competitive service position to a position as a Schedule C political appointee). In that situation, agencies must continue to comply with longstanding rules—codified at 5 CFR 302.102(b)—providing for employees to be given notice that they are leaving the competitive service and requiring that employees provide acknowledgment that they understand that they are voluntarily leaving the competitive service to accept an appointment in the excepted service.[156]

3. Appeal Rights for Encumbered Positions

OPM proposes further amending 5 CFR part 302 to establish that a competitive service employee whose position is moved into the excepted service, or an excepted service employee whose position is moved into a different schedule of the excepted service, may directly appeal to MSPB if the entity perpetuating the move purports, contrary to these regulations, to strip the employee of the status and civil service protections they had already accrued. This rulemaking would not apply to situations where the employee applies for, and is selected for the new position, knowing that acceptance of the position voluntarily relinquishes such rights.

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[156] Under 5 CFR 302.102(b), when an employee serving under a temporary appointment in the competitive service is selected for an excepted appointment, the agency must:

1. Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service while he/she occupies the position; and
2. Obtain from the employee a written statement that he/she understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.

As explained previously in section I.E., under 5 U.S.C. 1103(a)(5), OPM has broad authority to execute, administer, and enforce civil service rules and regulations. Pursuant to its statutory authority, including under 5 U.S.C. 7701, 7511(c), and the President's delegation of authority, OPM is authorized to create a right of appeal to MSPB by regulation. MSPB, in turn, has the responsibility to "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under … law, rule or regulation," and an employee may appeal to the Board "from any action which is appealable to the Board under any law, rule, or regulation."[157] Both the Federal Circuit and MSPB have consistently affirmed the principle that MSPB's enabling statute gives it appellate jurisdiction over actions that are made appealable to the Board by OPM regulation and that where an appeal is solely by regulation, the regulation circumscribes the scope of the appeal.[158]

OPM, pursuant to its authority, has long conferred MSPB appeal rights via regulations under title 5, Code of Federal Regulations. For instance:

1. Section 300.104—A job candidate who believes that an employment practice which was applied to the candidate by OPM violates a basic requirement in § 300.103 is entitled to appeal to MSPB under the provisions of the Board's regulations.
2. Section 302.501—An individual who is covered by 5 U.S.C. 8101(1) and is entitled to priority consideration under 5 CFR part 302 may appeal a violation of the individual's restoration rights to MSPB under the provisions of the Board's regulations by presenting factual information that the individual was denied restoration rights because of the employment of another person.

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[157] 5 U.S.C. 1204(a)(1), 7701(a).
[158] *See Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006); *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350, 1355 (Fed. Cir. 2005); *Dowd v. United States*, 713 F.2d 720, 722-23 (Fed. Cir. 1983); *Gaxiola v. Dep't of the Air Force*, 6 M.S.P.R. 515, 519 (1981).

3. Section 315.806—An employee may appeal to MSPB in writing an agency's decision to terminate the employee during their probationary period, if the employee alleges the termination was based on partisan political reasons, marital status, or improper procedure.

4. Section 315.908—An employee who alleges that an agency action demoting an employee for not satisfactorily completing their supervisory probationary period may appeal to MSPB if the employee alleges the agency action was based on partisan political affiliation or marital status.

5. Section 351.901—An employee who has been furloughed for more than 30 days, separated, or demoted by a reduction in force action may appeal to MSPB.

6. Section 352.209—When an agency denies reemployment to a person claiming reemployment rights under subpart B of part 352, the agency shall inform the person of that denial by a written notice. In the same notice, the agency shall inform the person of the right to appeal to MSPB under the provisions of the Board's regulations.

7. Section 352.313—An employee may submit an appeal to MSPB alleging the agency has failed to comply with certain reemployment rights.

8. Section 352.508—An employee may submit an appeal to MSPB alleging the agency has failed to comply with certain reinstatement rights.

9. Section 352.707—If an agency denies reemployment to a person claiming reemployment rights under subpart I of part 352, the agency shall inform the individual of that denial and of the reasons therefor by a written notice. In the same notice, the agency shall inform the employee of the right to appeal to MSPB under the provisions of the Board's regulations.

10. Section 352.807—An employee may appeal to MSPB, under the provisions of the Board's regulations, an agency's decision on the employee's request for reemployment which the employee believes is in violation of subpart H of part 352.

11. Section 352.909—An applicant or an employee may submit an appeal to MSPB alleging the agency has not complied with certain reemployment rights under subpart I of part 352.

12. Section 731.501—When OPM or an agency acting under delegated authority under part 731 takes a suitability action against a person, that person may appeal the action to MSPB. Upon appeal, the Board may review the suitability determination itself, but may not review the suitability action specified as a result of that determination.[159]

Section 302.603 "Appeals."

