

**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:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to reinforce and clarify longstanding civil service protections and merit system principles, codified in law, as they relate to the involuntary movement of Federal employees and positions from the competitive service to the excepted service, or from one excepted service schedule to another. In this final rule, OPM adopts many of the provisions from the proposed rule with some modifications and clarifications based on comments received from the public. The final regulations will better align OPM regulations with relevant statutory text, congressional intent, legislative history, legal precedent, and OPM's longstanding practice.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

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##### **I. Executive Summary**

The Office of Personnel Management (OPM) is issuing final regulations governing competitive service and competitive status, employment in the excepted service, and adverse actions. The final rule also makes conforming changes to the regulations governing performance-based actions and awards.

This rule clarifies and reinforces longstanding civil service protections and merit system principles, reflected in the passage of the Pendleton Civil Service Reform Act of 1883. The Act ended the patronage, or "spoils," system for Federal employment and initiated the competitive civil service. For the past 140 years, Congress has enacted statutes and agencies have promulgated rules that govern the civil service, 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 Lloyd-La Follette Act of 1912, the Veterans' Preference Act of 1944, as amended, the Civil Service Reform Act of 1978 (CSRA), and the Civil Service Due Process Amendments Act of 1990, extended and updated these civil service provisions.

Whereas the Pendleton Act eliminated the spoils system and introduced a merit-based civil service as a key pillar of our democratic system, the CSRA was the signature, bipartisan reform that has most shaped the system we have today.<sup>1</sup> It created an elaborate “new framework”<sup>2</sup> of the modern civil service, protected career Federal employees from undue partisan political influence, and extended adverse action rights by statute to a larger cohort of employees, so that the business of government can be carried out efficiently and effectively, in compliance with the law, and in a manner that encourages individuals to apply to participate in the civil service.

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 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.).

Congress has dictated a well-established way in which agencies can control their workforces. If a Federal employee refuses to implement lawful direction from leadership, there

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<sup>1</sup> See *Lindahl v. OPM*, 470 U.S. 768, 773 (1985) (explaining that the CSRA “overhauled the civil service system”).

<sup>2</sup> *Id.* at 774; see *United States v. Fausto*, 484 U.S. 439, 443 (1988).

are mechanisms for agencies to respond through discipline, up to and including removal, as appropriate, under chapter 75 of title 5, U.S. Code. If a Federal employee's performance has been determined to be unacceptable, the agency may respond under chapter 75 (on the basis that action is necessary to promote the efficiency of the service) or pursue a performance-based action under chapter 43 of title 5, U.S. Code, at the agency's discretion. Under the law, however, a mere difference of opinion with leadership 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 have a level of institutional experience, subject matter expertise, and technical knowledge that incoming political appointees have found to be useful and may lack themselves. Such civil servants' ability to offer their objective analyses and educated views when 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 CSRA, and expanded and strengthened those protections through subsequent enactments such as the Civil Service Due Process Amendments Act.<sup>3</sup>

Congress has generally charged the OPM Director with executing, administering, and enforcing the laws governing the civil service.<sup>4</sup> In chapter 75, Congress provided certain Federal employees with specified procedural rights and provided OPM with broad authority to prescribe regulations to carry out the chapter's purposes.<sup>5</sup> Moreover, OPM regulations govern the movement of positions from the competitive service to the excepted service.<sup>6</sup> Pursuant to its authority, OPM issues this rule to clarify and reinforce longstanding civil service protections and

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<sup>3</sup> Pub. L. 101-376, 104 Stat. 461, H.R. 3086 (Aug. 17, 1990); *see also* H.R. Rep. 101-328 (Nov. 3, 1989).

<sup>4</sup> *See* 5 U.S.C. 1103(a)(5)(A).

<sup>5</sup> *See* 5 U.S.C. 7504, 7514.

<sup>6</sup> *See, e.g.*, 5 CFR part 212.

merit system principles as codified in the CSRA. OPM amends its regulations in 5 CFR chapter I, subchapter B, as follows:

First, the rule amends 5 CFR part 752 (Adverse Actions) to clarify that civil servants in the competitive service or excepted service who qualify as “employees” under 5 U.S.C. 7501, 7511(a)—meaning they have fulfilled their probationary or trial period requirement or durational requirement and are not excluded from the definition of “employee” by 5 U.S.C. 7511(b)<sup>7</sup>—will retain the rights previously accrued upon an involuntary move<sup>8</sup> from the competitive service to the excepted service, or from one excepted service schedule to another, or any subsequent involuntary move, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights.<sup>9</sup> The rule also conforms the regulation for non-appealable adverse actions with statutory language in 5 U.S.C. 7501 and Federal Circuit precedent to clarify which employees are covered. The rule amends 5 CFR part 212 (Competitive Service and Competitive Status) to further clarify a competitive service employee’s status in the event the employee and/or their position is moved involuntarily to an excepted service schedule. OPM also updates the regulations to reflect the repeal of 10 U.S.C. 1599e, effective December 31, 2022, and restores a one-year probationary period for covered Department of Defense employees appointed to permanent positions within the competitive service in the Department of Defense on or after December 31, 2022.

Second, the rule amends 5 CFR part 210 (Basic Concepts and Definitions (General)) to interpret the phrases “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining”<sup>10</sup> in 5 CFR 210.102. These terms of art—which would

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<sup>7</sup> OPM notes that employees appointed pursuant to Schedule C have no expectation of accruing such rights, considering the longstanding interpretation of 5 U.S.C. 7511(b)(2) and E.O. 10577, Rule VI, Schedule C, as amended. There are a small number of additional, discrete, positions for which the appointing authority similarly precludes the accrual of such rights, by the appointing authority’s own terms.

<sup>8</sup> The final rule further discusses the differences between voluntary and involuntary moves in Section IV(A).

<sup>9</sup> As explained further *infra*, an individual can voluntarily relinquish rights when moving to a position that explicitly results in 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 with different rights. *See Williams v. MSPB*, 892 F.3d 1156 (Fed. Cir. 2018).

<sup>10</sup> *See* 5 CFR 213.3301, 302.101, 432.102, 451.302, 752.202, 752.401.

apply throughout OPM’s Civil Service Regulations in 5 CFR chapter I, subchapter B<sup>11</sup>— describe positions of the character generally excepted from chapter 75’s protections. OPM reinforces the longstanding interpretation that, in creating this exception in 5 U.S.C. 7511(b)(2), Congress intended to except noncareer political appointees<sup>12</sup> from civil service protections.

Third, the rule amends 5 CFR part 302 to provide specific procedures that apply when moving individuals or 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 a right of appeal to the Merit Systems Protection Board (MSPB or Board) to the extent any such move is involuntary and characterized as stripping individuals of any previously accrued civil service status and protections.

On September 18, 2023, OPM issued a notice of proposed rulemaking, which was published at 88 FR 63862. After consideration of public comments on the proposed regulatory amendments, OPM has determined that the issuance of these revised regulations is essential to strengthen and protect the foundations of the civil service and its merit system principles.<sup>13</sup> These principles were critical to the Pendleton Act’s repudiation of the spoils system; essential to continued compliance with the statutory schemes for performance management, as enacted

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<sup>11</sup> The relevant regulatory language currently varies slightly. For instance, 5 CFR part 752 refers to 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 final rule, OPM adopts “confidential, policy-determining, policy making, or policy-advocating” and “confidential or policy-determining” as two, interchangeable alternatives to describe these positions.