In these proposed regulations, OPM is prescribing an MSPB appeal right for an employee whose position in the competitive service is moved to the excepted service, or whose position in the excepted service is moved into a different schedule of the excepted service, and when any such move, contrary to these regulations, purportedly strips the employee of the status and civil service protections they had already accrued. This proposed provision would not apply when the employee voluntarily relinquishes such rights by applying for and accepting a new position with different rights. Such an appeal right would, however, cover the allegation that an agency coerced the employee to voluntarily move to a new position that would require the employee to relinquish their competitive status or civil service protections. The employee may file an appeal with MSPB to have their competitive status and civil service protections reinstated, as applicable. OPM notes that an employee may choose to assert in any appeal to MSPB that the agency committed procedural error, if applicable, by failing to act in accordance with the procedural requirements of § 302.602 while effecting any placement from the competitive service into the excepted service or from the excepted service to a different schedule of the excepted service. In cases where an employee asserts procedural error by the agency, MSPB typically will determine whether the procedural error was harmful as a pre-requisite for any

[159] *See* part 731, subpart E.

reversal of the agency's action. MSPB will find that an agency error is harmful only when the record shows that it was likely to have caused the agency to reach a different conclusion.[160]

Part 212—Competitive Service and Competitive Status, Subpart D

Section 212.401 Effect of competitive status on position.

OPM is also proposing to revise the regulations in 5 CFR part 212, subpart D, § 212.401(b) regarding the effect of an employee's competitive status on the employee's position. As described throughout this proposed rule, OPM's longstanding view is that Federal employees maintain the civil service status and protections that they have accrued. Indeed, since 1968, OPM has provided by rule that an employee with competitive service status (i.e., in the competitive service), at the time the employee's position is first listed (i.e., moved) under Schedule A, B, or C of the excepted service, remains in the competitive service as long as the employee continues to occupy the position.[161] OPM is proposing to update 5 CFR 212.401(b) consistent with this proposed rule, to establish that a competitive service employee whose position is first listed under any future excepted service schedule remains in the competitive service as long as the employee continues to occupy the position. OPM is proposing this update to account for the possibility of new excepted service schedules which may be established after promulgation of this rule or other efforts to move positions from the competitive service or within the excepted service.

III. Regulatory Analysis

A. Statement of Need

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[160] *See* 5 CFR 1201.3 (Appellate Jurisdiction); 1201.4(r) (Definitions, MSPB Practices and Procedures), 1205 (Powers and functions of the Merit Systems Protection Board); *Ramey v. U.S. Postal Service*, 70 M.S.P.R. 463, 467 (1996) ("An [MSPB] administrative judge's adjudication of an action not only embraces the provisions of law giving the Board jurisdiction over the action, but includes review of any other relevant provision of law, regulation or negotiated procedures as circumstances warrant."); *Adakai v. Dep't of Interior*, 20 M.S.P.R. 196, 201 (1984) ("There is no question that an agency is obligated to conform to procedures and regulations it adopts, and the Board is required to enforce such procedures.").

[161] 33 FR 12402, 12408 (Sept. 4, 1968).

On December 12, 2022, OPM received a petition from the National Treasury Employees Union (NTEU), which represents Federal workers in 34 agencies and departments,[162] to amend OPM regulations in a manner that would ensure compliance with civil service protections and merit system principles for competitive service positions moved to the excepted service.[163] NTEU contends in its petition that Congress has established protections for "employees" under chapter 75 in the competitive service and these protections create a constitutionally protected property interest in continued Federal employment. NTEU argues that no President can take away these rights, once accrued, without due process.

On May 23, 2023, the Federal Workers Alliance, a coalition of 13 labor unions representing over 550,000 Federal and postal workers, wrote OPM in support of the rulemaking changes proposed by NTEU. On May 26, 2023, the American Federation of Government Employees, AFL-CIO, the largest union of Federal employees representing more than 750,000 Federal and District of Columbia workers, did the same.

As discussed throughout this proposed rule, by operation of law, certain tenured Federal employees accrue a property interest in their continued employment and are entitled to adverse action rights under chapter 75 before they may be removed from career positions. Agencies are statutorily obligated to extend the specific protections codified at chapter 75 to eligible employees as defined in 5 U.S.C. 7511. OPM does not interpret chapter 75 as allowing the President, OPM, or an agency to waive these statutory requirements and OPM notes that it interprets section 7511 to preclude noncareer, political appointees under Schedule C and other statutorily specified categories of employees from accruing these procedural rights. These rules are proposed to clarify and reinforce that point.

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[162] *See* NTEU, "Our Agencies," https://www.nteu.org/who-we-are/our-agencies.
[163] *See* NTEU, Petition for Regulations to Ensure Compliance with Civil Service Protections and Merit System Principles for Excepted Service Positions, (Dec. 12. 2022), https://www.nteu.org/~/media/Files/nteu/docs/public/opm/nteu-petition.pdf?la=en.

OPM has the delegated authority to exempt employees from the competitive service only when "necessary" and warranted by "conditions of good administration."[164] The rationale for creating positions in the excepted service is driven largely by specific hiring needs and a determination that appointment through the competitive service is "not practicable,"[165] i.e., *not* by considerations of stripping career employees of civil service rights.

As stated above, President Trump, in the now-revoked Executive Order 13957, introduced a new conception of the scope of the phrase "confidential, policy-determining, policy-making, or policy-advocating character," and sought to employ that conception to expand the category of employees excluded from adverse action procedural rights under section 7511.[166] This language was derived from the description of Schedule C of the excepted service, and using that language in the way Executive Order 13957 did departed from the long-standing understanding that this exception applied only to noncareer, political appointees under Schedule C. OPM has therefore determined that a regulation interpreting this provision is warranted.

The CSRA and merit system principles have informed OPM's regulations regarding the competitive and excepted service, and employee movement between them. One of those principles is that the creation of new positions in—and movement of existing positions into—the excepted service is meant to be an exception to the normal procedure for filling positions through the procedures prescribed for the competitive service and maintaining the positions in that service thereafter. Accordingly, OPM has maintained for decades several safeguards and transparency measures associated with any such movements. These safeguards and measures may include agency reporting to OPM,[167] such as in situations where positions are placed

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[164] 5 U.S.C. 3302; 5 CFR 6.1.
[165] *See* 5 CFR 6.1.
[166] 85 FR 67361-62.
[167] *See* 5 CFR 5.1 ("The Director, Office of Personnel Management, shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in title 5, United States Code, the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office."); *id.* 5.4 ("When required by the Office, the Merit Systems Protection Board, or the Special Counsel of the Merit Systems Protection Board, or by authorized representatives of these bodies, agencies shall make available to them, or to their authorized representatives, employees to testify in regard to matters inquired of under

temporarily in the excepted service for the purpose of a trial period leading to a permanent appointment in the competitive service;[168] OPM authorization of the creation of certain new positions in—or moving of certain existing positions into—the excepted service;[169] publication in the *Federal Register*;[170] and an acknowledgment of the consent of affected employees when an existing employee obtains a different position in another service or schedule.[171] The now-revoked directions to agencies contained in Executive Order 13957, for implementing the now-defunct Schedule F, created ambiguity as to the continued vitality of these longstanding principles with respect to employees who had accrued adverse action appeal rights. We seek to confirm these principles through the proposed modifications to the regulations.

Finally, these proposed revisions would also further the objectives of Executive Order 14003. In the findings underpinning that Executive order, President Biden observed that the foundations of the civil service and its merit system principles were essential to the Pendleton Civil Service Reform Act of 1883's repudiation of the spoils system.[172] The President further noted that revoking Schedule F was necessary "to enhance the efficiency of the civil service and to promote good administration and systematic application of merit system principles."[173] The changes proposed here would support the civil service and merit system principles for career Federal employees by clarifying and reinforcing the rights that accrue to tenured employees.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation. OPM has determined this is not a viable option. The risks of not issuing this proposed rulemaking are many and include both fiscal as well as non-fiscal consequences. As noted in the preamble, this rulemaking is needed to

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the civil service laws, rules, and regulations, and records pertinent to these matters"); *id.* 10.2 (OPM authority to set up accountability systems); *id.* 10.3 (OPM authority to review agency personnel management programs and practices).

[168] *See, e.g.*, 5 CFR part 362.

[169] 5 CFR 6.1.

[170] *Id.*

[171] 5 CFR 302.102(b).

[172] E.O 14003, sec. 2.

[173] *Id.*

preserve the integrity of the Federal career workforce as an independent entity free of political influence or personal loyalties to political leaders, consistent with merit system principles. Preserving the integrity of the Federal career workforce ensures career employees keep the status and rights they have attained and to which they are therefore entitled by law. This in turn preserves if not promotes employee morale, minimizes workforce disruptions by preventing potential losses of seasoned or experienced personnel, and contributes to a positive impact on agencies' ability to meet mission requirements. Finally, these changes will promote compliance with statutory enactments.

This rulemaking is expected to create an incentive for agency recruitment efforts, enhancing agencies' ability to fulfill important merit system principles—that recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a workforce from all segments of society—and that 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,[174] and also promotes compliance with the congressional policy to confer a preference on eligible veterans or family members with entitled to derived preference. In a more pragmatic sense, diminishing or eliminating civil service protections from entire categories of career employees would destabilize the civil service—potentially repeatedly, each time there is a change in administration—and eliminate a competitive advantage Federal agencies have long enjoyed when competing with other sectors for needed talent: stable, fair, merit-based employment.

Failure to protect adverse action rights and other civil service protections risks a loss of experienced staff, leading to a disruption, if not interruption, of agency mission operations. This is an especially important consideration given the many challenges facing our nation and requiring a response by the Executive branch. These challenges include threats to our nation's economy (writ large as well as those impacting small businesses and emerging markets and

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[174] *See* 5 U.S.C. 2301(b)(1).

technologies), public health, climate (both the private property and businesses impacted by droughts, floods, wildfires, etc.), data security, and emerging foreign powers on the international geo-political landscape, among others.

The option of not regulating in this area carries with it fiscal costs as well. These costs include that of recruiting and replacing staff who separate before or after their positions are moved to the excepted service in a manner that purportedly strips them of their civil service protections, as well as the loss of or delay in services, benefits, and entitlements owed to many of our nation's citizens. Many of the citizens receiving these entitlements depend on them to meet their basic living expenses.

Regarding 5 CFR part 752, OPM's proposed changes to the implementing regulations for adverse actions are consistent with statute and cannot be further simplified. OPM proposes to conform part 752 with Federal Circuit precedent[175] and statutory language.[176] In addition, OPM proposes to make plain that an employee who is moved from the competitive service to a position in the excepted service, or from one excepted service schedule to the same or similar position in another excepted service schedule, retains the status and civil service protections the employee had already accrued.