<sup>12</sup> 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 continued employment beyond the presidential administration in which the appointment occurred.

<sup>13</sup> 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 or people 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. However, an OPM regulation may prescribe the procedures by which agencies would be required to move positions unless inconsistent with that statutory provision. Similarly, these regulatory 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.

by Congress (and subsequently expanded) to extend procedural entitlements to most career employees following a specified period of service; and essential to the creation of the modern civil service on which this country depends and under which it has thrived for 140 years.<sup>14</sup> The final rule is also critical to the Federal Government's ability to recruit and retain the talent that agencies need to deliver on their complex missions. Individuals considering whether to accept a career civil service position need to know that they will be valued for their knowledge, skills, and abilities; evaluated based on merit; and not only protected from retribution for offering their candid opinions but encouraged to do so. Policies that cast doubt on these fundamental characteristics of a career civil service job restrict the pool of applicants interested in Federal Government jobs and disadvantage agencies in competing for top talent.

OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of this final rule.

## **II. Digest of Public Comments**

In response to the proposed rule, OPM received 4,097 comments during the 60-day public comment period from a variety of individuals (including current and former civil servants), organizations, and Federal agencies. At the conclusion of the public comment period, OPM reviewed and analyzed the comments. In general, the comments ranged from enthusiastic support of the proposed regulations to categorical rejection. Approximately 67 percent of the overall comments were supportive of the proposed regulatory amendments.<sup>15</sup> Of the approximately 33 percent of comments that were opposed, more than 95 percent of those comments consisted of one of four form letters.<sup>16</sup>

In the proposed rule, OPM requested comments on a variety of topics regarding the implementation and impacts of this rulemaking.<sup>17</sup> OPM received many comments in response

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<sup>14</sup> E.O. 14003, sec. 2.

<sup>15</sup> Approximately five of the 4,097 comments could be considered neutral—neither supportive nor opposed.

<sup>16</sup> The form letters are described below where relevant.

<sup>17</sup> See 88 FR 63862, 63881.

and incorporated them in the relevant sections that follow. Such information was useful for better understanding the effect of these final revisions on civil service protections, merit system principles, and the effective and efficient business of government, in compliance with the law.

In the next section, we address the background for these regulatory amendments and related comments. In subsequent sections, we address the specific amendments, provide a regulatory analysis, and list procedural considerations. OPM concludes with the amended regulatory text.

### **III. Background and Related Comments**

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

It is critical to our government that career Federal employees be protected from undue partisan influence so that business can be carried out efficiently and effectively, in compliance with the law.

President George Washington based most of his federal appointments on merit. Subsequent presidents, though, deviated from this policy, to varying degrees.<sup>18</sup> “By the time Andrew Jackson was elected president in 1828,” the patronage or “‘spoils system,’ ... was in full force.” Under this system, Federal employees were generally appointed, retained, or removed based on their political affiliations and support for the political party in power rather than their capabilities or competence.<sup>19</sup> 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.<sup>20</sup> This 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

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<sup>18</sup> See, e.g., Nat’l Archives, Milestone Documents, “Pendleton Act (1883),” <https://www.archives.gov/milestone-documents/pendleton-act>.

<sup>19</sup> U.S. Merit Sys. Prots. Bd., “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](https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf)

<sup>20</sup> U.S. Off. of Pers. Mgmt., “Biography of an Ideal,” p. 83 (2003), <https://dml.armywarcollege.edu/wp-content/uploads/2023/01/OPM-Biography-of-an-Ideal-History-of-Civil-Service-2003.pdf>.



during campaigns and would continue to serve them in government.”<sup>21</sup> Theodore Roosevelt, who served as a Civil Service Commissioner before becoming the Vice President and then President of the United States, described the spoils system as “more fruitful of degradation in our political life than any other that could possibly have been invented. The spoils monger, the man who peddled patronage, inevitably bred the vote-buyer, the vote-seller, and the man guilty of misfeasance in office.”<sup>22</sup> George William Curtis, a reformer and 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.”<sup>23</sup> 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.”<sup>24</sup>

To protect career Federal employees from undue partisan influence, civil service advocates and then Congress sought to establish a Federal nonpartisan career civil service that would be selected based on merit rather than political affiliation.<sup>25</sup> Such a workforce, though initially limited in scope, would reinvigorate government, making it more efficient and competent.<sup>26</sup> 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.<sup>27</sup>

The Pendleton Act of 1883<sup>28</sup> ended this patronage system for covered positions and created the competitive civil service. Coverage has grown as a proportion of the Federal workforce over time to cover nearly all career positions.<sup>29</sup> The Pendleton Act required agencies

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<sup>21</sup> 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://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=1313&context=jour\\_mlr](https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=1313&context=jour_mlr).

<sup>22</sup> U.S. Off. of Pers. Mgmt., *supra* note 20 at pp. 182-83.

<sup>23</sup> *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.

<sup>24</sup> *Id.* at pp. 183-84.

<sup>25</sup> See Gaughan, *supra* note 21 at p. 787; U.S. Merit Sys. Prots. Bd., *supra* note 19 at pp. 3-5.

<sup>26</sup> See Gaughan, *supra* note 21 at p. 787.

<sup>27</sup> See U.S. Merit Sys. Prots. Bd., *supra* note 19 at pp. 4-5; U.S. Off. of Pers. Mgmt., *supra* note 20 at pp. 198-201.

<sup>28</sup> Pub. L. 16; Civil Service Act of 1883, (Jan. 16, 1883) (22 Stat. 403).

<sup>29</sup> Nat’l Archives, *supra* note 18.

to appoint Federal employees covered by the Act based on competency and merit.<sup>30</sup> It also established the Civil Service Commission (CSC) to help implement and enforce the government's adherence to merit-based principles.<sup>31</sup>

Commenters generally agreed<sup>32</sup> with this background,<sup>33</sup> especially the point that the corruption of the spoils era and evolving complexity of government necessitated a nonpartisan career civil service. A professor concurred with OPM's contention that the growing complexity of issues facing the United States in the late nineteenth century, "combined with the pathologies engendered by the Jacksonian spoils system (culminating in the assassination of President Garfield) led to the creation of a competitive civil service." Comment 42.<sup>34</sup> Other commenters noted that the Pendleton Act was intended to eliminate the influence of personal loyalty and partisan activity as the key qualifications for career appointees, and replace them with "fitness, capacity, honesty [and] fidelity." Comment 2816; *see also* Comments 2822, 3029.

The contours of the civil service and merit system principles that resulted were borne of extensive debates in which one view clearly prevailed. A former federal official commented that "Congress decided to target the threats of increased incompetence and patronage in a spoils system, and decided that the benefits of a professionalized civil service outweighed concerns about bureaucratic inertia." Comment 2816. Commenter noted that "opponents of the Pendleton Act argued [at the time] that civil service protections were 'one step in the direction of the establishment of an aristocracy in this country, the establishment of another privileged class.'" *Id.* Commenter concluded that "arguments that the civil service should be responsive to, rather than insulated from, the churn of partisan politics are echoed by contemporary critics of civil

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<sup>30</sup> 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.").