One regulatory alternative to conforming part 752 is to forgo changes to the regulation and allow Federal agencies to continue relying upon 5 U.S.C. 7511 for a more complete understanding of eligibility for procedural and appeal rights. However, as MSPB observed in urging OPM to update 5 CFR 752.401:

> Retaining out-of-date information in a Government regulation can confuse agencies, managers, and employees and produce unintended outcomes. Human resources specialists or managers who are not experts in employee discipline may inadvertently rely on these particular regulations. Agencies may fail to use proper procedures and fail to notify employees of appeal rights. Terminations may be reversed.[177]

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[175] *See Van Wersch*, 197 F.3d at 1151-52; *McCormick*, 307 F.3d at 1341-43.
[176] *See* 5 U.S.C. 7501.
[177] U.S. Merit Systems Protection Board, *supra* note **Error! Bookmark not defined.**.

Given that agency practitioners are more likely to turn first to regulations rather than statute or case law for guidance on performance-based and adverse actions, OPM's current regulations need updating.

OPM's preferred option is to amend the coverage-related provisions in part 752 to close the unnecessary gap between current regulations and relevant precedent by adding clarity and specific guidance to implement the statute. Having regulations that are congruent to statute may mitigate cases in which an agency is unclear on whether to provide procedural rights to an employee. In turn, this promotes efficiency in removing or disciplining employees and addresses complaints that the Federal removal process is too cumbersome. Through this rulemaking, OPM is providing essential statutory requirements that have not been previously reflected in OPM's regulations.

OPM is proposing these regulations in the least burdensome way possible. Fundamentally, the amendments to part 752 do not impose any requirements on agencies that are not already in place through statute or case law. This includes the provisions that an employee retains accrued rights when the employee is moved from the competitive service to the excepted service or placed in a new schedule within the excepted service.

With respect to 5 CFR part 210, OPM considered not defining "confidential, policy-determining, policy-making, policy-advocating" and "confidential or policy-determining" positions but, as stated *supra*, believes that doing so adds important clarity. To alleviate any ambiguity as to the scope of the exception in 5 U.S.C. 7511, including any confusion that may have been introduced by the promulgation of the now-revoked Executive Order 13957, this rule proposes to more explicitly define the employees and positions that are excluded from civil service protections to align with congressional intent as expressed in H.R. Rep. 101-328. Accordingly, OPM proposes to add a definition for "Confidential, policy-determining, policy-making, or policy-advocating" and "confidential or policy-determining" to clarify that it means a noncareer, political appointment that is identified by its close working relationship with the

President, head of an agency, or other key appointed officials who are directly responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred. This definition is consistent with legislative history and codifies longstanding practice.

Finally, OPM's proposed addition of 5 CFR 302.602 to establish minimum requirements for moving employees and positions into and within the excepted service necessitates the creation of a new guardrail to reinforce merit system principles. Therefore, OPM proposes to confer in § 302.603 a narrow MSPB appeal right to an employee whose position is placed into the excepted service or an excepted service employee whose position is placed into a different schedule of the excepted service and when any such move, in violation of these regulations, purportedly strips the employee of the status and civil service protections they had already accrued.

OPM weighed the alternative of not conferring a right of appeal to MSPB. As stated in 5 CFR 1201.3, MSPB's "appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation." Currently, for personnel actions for which there is no MSPB appellate coverage, an aggrieved Federal employee may have multiple other options for contesting a personnel decision, including filing an Equal Employment Opportunity (EEO) complaint, OSC complaint, administrative grievance, or if applicable, a negotiated grievance procedure. However, with regard to an allegation that a move purportedly strips the employee of the status and civil service protections the employee has already accrued, or that an agency coerced the employee to voluntarily move to a new position that would require the employee to relinquish their competitive status or civil service protections, OPM concluded that the current scheme of avenues for redress is less preferable to safeguard against actions brought against employees for reasons stated above. Such actions would have an adverse impact on employee

morale across Federal agencies and a corrosive effect on the American public's confidence in equitable administrative processes of Federal civilian service.

OPM also considered not conferring a right of appeal directly to MSPB. The omission of § 302.603 would leave open the possibility that an agency could move an employee in a manner that is unlawful, arbitrary, or capricious without any accountability. Alternatively, OPM could have broadened § 302.603 to cover an appeal based on the underlying reasons for the movement. However, if an agency follows the robust procedures in § 302.602 for movement, MSPB's review of an appeal brought under § 302.603 should be limited to paragraphs (b) and (c) as an agency should be given deference in determining the appropriate placement of its workforce.

Currently, if an employee alleges that an agency has taken a prohibited personnel practice, the employee can file a complaint with OSC, or if the employee is contesting an otherwise appealable action, the employee can file an MSPB appeal of the appealable personnel action and claim as an affirmative defense that the agency committed a prohibited personnel practice. OPM's preferred option—the addition of § 302.603 as proposed—reinforces that affected employees are deserving of fair and equitable treatment in all aspects of their employment as it relates to movement to and within the excepted service.

C. Impact

OPM is proposing these revisions to clarify and reinforce existing protections that exist for many Federal employees and to add procedures that agencies must follow to further advance merit system principles. Congress enacted procedural rules to provide an adequate opportunity to hear from the tenured employee and appropriately explore the underlying facts and law before adverse actions are taken and thus help ensure that such actions are taken for proper cause.[178] The procedural protections enacted by Congress are for all tenured employees, not only for the few employees who will inevitably present problems in a workforce of more than two million individuals. And procedural protections exist for the whistleblower, the employee who belongs

[178] U.S. Merit System Protections Board, *supra* note 13 at p. ii.

to the "wrong" political party, the reservist whose periods of military service are inconvenient to superiors, the scapegoat, and the person who has been misjudged based on faulty information.

As explained above, where Congress has created a property interest in a position for tenured employees,[179] due process considerations protect employees from an unlawful deprivation of that interest. The procedural protections enacted by Congress are a small price to pay to deliver to the American people a merit-based civil service rather than a system based on political patronage.[180]

Therefore, to the extent these rules as finalized will reinforce procedural requirements that exist already for most Federal employees, OPM believes that those portions of the rules will not change any existing requirements for agencies covered by the rules and the impact on agencies is expected to be negligible.

The procedural requirements for moving an employee from the competitive service to the excepted service or within the excepted service are no more rigorous than the many other regulations promulgated by OPM for the administration of the civil service, especially those reticulated regulations related to the excepted service under Schedules D and E (as described above). The reporting requirements relating to excepted service positions align with those with which OPM already must comply.

D. Costs

If finalized, the proposed rule would require agencies to update internal policies and procedures to ensure compliance with proposed §§ 210.102(b), 212.401, 213.3301, 302.101, 302.603, 451.302 and with the regulatory amendments to parts 432 and 752 as well as resolve any appeals that may arise from contested moves covered by part 302. Regarding the procedural requirements for moving positions, the rule would affect the operations of more than 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. OPM cannot

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[179] *See supra*, Sec. I.B.; *Loudermill*, 470 U.S. at 541.
[180] U.S. Merit System Protections Board, *supra* note 13 at pp. ii-iii.

estimate these costs with great specificity because they will vary depending on the specific number of positions an agency would seek to move.

The cost analysis to update policies and procedures and resolve appeals assumes an average salary rate of Federal employees performing this work at the 2023 rate for a GS-14, step 5, from the Washington, DC, locality pay table ($150,016 annual locality rate and $71.88 hourly locality rate). We assume the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $143.76 per hour.

We estimate that the cost to comply with updating policies and procedures in the first year would require an average of 40 hours of work by employees with an average hourly cost of $143.76 per hour. Upon publication of the final rule, this would result in first-year estimated costs of about $5,750 per agency, and about $460,000 governmentwide. There are ongoing costs associated with routinely reviewing and updating internal policies and procedures, but not necessarily a measurable increase in costs for agencies.

To comply with the regulatory requirements in this proposed rule, affected agencies would need to resolve any appeals that may arise pursuant to § 302.603. We estimate that, in the first year following publication of a final rule, this would require an average of 120 hours of work by employees with an average hourly cost of $143.76 per hour. This would result in estimated costs in that first year of implementation of about $17,250 per agency, and about $1.38 million governmentwide. In subsequent years, we assume a decreased need for appeal resolution as agencies further refine their processes under § 302.603, resulting in less staff time. Accordingly, in subsequent years, we estimate an average of 80 hours of work by employees with an average hourly cost of $143.76 per hour. This would result in estimated costs of about $11,500 per agency annually, and about $920,000 governmentwide annually in the years after the first year of implementation.

In sum, OPM estimates the first-year cost to be approximately $23,000 per agency, and about $1.84 million governmentwide. For subsequent years, we estimate annual costs to be $11,500 for agencies, and about $920,000 governmentwide.

E. Benefits

OPM is proposing to clarify the Federal civil service protections that are critical to balancing an effective, experienced, and objective bureaucracy with Executive branch control. These regulations benefit the American people not only by shoring up civil service protections, but also, by so doing, strengthening our republican form of government, and thus promoting good government. As stated in Executive Order 14003, it is this Administration's policy to "protect, empower, and rebuild the career Federal workforce." This rulemaking benefits the career Federal workforce by reinforcing that it is deserving of the trust and confidence of the American people.

OPM stated in its Fiscal Year 2019 Human Capital Review Summary Report that "Agencies face different challenges depending on their mission and the current state of their organizations; but there is little debate that effectively managing human capital is at the forefront of leadership's greatest priorities."[181] Among the top trends that surfaced during OPM's review were (1) identifying and closing skills gaps and (2) recruiting and retaining employees. For example, agencies raised concerns around attrition rates for scientific and technical positions as well as an inability to hire fast enough to meet demands. The ongoing challenge with recruitment and retention for IT and cyber positions is due to the ever-changing landscape, competition with the private sector and other Federal agencies, and difficulty retaining talent.