<sup>31</sup> *Id.* at 403.

<sup>32</sup> One notable dissent comes in Comment 4097, from an advocacy nonprofit organization. Commenter opposed the rule and did not dispute the factual bases of the Pendleton Act but argued that its limited treatment of removal rights supports a view that modern removal protections can now be eliminated for certain career civil servants. OPM disagrees with this argument as explained in later sections.

<sup>33</sup> *See* 88 FR 63862, 63863-67 (detailing background in proposed rule).

<sup>34</sup> Comments filed in response to this rulemaking are available at <http://www.regulations.gov/comment/OPM-2023-0013-nnnn>, where "nnnn" is the comment number. Note that the number must be four digits, so insert preceding zeroes as appropriate.

service protections. But these arguments against a professional civil service were soundly rejected with the passage of the Pendleton Act and have been proven to have been incorrect over more than a century of experience.” *Id.*

A legal nonprofit organization similarly commented that the features of the “civil service that frustrate its critics—fealty to Congressional programs, dedication to government institutions, consideration of the public interest, and a mission broader than simply serving political appointees—are core components of the system established by an elected Congress almost 150 years ago.” Comment 2822. Congress “has spoken clearly about its vision for the civil service for a century and a half, and consistently rejected a civil service that is merely an extension of a President’s will.” *Id.*

Several commenters noted that the Pendleton Act was extraordinarily successful in establishing the foundation for the modern civil service. A former federal official explained that the Act had the qualitative benefit of improving targeted employees’ professional backgrounds. Comment 2816. As discussed further in Section III(E), the nonpartisan civil service ensured that the United States government would be capable of combating problems “unimagined when the Pendleton Act was passed, including auto safety, climate change, and the airworthiness of planes.” *See* Comment 42.

Even with respect to the enactment of the Pendleton Act, a subsequent President saw the need to address removals more specifically not long afterward.<sup>35</sup> 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.”<sup>36</sup>

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<sup>35</sup> The Pendleton 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.” 22 Stat. at 404.

<sup>36</sup> U.S. Merit Sys. Prots. Bd., *supra* note 19 at p. 5.

Congress, far from objecting to this Order, later essentially codified these requirements in the Lloyd-La Follette Act of 1912<sup>37</sup> to establish that covered Federal employees were to be both hired and removed based on merit. Specifically, section 6 of the Act provided no person in the “classified civil service”<sup>38</sup> of the United States can be removed “except for such cause as will promote the efficiency of said service” and for reasons given in writing. The Act also mandated providing notice to the person whose removal is sought 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” of the removal.

Congress, over time, has codified, renewed, and expanded protections to civil servants. A former federal official quoted Rep. James Tilghman Lloyd, one of the Lloyd-La Follette Act’s namesakes, as saying the Act sought to “do away with the discontent and suspicion which now exists among the employees [of the civil service] and [] restore that confidence which is necessary to get the best results from the employees.” Comment 2816. It would, according to Rep. Lloyd, ensure that civil servants “being dismissed from service would have the benefit of a written record of charges against them, with reports made to Congress, and the ability to have Congress subject their dismissal to ‘special inquiry’ if department heads ‘trump up charges’ to dismiss civil servants.”<sup>39</sup> *Id.*

Thereafter, Congress enacted further requirements and reforms. In 1944, Congress passed the Veterans’ Preference Act,<sup>40</sup> 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

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<sup>37</sup> 37 Stat. 555 (1912).

<sup>38</sup> The “classified civil service” refers to the competitive service. *See* 5 U.S.C. 2102.

<sup>39</sup> Citing 48 Cong. Rec. 2653-54 (1912).

<sup>40</sup> 58 Stat. 387 (1944).

adverse action protections and access to an appeals process.<sup>41</sup> Then, in 1962, President John F. Kennedy issued Executive Order 10988 to extend similar adverse action rights to a broader swath of the civil service, specifically, employees in the competitive service.<sup>42</sup>

## **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 a broader group of civil servants and govern personnel actions, Congress in 1978 passed the CSRA<sup>43</sup>—the most comprehensive Federal civil service reform since the Pendleton Act.

One factor that led to the CSRA, as a whistleblower protection nonprofit organization explained, was that “whistleblowers at the Senate Watergate hearings” showed that the Nixon Administration “tried to implement the Malek Manual, a secret blueprint to replace the civil service merit system with a political hiring scheme” that would have begun “by purging all Democrats from federal employment.” Comment 3340.<sup>44</sup> Those abuses led to passage of the CSRA “to shield the merit system with enforceable rights against similar future abuses.” *Id.*<sup>45</sup>

The CSRA made significant organizational changes to civil service management, adjudications, and oversight. It replaced the CSC, dividing its duties among OPM<sup>46</sup> and the MSPB, which initially encompassed the Office of Special Counsel (OSC).<sup>47</sup> OSC later became a

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<sup>41</sup> 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 Sys. Prots. Bd., *supra* note 19 at pp. 7-8.

<sup>42</sup> 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).

<sup>43</sup> 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.”).

<sup>44</sup> Citing Dobrovir, Gebhardt and Devine, “Blueprint for Civil Service Reform,” Fund for Constitutional Government (1976).

<sup>45</sup> That these concerns have been ongoing can be seen in Congress’ enactment of the Presidential Transitions Improvements Act of 2015 referenced in note 155, *infra*.

<sup>46</sup> 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).

<sup>47</sup> U.S. Gov’t Accountability Off., “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.

separate agency to which specific duties were assigned.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> The MSPB adjudicates challenges to personnel actions taken under the civil service laws,<sup>51</sup> among other things, and OSC investigates and prosecutes prohibited personnel practices.<sup>52</sup> 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.<sup>53</sup> These principles are summarized here:

#### Merit System Principles<sup>54</sup>

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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<sup>48</sup> See Cong. Rsch. Serv., "Merit Systems Protection Board (MSPB): A Legal Overview," p. 4 (March 25, 2019), <https://crsreports.congress.gov/product/pdf/R/R45630>.

<sup>49</sup> See 5 U.S.C. 1103(a)(5), (a)(7).

<sup>50</sup> *Id.*; see 5 U.S.C. 8461.

<sup>51</sup> See 5 U.S.C. 1204, 7513(d).

<sup>52</sup> See 5 U.S.C. 1212.

<sup>53</sup> See 47 Cong. Ch. 27 (Jan. 16, 1883), 22 Stat. 403.

<sup>54</sup> See 5 U.S.C. 2301.

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

The CSRA also established an “elaborate new framework” related to civil service protections for employees in the competitive and excepted services. Challenges to non-appealable adverse actions, appealable adverse actions, and “prohibited personnel practices” are channeled into separate procedural tracks.<sup>55</sup> The procedures an agency must follow in taking an adverse action and whether the agency’s action is appealable to the MSPB depend on the action the agency seeks to impose.