This proposed rule has several important benefits. First, it supports the retention of Federal career professionals who provide the continuity of institutional knowledge and subject-

[181] U.S. Office of Personnel Management, "Fiscal Year 2019 Human Capital Reviews Report," p. 1 (Mar. 2020), *https://www.chcoc.gov/sites/default/files/2019%20Human%20Capital%20Review%20Summary%20Report.pdf.*

matter expertise necessary for the critical functioning of the Federal Government.[182] "A vast body of research" shows "public service motivation as a central factor in public employment" and that civil servants "invest effort and develop expertise precisely because a stable public job provides an environment where they can pursue their motivation to make a difference."[183] The rights and protections afforded to career Federal employees offer a more stable alternative to comparable private and non-government sector positions.[184] These professionals play an integral role in transferring knowledge, not just as part of their official duties, but also by training and mentoring newer and less experienced Federal employees, interns, contractors, etc.

A related benefit of this rulemaking is that it will mitigate costs associated with recruitment of personnel needed to replace staff who leave or are subsequently removed following placement in the excepted service. "Instability and politization makes public service less attractive, leading to higher turnover of experienced civil servants and giving public officials less reason to develop expertise."[185] OPM cannot estimate the exact value of this benefit to taxpayers because it would depend on the specific number of positions moved by an agency. Nevertheless, the proposed rule will protect agencies' abilities to meet mission requirements by mitigating disruptions caused by upheavals within an agency's workforce, the result of which could have a negative impact on an agency's ability to meet mission requirements and use its resources (including taxpayer-funded resources) in a timely and efficient manner.

There is little evidence to support the notion that a more politicized civil service, or that allowing for the firing of career civil servants without appropriate process that permits such employees to probe the agency's reasons and provide a response, will increase governmental performance.[186] This proposed rule will reduce the risks associated with misapplying the CSRA,

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[182] Donald P. Moynihan, "Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service," *Public Administration Review*, p. 174, 177 (Jan.-Feb. 2022).
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *See id.*; *see also* Donald P. Moynihan, "Populism and the Deep State: the Attack on Public Service under Trump," *Liberal-Democratic Backsliding and Public Administration*, (May 21, 2020),

depriving civil service protections to those who have rightfully earned them, and needlessly politicizing our nation's nonpartisan career civil service.

Finally, agency counsel and employee relations practitioners will benefit from the clarifications in this proposed rule that address current inconsistencies between OPM regulations and statute. After MSPB recommended that OPM update its regulations to reflect the Federal Circuit's decisions in *Van Wersch* and *McCormick*,[187] OPM revised 5 CFR part 752, subpart D to conform to the court's interpretation of 5 U.S.C. 7511 as it pertains to appealable suspensions, removals, and furloughs. However, OPM elected at that time not to update subpart B of part 752 for suspensions of 14 days or less. In addition to closing regulatory gaps in part 752 by conforming the regulations to case law and statute, OPM proposes to clarify that an employee moved to or within the excepted service retains accrued procedural and appeal rights. The cumulative effect of these changes will be a comprehensive and robust regulatory framework on which agency practitioners can rely for understanding and applying the protections available to Federal employees.

IV. Request for Comments

OPM requests comments on the implementation and impacts of this proposed rule in general. Such information will be useful for better understanding the effect of these proposed revisions on civil service protections, merit system principles, and the effective and efficient business of government, in compliance with the law. The type of information in which OPM is interested includes, but is not limited to, the following:

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607309 ("If political appointees offer responsiveness to elected officials through their loyalty, this responsiveness comes at a cost. The best evidence we have is that appointees generate poorer organizational performance relative to career officials.") (citation omitted); David E. Lewis, "Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?" *The Journal of Politics*, Vol. 69, No. 4 (Nov. 2007), https://www.jstor.org/stable/10.1111/j.1468-2508.2007.00608.x ("This analysis demonstrates that appointees get systematically lower performance grades than careerists. Previous bureau experience and longer tenure in management positions explain why careerist-run programs get higher grades. . . . These results add weight to what civil service reformers like George Pendleton believed, namely that a merit-based civil service system would lead to lower turnover in the Federal workforce and the cultivation of useful administrative expertise.").

[187] U.S. Merit Systems Protection Board, *supra* note **Error! Bookmark not defined.**.

- Throughout the preamble, OPM provides examples of civil service protections since the Pendleton Act of 1883. OPM seeks comment on whether more examples would be helpful and, if so, the authority for those protections.
- Whether the regulatory changes proposed under part 752 are sufficiently protective of employees' rights in their continued employment.
- Whether the proposed definition for the terms "confidential, policy-determining, policy-marking, or policy-advocating" and "confidential or policy-determining" is appropriate or whether it should be expanded or limited with the understanding that it should satisfy the aims of the CSRA (including congressional intent), civil service protections, and merit system principles.
- Whether the procedures for moving positions from the competitive service to the excepted service or from one excepted service schedule to another are appropriate or whether they should be expanded or limited with the understanding that they should satisfy the aims of the CSRA (including congressional intent), civil service protections, and merit system principles.
- Whether the proposed MSPB appeal rights under part 302 are needed and, if so, whether they are is sufficiently protective of employees' rights.
- Whether this rulemaking should include additional mechanisms for enforcing the protections set forth in this proposal, and if so, what those mechanisms should be.
- Comments on the initial cost and benefit analysis, including the identification of data and studies that would inform OPM's analysis.
- Comments on whether discrete provisions of this proposal could be severed from the proposed rule in the event a provision was held to be invalid or unenforceable by its terms.

V. Procedural Issues and Regulatory Review

A. Severability

OPM proposes that, if any of the provisions of this proposed rule as finalized is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the

application of the provision to other persons not similarly situated or to other dissimilar circumstances. For example, if a court were to invalidate any portions of this proposed rule as finalized imposing procedural requirements on agencies before moving positions from the competitive service to the excepted service, the other portions of the rule—including the portions providing that employees in the competitive service maintain their protections even if their positions are moved to the excepted service—would independently remain workable and valuable. Similarly, the portions of this proposed rule defining "confidential, policy-determining, policy-making, or policy-advocating position" and "confidential and policy-determining" can and would function independently of any of the other portions of this proposed rule. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

B. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule will apply only to Federal agencies and employees.

C. Regulatory Review

OPM has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993), 13563 (Jan. 18, 2011), and 14094 (Apr. 6, 2023), which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with effects of $200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a "significant regulatory action" under section 3(f) of Executive Order 12866, as supplemented by Executive Orders 13563 and 14094.

D. Executive Order 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 10, 1999), it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E. Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 (Feb. 7, 1996).

F. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

G. Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

5 CFR Parts 210 and 212

Government employees.

5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

5 CFR Parts 302 and 432

Government employees.

5 CFR Part 451

Decorations, Government employees.

5 CFR Part 752

Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, OPM is proposing to amend 5 CFR parts 210, 212, 213, 302, 432, 451, and 752 as follows:

PART 210—BASIC CONCEPTS AND DEFINITIONS (GENERAL)

1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Subpart A—Applicability of Regulations; Definitions

2. Amend § 210.102 by:

a. Redesignating paragraphs (b)(3) through (18) as paragraphs (b)(5) through (20); and

b. Adding new paragraphs (b)(3) and (4).

The additions read as follows:

§ 210.102 Definitions

* * * * *

(b) * * *

(3) *Confidential, policy-determining, policy-making, or policy-advocating* means of a character exclusively associated with a noncareer, political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of continued employment beyond the presidential administration during which the appointment occurred.

(4) *Confidential or policy determining* means of a character exclusively associated with a noncareer, political appointment that is identified by its close working relationship with the President, head of an agency, or other key appointed officials who are responsible for furthering the goals and policies of the President and the Administration, and that carries no expectation of

continued employment beyond the presidential administration during which the appointment occurred.

* * * * *

PART 212—COMPETITIVE SERVICE AND COMPETITIVE STATUS

3. The authority citation for part 212 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

Subpart D—Effect of Competitive Status on Promotion

4. Amend §212.401 by revising paragraph (b) to read as follows:

§ 212.401 Effect of competitive status on position.

* * * * *

(b) An employee in the competitive service at the time his position is first listed under Schedule A, B, or C, or whose position is otherwise moved from the competitive service and listed under a schedule created subsequent to [effective date of final rule], remains in the competitive service while he occupies that position.

PART 213—EXCEPTED SERVICE

5. The authority citation for part 213 continues to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.;* Pub. L. 105–339, 112 Stat 3182–83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

Sec. 213.101 also issued under 5 U.S.C. 2103.

Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; 38 U.S.C. 4301 et seq.; and Pub. L. 105–339, 112 Stat. 3182–83.

Subpart C—Excepted Schedules

6. Amend § 213.3301 by revising the section heading and paragraph (a) to read as follows:

§ 213.3301 Positions of a confidential or policy-determining character.

(a) Upon specific authorization by OPM, agencies may make appointments under this section to positions that are of a confidential or policy determining character as defined in § 210.102 of this chapter. Positions filled under this authority are excepted from the competitive service and constitute Schedule C. Each position will be assigned a number from §§ 213.3302 through 213.3999, or other appropriate number, to be used by the agency in recording appointments made under that authorization.

* * * * *

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

7. The authority citation for part 302 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*

Subpart A—General Provisions

8. Amend § 302.101 by revising paragraph (c)(7) to read as follows:

§ 302.101 Positions covered by regulations.

* * * * *

(c) * * *

(7) Positions included in Schedule C (see subpart C of part 213 of this chapter) and positions excepted by statute which are of a confidential, policy-determining, policy-making, or policy-advocating nature;

* * * * *

9. Add subpart F consisting of §§ 302.601 through 302.603, to read as follows.

Subpart F—Moving Employees and Positions into and Within the Excepted Service

Sec.

§ 302.601 Scope.

This subpart applies to any situation where an agency moves a position from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive order, or an OPM issuance, to the extent that this subpart is not inconsistent with applicable statutory provisions. This subpart also applies in situations where a position previously governed by title 5 of the U.S. Code will be governed by another title of the U.S. Code going forward, unless the statute governing the exception provides otherwise.

§ 302.602 Basic requirements.

(a) In the event the President, Congress, OPM, or their designees direct agencies to move positions from the competitive service for placement in the excepted service under Schedule A, B, or C, or any Schedule in the excepted service created after [effective date of final rule], or to move positions from a schedule in the excepted service to a different schedule in the excepted service, the following requirements must be met, as relevant:

(1) If the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that list, and their location within the organization.

(2) If the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must provide a list of the positions to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes the positions met those criteria.