Suspensions of 14 days or less are not directly appealable to the MSPB.<sup>56</sup> 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.<sup>57</sup>

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, if the subject of the contemplated action meets the definition of an “employee” under 5 U.S.C. 7511(a) by satisfying probationary or length of service conditions.<sup>58</sup> These employees, other than those who are statutorily excepted from chapter 75’s protections, receive the civil service protections outlined in 5 U.S.C. 7513.<sup>59</sup> 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<sup>60</sup> under an initial appointment; or (b)

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<sup>55</sup> 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).

<sup>56</sup> 5 U.S.C. 7503; *Fausto*, 484 U.S. at 446.

<sup>57</sup> 5 U.S.C. 7503(b)(1)-(4); 5 CFR part 752, subpart B.

<sup>58</sup> See 5 CFR 752.401, 404, and 1201.3; see also 5 U.S.C. 7512(1)-(5), 7514; *Fausto*, 484 U.S. at 446-47.

<sup>59</sup> 5 U.S.C. 7513(d), 7701(a).

<sup>60</sup> 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 Sys. Prots. Bd., *Navigating the Probationary Period After Van Wersch and McCormick*, (Sept. 2006),

has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (2) a preference eligible<sup>61</sup> 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 Regulatory 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.<sup>62</sup>

In the event of a final MSPB decision adverse to the employee, employees may seek judicial review by petitioning to the appropriate Federal appellate or district court.<sup>63</sup>

Excepted from these procedural protections and rights to appeal conferred on other employees under chapter 75 are certain civil servants described in 5 U.S.C. 7511(b), including, among other categories not relevant here, those officers appointed by the President with the advice and consent of the Senate and other officers whom the President is permitted to appoint himself or herself. Also excepted are individuals “whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character.”<sup>64</sup> These determinations must be made by “(A) the President for a position that the President has excepted from the competitive service; (B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or (C) the President or the head of an agency for a position excepted from the competitive service by statute.”<sup>65</sup> As detailed further in Section

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[https://www.mspb.gov/studies/studies/Navigating\\_the\\_Probationary\\_Period\\_After\\_Van\\_Wersch\\_and\\_McCormick\\_276106.pdf](https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf).

<sup>61</sup> 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 veteran with a service-connected disability. *See* 5 U.S.C. 2108(3).

<sup>62</sup> 5 U.S.C. 7511(a)(1).

<sup>63</sup> 5 U.S.C. 7513(d), 7701-7703, 7703(a)(1), (b)(2). The appropriate federal appellate court will generally be the U.S. Court of Appeals for the Federal Circuit but, in some instances, where appellant asserts whistleblower retaliation, employees may appeal to the Federal Circuit or another circuit court. Cases that include claims under certain discrimination statutes are appealable to Federal district courts. *See* 5 U.S.C. 7703(b)(2).

<sup>64</sup> 5 U.S.C. 7511(b)(2)(A), (B), and (C).

<sup>65</sup> 5 U.S.C. 7511(b)(2).



IV(B), 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 to the voluntary filling of noncareer political appointments that carry no expectation of continued employment beyond the presidential administration during which the appointment occurred.<sup>66</sup>

The unique responsibilities of politically appointed employees, many of whom are listed under 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 specific exception from the competitive service and, for that reason, each position listed in Schedule C is revoked immediately upon the position becoming vacant.<sup>67</sup> Agencies may terminate political appointees at any time. This also means that, absent any unique circumstance provided in law<sup>68</sup> 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 of title 5, U.S. Code, as an additional process for empowering supervisors to address performance concerns.<sup>69</sup> Accordingly, in addition to using the provisions of chapter 75, agencies can address performance concerns under chapter 43. Under this scheme established by Congress, the decision of which chapter to use is left to the discretion of the manager tasked with pursuing the action.

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<sup>66</sup> See *infra*, Sec. IV.(B); see also 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 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).

<sup>67</sup> See 5 CFR 213.3301.

<sup>68</sup> Such as 5 CFR 212.401, discussed further in Section IV.

<sup>69</sup> U.S. Merit Sys. Prots. Bd., “Addressing Poor Performers and the Law,” p. 4. (Sept. 2009), [https://www.mspb.gov/studies/studies/Addressing\\_Poor\\_Performers\\_and\\_the\\_Law\\_445841.pdf](https://www.mspb.gov/studies/studies/Addressing_Poor_Performers_and_the_Law_445841.pdf).

Through various enactments currently 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 earn a property interest in that continued employment. For such employees, 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.”<sup>70</sup> 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 of Regents of State Colleges v. Roth*, recognized that restrictions on loss of employment, such as tenure, can create a property right.<sup>71</sup> In *Cleveland Board of Education v. Loudermill*,<sup>72</sup> 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.<sup>73</sup>

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 due process. This obligation drives some of the procedures in both chapters 43 and 75, while other procedures have been developed in accordance with Congress’ assessments of what is good policy.<sup>74</sup> Regardless of the nature of the particular action specified, agencies must follow

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<sup>70</sup> See 5 U.S.C. 7503(a), 7513(a); 5 CFR 752.102(a), 752.202(a).

<sup>71</sup> 408 U.S. 564, 576-77 (1972). The Court described three earlier decisions—*Slochower v. Bd. of Educ.*, 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 public employees had due process rights. Before the Court explicitly recognized that restrictions on the loss of employment could create a property right, the Court protected statutorily-conferred public employment rights under other legal theories. See, e.g., *United States v. Wickersham* 210 U.S. 390, 398-399 (1906); *Keim v. United States*, 177 U.S. 290, 296 (1900); see also *Indiana ex rel. Anderson v. Brand* (303 U.S. 95 (1938); *Hall v. Wisconsin*, 103 U.S. 5 (1880) (enforcing statutory rights to public employment benefits under theories of contractual entitlement, even when legislatures changed those statutory entitlements).

<sup>72</sup> 470 U.S. 532 (1985).

<sup>73</sup> *Id.* at 541.

<sup>74</sup> The exact procedures required will turn on the factual situation and may be different from instance to instance.

the procedures specified by Congress to effectuate a removal under those chapters, as a matter of law, unless they are changed by Congress.

An advocacy nonprofit organization opposed to this rule argued that the Lloyd-La Follette Act and predecessor executive orders “were not understood (or applied)” to give federal employees a property right to their jobs before “the Supreme Court interpreted the Act as having that effect in *Arnett v. Kennedy* (1974).” Comment 4097. Commenter’s point is incorrect, and, in any event, irrelevant. As observed in note 71 above, the Supreme Court recognized in earlier cases that due process rights could attach to public employment. And Congress, far from limiting or ending such rights, has enacted new statutes since *Arnett*, notably the CSRA and the Civil Service Due Process Amendments Act, conferring robust procedural rights on broader groups of Federal employees. In any event, although Congress has, from time to time, tinkered with the procedures required in various agency settings, it has done nothing since *Arnett* purporting to remove due process rights from incumbents who have accrued them, which suggests approval of the Supreme Court’s approach in that case.

Finally, in addition to establishing the requirements and procedures for challenging adverse actions and performance-based actions, the CSRA includes a mechanism for an employee in a “covered position” to challenge a “personnel action” that constitutes a “prohibited personnel practice” because it has been taken for a prohibited reason.<sup>75</sup> “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 exception on the basis that the position is of a “confidential, policy-determining, policy-making, or policy-advocating character.”<sup>76</sup>

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<sup>75</sup> 5 U.S.C. 2302(a)(1), (a)(2), (b). Challenges to a personnel action on the basis that it constitutes a prohibited personnel practice may be brought by anyone in a covered position, regardless of their entitlement to adverse action rights.

<sup>76</sup> 5 U.S.C. 2302(a)(2)(B), 3302.

At 5 U.S.C. 2302(a)(2)(A), Congress lists personnel actions that can form the basis of a prohibited personnel practice under 5 U.S.C. 2302(b). The CSRA, as described in the proposed rule,<sup>77</sup> also codified a comprehensive list of prohibited personnel practices.<sup>78</sup>

### **C. The Competitive, Excepted, and Senior Executive Services**

The CSRA also established a new service—the Senior Executive Service, or SES—“to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and is otherwise of the highest quality.”<sup>79</sup> As described further below, the SES is distinct from the competitive service and the excepted service.<sup>80</sup> It consists of senior government officials, both noncareer and career, who share a broad set of responsibilities to help lead the work of the Federal Government.

In the competitive service, individuals must complete a competitive hiring process before being appointed. This process may include a written test or an equivalent evaluation of the individual’s relative level of knowledge, skills, and abilities necessary for successful performance in the position to be filled.<sup>81</sup>

Although most government employees are in the competitive service, about one-third are in the excepted service.<sup>82</sup> 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.<sup>83</sup> For positions excepted from the competitive service by statute, selection must

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<sup>77</sup> See 88 FR 63862, 63866.

<sup>78</sup> 5 U.S.C. 2302(b). OSC investigates allegations of prohibited personnel practices brought by employees in covered positions and may investigate in the absence of such an allegation, to determine if a prohibited personnel practice occurred. 5 U.S.C. 1214(a)(1)(A), (a)(5). If OSC concludes that a prohibited personnel practice has occurred and, if OSC is unable to obtain a satisfactory correction from an agency responsible for a prohibited personnel practice, OSC may petition the MSPB to grant corrective action. If OSC proves its claim, the MSPB may order the corrective action it deems appropriate. See 5 U.S.C. 1214(b)(2)(B), (C), (b)(4)(A).

<sup>79</sup> 5 U.S.C. 3131.

<sup>80</sup> 5 U.S.C. 2101(a) (definition of civil service), 2102(a)(1) (competitive service), 2103(a) (excepted service) 3132(a)(2) (Senior Executive Service).

<sup>81</sup> 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. Off. of Pers. Mgmt., “Competitive Hiring,” <https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/>.

<sup>82</sup> See Cong. Rsch. Serv., “Categories of Federal Civil Service Employment; A Snapshot,” at p. 4 (May 26, 2019), <https://sgp.fas.org/crs/misc/R45635.pdf>.

<sup>83</sup> See 5 U.S.C. 2103; 5 CFR parts 213, 302.

be made pursuant to the provisions Congress enacted for those positions. 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.”<sup>84</sup> 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.”<sup>85</sup> This means that agencies should generally afford veterans’ preference in the same manner they would have for the competitive service, though, in a few situations<sup>86</sup> 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.<sup>87</sup>

The President is authorized by statute to provide for “necessary exceptions of positions from the competitive service” when warranted by “conditions of good administration.”<sup>88</sup> 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 thereto through competitive examination are not practicable.<sup>89</sup> 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.”<sup>90</sup>

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:

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<sup>84</sup> 5 U.S.C. 2301(b)(1).

<sup>85</sup> 5 U.S.C. 3320. Part 302 of title 5 of OPM’s regulations establishes the mechanisms by which compliance with section 3320 can be achieved.

<sup>86</sup> *See infra* notes 357-361.

<sup>87</sup> 5 CFR 302.101(c).

<sup>88</sup> 5 U.S.C. 3302.

<sup>89</sup> 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.”).

<sup>90</sup> 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 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 scientific, professional, and technical activities.
- 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.
- Schedule E—Includes positions of administrative law judges.<sup>91</sup>

As described *supra*, competitive and excepted service incumbents, except those in Schedule C—and others excluded under 5 U.S.C. 7511(b)—become “employees” for purpose of civil service protections after they satisfy the probationary or length of service requirements in 5 U.S.C. 7511(a). Excepted service employees, except those in Schedule C and others excluded under section 7511(b), maintain the same notice and appeal rights for adverse actions and performance-based actions as competitive service employees.<sup>92</sup> However, and as noted here,

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<sup>91</sup> 5 CFR 6.2.

<sup>92</sup> 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

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<sup>93</sup>—in an executive agency, the Postal Service, or the Postal Regulatory Commission must complete 1 year of current continuous service to avail themselves of the relevant notice and appeal rights.<sup>94</sup> 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 2 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.<sup>95</sup>

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 reduced in grade or removed under chapter 43, is entitled to appeal the action to the MSPB.<sup>96</sup> 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 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; or (3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.<sup>97</sup>

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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.

<sup>93</sup> *See* 5 U.S.C. 2108(3); *see also supra* note 61.

<sup>94</sup> *See* 5 U.S.C. 7511(a)(1)(B).

<sup>95</sup> *See* 5 U.S.C. 7511(a)(1)(C).

<sup>96</sup> *See* 5 U.S.C. 4303(e).

<sup>97</sup> *See* 5 U.S.C. 4303(f).

Finally, the SES is a service separate from the competitive and excepted services.<sup>98</sup> The SES has a separate system for hiring executives, managing them, and compensating them.<sup>99</sup> The SES is also governed by separate adverse action procedures, in Subchapter V of chapter 75. As described more fully in Section IV, the adverse action processes in 5 U.S.C. 7501-7515 and the exclusion from such rights and coverage in 5 U.S.C. 7511(b), do not apply to the SES. The SES adverse action procedures, unlike the rules governing the competitive and excepted services, make no mention—let alone an exception—for positions of “a confidential, policy-determining, policy-making, or policy-advocating character.”<sup>100</sup>

A member of the SES can be a career appointee, noncareer appointee, limited term appointee or limited emergency appointee. These terms are defined at 5 U.S.C. 3132(a).<sup>101</sup> Congress established rules restricting noncareer appointments, as well as limited term and limited emergency appointments.<sup>102</sup> The adverse action rights for SES set out in Subchapter V, 5 U.S.C. 7541-7543, apply only to career appointees to the SES. Removal of career employees for less than fully successful executive performance is governed by a separate provision at 5 U.S.C. 3592. By contrast, none of these provisions affect an agency head’s ability to remove a member of the noncareer SES.

#### **D. The Prior Schedule F**

On October 21, 2020, President Donald Trump issued Executive Order 13957, “Creating Schedule F in the Excepted Service,” which risked altering the carefully crafted legislative balance that Congress struck in the CSRA.<sup>103</sup> That Executive Order, if fully implemented, could have transformed the civil service by purportedly stripping adverse and performance-based action grievance and appeal rights from large swaths of the Federal workforce—thereby turning them into at-will employees. It could have also sidestepped statutory requirements built into the

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<sup>98</sup> See 5 U.S.C. 2102 (competitive service does not include SES), 2103 (excepted service does not include SES),

<sup>99</sup> See 5 U.S.C. 5131-5136.