(3) If the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the

agency intends to move, then the agency must, in addition to supplying a list and the locations in the organization, supply the objective criteria to be used and an explanation of how these criteria are relevant.

(b) An agency is also required to—

(1) Identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

(2) Document the basis for its determination that movement of the position or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

(3) Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the position or positions is both consistent with the standards set forth by the directive, as applicable, and with merit system principles.

(4) Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority, which OPM will then review.

(5) For exceptions effectuated by the President or OPM, list positions to the appropriate schedule of the excepted service only after obtaining written approval from the OPM Director to do so. For exceptions effectuated by Congress, inform OPM of the positions excepted either before the effective date of the provision, if the statutory provisions are not immediately effective, or within 30 days thereafter.

(6) For exceptions created by the President or OPM, initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the *Federal Register*, to include the types, numbers, and locations of the positions moved to the excepted service.

(c) In accordance with the requirements provided in paragraphs (a) and (b) of this section—

(1) An agency that seeks to move an encumbered position from the competitive service to the excepted service, or from one excepted service schedule to another, must provide written notification to the employee of the intent to move the position 30 days prior to the effective date of the position being moved.

(2) The written notification required by paragraph (c)(1) of this section must inform the employee that the employee maintains their civil service status and protections notwithstanding the movement of the position.

§ 302.603 Appeals.

(a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved to the excepted service, or an excepted service employee whose position is placed into a different schedule of the excepted service or who is otherwise moved to a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b) and (c) of this section, to have their competitive status and civil service protections reinstated, as applicable.

(b) An employee whose position is moved into the excepted service or into a different schedule of the excepted service may appeal to the extent that such move purportedly strips the employee of the status and civil service protections the employee has already accrued.

(c) An employee whose move to a new position that would require the employee to relinquish their competitive status or civil service protections is facially voluntary may appeal if the employee believes that such move was coerced.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

10. The authority citation for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

11. Amend § 432.102 by revising paragraph (f)(10) to read as follows:

§ 432.102 Coverage.

* * * * *

(f) * * *

(10) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy advocating character, as defined in § 210.102 of this chapter by—

(i) The President for a position that the President has excepted from the competitive service;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute.

* * * * *

PART 451—AWARDS

12. The authority citation for part 451 continues to read as follows:

Authority: 5 U.S.C. 4302, 4501–4509; E.O. 11438, 33 FR 18085, 3 CFR, 1966–1970 Comp., p. 755; E.O. 12828, 58 FR 2965, 3 CFR, 1993 Comp., p. 569.

Subpart C—Presidential Rank Awards

13. Amend § 451.302 by revising paragraph (b)(3)(ii) to read as follows:

§ 451.302 Ranks for senior career employees.

* * * * *

(b) * * *

(3) * * *

(ii) To positions that are excepted from the competitive service because of their confidential or policy-determining character.

* * * * *

PART 752—ADVERSE ACTIONS

14. The authority citation for part 752 continues to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91, 131 Stat. 1283, and Pub. L. 114–328, 130 Stat. 2000.

Subpart B—Regulatory Requirements for Suspension for 14 Days or Less

15. Amend § 752.201 by revising paragraphs (b)(1) through (6) and (c)(5) and (6) and adding paragraph (c)(7) to read as follows:

§ 752.201 Coverage.

* * * * *

(b) * * *

(1) An employee in the competitive service who has completed a probationary or trial period, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position;

(2) An employee in the competitive service serving in an appointment which requires no probationary or trial period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position;

(4) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed under any schedule of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position; and

(6) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position.

(c) * * *

(5) Of a National Guard Technician;

(6) Taken under 5 U.S.C. 7515; or

(7) Of an employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this subchapter by—

(i) The President for a position that the President has excepted from the competitive service;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute.

* * * * *

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

16. Amend § 752.401 by revising paragraphs (c)(1), (c)(2)(i) and (ii), (c)(3) through (9), and (d)(2) to read as follows:

§ 752.401 Coverage.

* * * * *

(c) * * *

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period, including such an employee who is moved involuntarily into the excepted service;

(2) * * *

(i) Who is not serving a probationary or trial period under an initial appointment, including such an employee who is moved involuntarily into the excepted service; or

(ii) Except as provided under section 1105 of Public Law 114-92 (as repealed by section 1106(a)(1) of Public Law 117-81), who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, including such an employee who is moved involuntarily into the excepted service;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or a similar position;

(4) A Postal Service employee covered by Public Law 100-90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or a similar position;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at 5 U.S.C. 105, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less, including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or a similar position;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter, including such an employee whose position is moved involuntarily into a different schedule of the excepted service and still occupies that position;

(7) An employee who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time the employee's position was first listed under any schedule of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3), including such an employee who is moved involuntarily into a different schedule of the excepted service and still occupies that position or a similar position; and

(9) An employee of the Government Publishing Office, including such an employee who is moved involuntarily into the excepted service.

(d) * * *

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character, as defined in § 210.102 of this chapter by—

(i) The President for a position that the President has excepted from the competitive service;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute.

* * * * *

[FR Doc. 2023-19806 Filed: 9/15/2023 8:45 am; Publication Date: 9/18/2023]