<sup>100</sup> See 5 U.S.C. 7541-7543.

<sup>101</sup> 5 U.S.C. 3393, 3394.

<sup>102</sup> 5 U.S.C. 3134.

<sup>103</sup> 85 FR 67631 (Oct. 21, 2020).



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 and conduct, 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.

Before it could be implemented, however, Executive Order 13957 was revoked, and Schedule F abolished, by President Biden through Executive Order 14003, "Protecting the Federal Workforce."<sup>104</sup>

OPM received many comments related to Schedule F from both proponents and critics of it and Executive Order 13957. The lawfulness and wisdom of the policy choices embodied in now-revoked Schedule F are in most respects outside the scope of this rulemaking. Regardless of whether Executive Order 13957 was a valid exercise of authority, it is not directly at issue here. Nonetheless, numerous commenters addressed the topic and OPM has determined that it would be prudent to set forth its views in response to those comments. The various parts of the Executive Order, Schedule F, and related comments are thus addressed below. The validity of this rule does not depend on the legality or wisdom of Executive Order 13957.

#### 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 services) who occupied positions of a "confidential, policy-determining, policy-making, or policy-advocating character." These included positions the agency assessed for the first time, without guidance or precedent, to allegedly include these characteristics. Agencies were then to petition OPM for its approval to place them in Schedule F, a newly-created category of positions to be excepted from the

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<sup>104</sup> 86 FR 7231 (Jan. 22, 2021).

competitive service. If these positions had been placed in Schedule F, the employees encumbering them would have, according to the text of the Executive Order, been stripped of any adverse action procedural rights and MSPB appeal rights under chapter 75 discussed *supra*. Thus, the Order attempted to subject employees to removal, at will, by virtue of the involuntary placement of the positions they occupied in this new schedule (and regardless of any rights they had already accrued or any reliance on those rights).<sup>105</sup>

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.”<sup>106</sup> 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.<sup>107</sup> Executive Order 13957 did not 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.<sup>108</sup>

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<sup>105</sup> 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.

<sup>106</sup> E.O. 13957, sec. 1.

<sup>107</sup> The Executive Order stated 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. The “conditions of good administration” language appears in 5 U.S.C. 3302. We note that Section 3302 is placed in Subchapter I of chapter 33, a subchapter addressing examination, certification, and appointment. It relates only to exclusions of positions from the competitive service requirements relating to those topics when conditions of good administration warrant and does not purport to confer authority on the President to except positions from the adverse action provisions of chapter 75. Similarly, chapter 75 does not itself purport to confer authority on the President to except positions from the scope of chapter 75. The authority to regulate under chapter 75 is conferred directly upon OPM unlike the authority to regulate under section 3302, which is conferred upon the President. Compare 5 U.S.C. 7514 (“The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter . . .”) to 5 U.S.C. 3302 (“The President may prescribe rules governing the competitive service.”). Of course, a President could order the Director of OPM to promulgate regulations relating to chapter 75. Any such rule, however, would then be subject to the requirements of the Administrative Procedure Act.

<sup>108</sup> 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.

Executive Order 13957 instructed agency heads to review existing positions to determine which, if any, should be placed into Schedule F. The 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 the Inauguration—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,”<sup>109</sup> 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 within Schedule F.<sup>110</sup> Moreover, the Executive Order did not make the underlying determination that particular positions were “of a confidential, policy-determining, policy-making or policy-advocating character.”<sup>111</sup> In essence, the exception was created in advance of any determination. The Executive Order instead announced that any position that could be described in these terms, and which was not encumbered by an appointee under Schedule C, should be placed in a separate and new excepted service schedule. The Executive Order then directed *agencies* to determine which of their positions met that criterion and compile a list of individuals for OPM to consider placing in Schedule F.

## 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

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<sup>109</sup> See *infra* notes 355-359.

<sup>110</sup> Gov’t Accountability Off., “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>.

<sup>111</sup> 5 U.S.C. 7511(b)(2) (“This subchapter does not apply to an employee . . . (2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by – (A) the President for a position that the President has excepted from the competitive service.”); see also E.O. 13957, sec. 5 (only listing broad duties—including “viewing” or “circulating” proposed regulations and other non-public policy proposals—that agency heads should consider when petitioning the OPM Director to place positions in Schedule F).

that are not normally subject to change as a result of a presidential transition shall be made under Schedule F.”<sup>112</sup> 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 previously placed) was, again, 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.”<sup>113</sup> The stated purpose was to “provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures”<sup>114</sup> or, presumably, for positions already in the excepted service, without the constraints imposed by 5 CFR part 302. The Order 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.”<sup>115</sup> 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.”<sup>116</sup>

The Executive Order did not address 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. They also permit agencies to 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. The Order also did not address the existence of longstanding rules, grounded in the need to establish lack of unlawful bias in proceedings under

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<sup>112</sup> 85 FR 67631, 67632.

<sup>113</sup> 85 FR 67631.

<sup>114</sup> *Id.*

<sup>115</sup> 85 FR 67631, 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.

<sup>116</sup> 85 FR 67632.

Federal anti-discrimination statutes, that require assessment of any such competencies.<sup>117</sup> The summary imposition of new competencies would be contrary to existing statutory requirements and could potentially be discriminatory in application, even if that were not the agency's intent. Finally, the Order recited that the normal statutory veterans' preference requirements that would have applied to identified positions<sup>118</sup> would not apply, and that agencies would be required to apply veterans' preference requirements only "as far as administratively feasible."<sup>119</sup>

As noted above, OPM received many comments about the prior Schedule F and its potential impacts on adverse action rights, performance-based action rights, appeals, and hiring.

#### *Comments Regarding Departure of Schedule F from Precedents*

Many individuals and organizations commented that Schedule F represented an unprecedented departure from Congressional intent, longstanding legal interpretations, and past practices. A joint comment by a nonprofit organization and former federal official agreed that Schedule F was "an aberration, divorced from established legal interpretation and historical precedent" and "there can be no doubting that it would have disrupted the functions of government, even if ultimately overturned by the courts." Comment 2134. The comment continued that "even a small movement of positions into Schedule F would have amounted to presidential usurpation of the role of Congress, which has firmly enshrined the merit system in law to protect Americans and preserve democracy against authoritarian overreach." *Id.* Other commenters argued that the process in which Schedule F was created was deficient because it intended to significantly alter longstanding statutory protections. Comment 1316 argued that "[i]f the executive, or one of its appointees, wishes to change the operation of an agency, they must do so by lobbying for a change in the law that authorizes it or implement[] changes in accordance with those laws and the constraints of the Administrative Procedure Act." A comment from

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<sup>117</sup> 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.

<sup>118</sup> See 5 U.S.C. 3320.

<sup>119</sup> 85 FR 67631, 67632-33 (sec. 4(i)(Schedule F)); see also 5 CFR part 302.

Members of Congress stated that Schedule F not only would have “jeopardize[d] the livelihoods of tens of thousands of hard-working, career civil servants,” but also would “upend civil service precedent.” Comment 48. As explained in the proposed rule<sup>120</sup> and here, OPM agrees that Schedule F risked altering the carefully crafted legislative balance that Congress struck in the CSRA and the history of protections leading up to it.

To be clear though, this rulemaking takes no position on whether Executive Order 13957 was based on legal error, nor is this rulemaking premised on such a conclusion. Instead, as OPM explained in the proposed rule,<sup>121</sup> there were a number of existing mechanisms that would address the policy concerns identified in the Executive Order without establishing a new schedule, and the creation of Schedule F risked undermining other objectives of the civil service laws.<sup>122</sup> The basis for this rulemaking, as explained herein, is to clarify and reinforce the retention of accrued rights and status following an involuntary move to or within the excepted service and promulgate a definition of what it means to be a “confidential, policy-determining, policy-making, or policy-advocating” position consistent with decades of practice and how the Executive Branch, Congress, and the courts have understood that phrase to encompass political appointees.

A few commenters opposed to this rule argued that the President has the authority to issue civil service reform in a manner like Schedule F. An advocacy nonprofit organization stated that the order was “grounded on firm legal authority” because title 5 specifically authorizes the President to exempt policy-influencing positions from civil service appeals. Comment 4097. Commenter argued that “statutory context makes clear” this authority extends to both political appointees and career officials. Commenter continued that the “fact that prior presidents have restrained themselves in their dealings with subordinates does not imply they lacked this authority.” *Id.* Commenter asserted that the “Supreme Court has already concluded

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<sup>120</sup> 88 FR 63862, 63867-69.

<sup>121</sup> *Id.*

<sup>122</sup> *See also* E.O. 14003 at 2 (providing a similar assessment).

that ‘policymaking positions in government may be excepted from the competitive service to ensure presidential control, see 5 U.S.C. §§ 2302(a)(2)(B), 3302’ (*Free Enterprise Fund v. Public Company Accounting Oversight Board*, 2010).”<sup>123</sup>

The “confidential, policy-determining, policy-making or policy-advocating” provision was intended to permit agency heads to directly appoint a cadre of political appointees who have a close and confidential working relationship with the President’s appointees to further and support the priorities of the President and the President’s appointees. As discussed extensively throughout this final rule, the term of art, “confidential, policy-determining, policy-making or policy-advocating,” has a longstanding meaning that equates to political appointments, typically made under Schedule C. OPM, in this rulemaking, is defining that phrase as it is used in the statutory exception in 5 U.S.C. 7511(b)(2) for the reasons explained in the proposed rule<sup>124</sup> and in Section IV(B).<sup>125</sup>

Comment 4097 also argued that a separate provision, 5 U.S.C 2302(a)(2)(B), defining a “covered position” for the purposes of protections from prohibited personnel practices, similarly excludes from protections positions excepted from the competitive service because of their “confidential, policy-determining, policy-making, or policy-advocating character.” Commenter claimed this demonstrates that “policymaking positions in government may be excepted from the competitive service to ensure presidential control.” Although this final rule does not directly amend regulations dealing with prohibited personnel practices, OPM construes this statutory language in 5 U.S.C 2302(a)(2)(B) as aligning with the reasoning in OPM’s final rule with respect to chapter 75. It simply means that positions of a “confidential, policy-determining, policy-making, or policy-advocating” character have long been understood to be political appointees and, in addition to not having adverse action rights, are not covered by protections

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<sup>123</sup> The full cite to this opinion is 561 U.S. 477 (2010).

<sup>124</sup> 88 FR 63862, 63871-73.

<sup>125</sup> See also Comment 2134 (“The preamble and the regulation accurately reflect the executive branch’s historical understanding that Congress intended for the competitive service exception for ‘confidential, policy-determining, policy-making, or policy-advocating’ positions to apply only to a small class of political appointee positions.”).

against prohibited personnel practices.<sup>126</sup> That is perfectly consistent with the nature of Schedule C employees. Congress has chosen to extend these protections only to the career civil service as described further in Section IV(B).

This commenter also cited 5 U.S.C. 3302, which says a President may make necessary exceptions of positions from the competitive service if “conditions of good administration warrant,” to support the assertion that career policymaking positions in government may be excepted from the competitive service to ensure presidential control. Again, OPM’s rule does not change this Presidential authority to except positions from the competitive service where necessary and where conditions of good administration warrant such action. But, as explained above, OPM disagrees that the authority to make exceptions in section 3302 also allows for the removal of incumbents’ accrued adverse action rights under chapter 75.<sup>127</sup> Section 3302 and the “warrant[ed]” by “conditions of good administration” standard relates to whether positions should be excepted from the competitive service. Congress did not suggest—in chapter 33 or chapter 75—that the same standard also be used in determining whether to remove civil service protections for the incumbents of such positions. Further, as explained in Sections IV.(A)-(B), OPM does not believe the exception in 5 U.S.C. 7511(b)(2) can remove the previously accrued adverse action rights of the incumbents of such positions.

As noted above, commenter also cited *Free Enterprise Fund* to support its assertion that the President can issue an action like Schedule F. The application of *Free Enterprise Fund* and other Appointments Clause and removal cases to this rulemaking are addressed further at Section III(F), but in short, commenter’s reliance on this case is beside the point and inapt. Whether a president can lawfully enact Schedule F by executive order does not affect the ability of OPM to promulgate this rule pursuant to its authority. In any event, in *Free Enterprise Fund*, the Supreme Court examined the constitutionality of multiple layers of removal restrictions for select

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<sup>126</sup> OPM notes, though, that the rule does not amend regulations related to prohibited personnel practices.

<sup>127</sup> See *supra* note 107.



positions at an independent agency (one layer of removal protections for the commissioners of the SEC and the next layer of protections for members of the Public Company Accounting Oversight Board (PCAOB or Board)). As an initial matter, most of the agencies that hire and fire subject to title 5 are not independent agencies, so they would not have multiple for-cause limitations on removal (i.e., most Secretaries, Directors, and other agency heads can be removed at will by the President). But even in most independent agencies, the removal restrictions at issue in *Free Enterprise Fund* are of limited relevance. There, the Supreme Court focused specifically on the removal protections of Board members, whom the Court held were executive officers “as the term is used in the Constitution” and who exercise “significant authority.” It clarified that “many civil servants within independent agencies would not qualify” as executive officers and none of the civil servants or corresponding protections addressed by the dissenting opinion introduce the same constitutional problems as those of the Board. One group the dissent specifically mentions are employees in the Senior Executive Service.<sup>128</sup> Even though SES employees work on policy and have significant leadership responsibilities, they also have civil service protections. The majority states that “none of the positions [the dissent] identifies,” which would include SES positions, “are similarly situated to the Board.”<sup>129</sup> “Nor do the employees referenced by the dissent enjoy the same significant and unusual protections from Presidential oversight as members of the Board,” the majority added. In other words, *Free Enterprise Fund* explicitly declined to hold that career SES positions, which have adverse action protections under 5 U.S.C. 7541-7543, pose constitutional concerns in and of themselves. Commenter invokes *Free Enterprise Fund* to argue that a lower-level strata of career civil servants (with fewer responsibilities and authority) cannot have civil service protections if they keep confidences or work on policy. But the Court stressed that “[n]othing in our opinion, therefore, should be read to cast doubt on the use of what is colloquially known as the civil

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<sup>128</sup> See 561 U.S. at 541.

<sup>129</sup> *Id.* at 506.

service system within independent agencies.” If nothing in *Free Enterprise Fund* casts doubt on the civil service system within independent agencies, it does not cast any doubt on the civil service system within the Executive Branch generally.<sup>130</sup>

Further, in *Free Enterprise Fund*, the Supreme Court crafted a narrow remedy to address the unique problem the statute presented, holding that members of the Board would have to be removable at will by the Commission to render the statutory scheme consistent with the Constitution. More recently, in *United States v. Arthrex*,<sup>131</sup> the Supreme Court crafted a different remedial solution for another statutory scheme presenting employees with significant responsibilities who enjoyed statutory removal protections. *Arthrex* concerned Administrative Patent Judges (APJs), whose duties included sitting on the Patent Trial and Appeal Board and issuing binding decisions. The Federal Circuit, sitting *en banc*, had held that APJs were principal officers whose appointments were unconstitutional because neither the Secretary nor Director could review their decisions or remove them at will. To remedy this constitutional violation, the Federal Circuit invalidated the APJs’ tenure protections, making them removable at will by the Secretary. The Supreme Court, however, vacated and remanded, concluding that it was preferable to reform the statute to require the Director, a Presidential appointee who already oversaw APJs for other functions, to serve as a final reviewing and issuing official for decisions rendered by the Patent Trial and Appeal Board. The Court left the APJs’ tenure provisions intact. The limited solutions adopted by the Supreme Court in *Free Enterprise Fund* and *Arthrex* are far removed from a proposal to remove previously accrued adverse action rights from thousands of traditional civil servants simply because, for example, some of their work might touch on policymaking. Nothing in this rulemaking is contrary to *Free Enterprise Fund* or any other

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<sup>130</sup> *Free Enterprise Fund* notes that civil service statutes in section 7511 contain an exception from adverse action rights for positions of a confidential, policy-determining, policy-making, or policy-advocating character, but it did not define what those phrases mean. See 561 U.S. at 506.

<sup>131</sup> 141 S. Ct. 1970 (2021).

binding precedent. On the other hand, an overwhelming number of precedents are contrary to commenter's positions, as described in this final rule.

Comment 4097 argued that “[t]he CSRA also allows the President to except positions from the competitive service for the purpose of nullifying removal restrictions.” The Supreme Court has cautioned against using vague statutory provisions to alter “fundamental details of a regulatory scheme,” stating that Congress “does not hide elephants in mouseholes.”<sup>132</sup>

Commenter seems to suggest that Congress did just that when it enacted the CSRA, even though that authority went undiscovered and unexercised for these purposes in over 40 years. Under this assertion, all a President would have to do is proclaim by unilateral order that “good administration warrants” a change and the carefully balanced and longstanding civil service protections provided by Congress would fall away if the positions could be characterized as having a “confidential”<sup>133</sup> or “policy” character—terms commenter argued require no further elaboration. That would be contrary to the very purpose of the CSRA, a result that Congress could not have possibly intended.

As explained in Comment 2134, a joint comment by a nonprofit organization and a former federal official, and further in Section IV(B), Congress, courts, and the Federal Government have parsed the meaning of the term of art “confidential, policy-determining, policy-making or policy-advocating” over at least the past 90 years and consistently viewed it as applying to noncareer political appointees.<sup>134</sup> Further, competitive service employees have in the past been moved involuntarily to excepted service schedules that do not contain adverse action

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<sup>132</sup> See *Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 468 (2001).

<sup>133</sup> In describing positions with confidential or policy characteristics, E.O. 13957 states “The heads of executive departments and agencies (agencies) and the American people also entrust these career professionals with non-public information that must be kept confidential.” If that were the sole standard for a “confidential” position, it would be hard to think of a career position that would not have been “confidential,” since the incumbents of virtually all positions have this obligation regarding non-public information. Such a novel reading of the adverse action exclusion could have led to untenable results. Of course, Congress, the courts, and the Federal Government have historically not read these and similar terms so broadly and have instead long given them, as used in 5 U.S.C. 7511(b)(2), a much narrower meaning.

<sup>134</sup> Comment 2134, as detailed in Section IV(B), explained that the phrase “confidential, policy determining, policy-making or policy-advocating” was first used in the CSRA in 1978. Before then, though, phrases such as “confidential or policy-determining” and “policy-making and confidential” were used. Those phrases were interchangeable and had the same meaning.

rights, but those incumbents have kept rights they have accrued (as detailed in Section IV(A)). Executive Order 13957 and Schedule F's attempt to strip accrued rights by moving positions into the excepted service would run contrary to longstanding precedent, including *Roth v. Brownell*,<sup>135</sup> as explained in Section IV(A). See Comment 2134. OPM therefore disagrees with commenter's broad assertion that the CSRA allows the President to except positions from the competitive service "for the purpose of nullifying removal restrictions."

*Comments Regarding Schedule F's Use of an Exception To Broadly Eliminate Adverse Action Rights*

Commenters supportive of the rule agreed with OPM and argued that, because the terms "confidential" and "policy-making, policy-determining, or policy-advocating" are so broad, Schedule F had no limiting principle and used the exception in 7511(b)(2) to broadly swallow adverse action rights. A professor commented that the "lack of clear definition and breadth of Schedule F allows it to serve as a promise for wide scale partisan retribution for any federal employee who might raise concerns about the legality of [a] policy agenda." Comment 50. A labor union argued that "the plain purpose of Schedule F was to create an exception so broad, it swallowed the rule of apolitical, merit based Federal employment and rendered meaningless the protections afforded to career Federal employees by the CSRA." Comment 2640. As described in the proposed rule<sup>136</sup> and in this final rule, OPM shares some of these concerns.

One commenter opposed to this rule argued that the statutory exceptions in 7511(b)(2) are broad enough to include career positions. Comment 4097 argued that "[n]othing in the words 'confidential, policy-determining, policy-making, or policy-advocating' hints at covering only political appointments or references the duration of an employee's tenure. Instead, the CSRA makes clear these terms cover both career and noncareer positions." OPM disagrees that these words can be read in isolation or separated from their historical context and development. As

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<sup>135</sup> 215 F.2d 500 (D.C. Cir. 1954), *cert. denied sub nom, Brownell v. Roth*, 348 U.S. 863 (1954) (confirming that employees with competitive status retained their appeal rights upon involuntary movement to the excepted service).

<sup>136</sup> 88 FR 63862, 63871-73.

explained in Section IV(B) and shown in Comment 2134, which extensively details the context, history, and meaning of these terms of art, they have, except in Executive Order 13957, always meant noncareer political appointees. Section 7511 was amended as part of the Civil Service Due Process Amendments of 1990, in which Congress, for the first time, extended the ability to accrue adverse action rights (and for certain adverse actions, appeal rights) to individuals in the excepted service other than preference eligibles, who already had the ability to accrue such rights. Congress did not intend to undercut this extension of rights by permitting broad exclusions. In discussing what positions would be excluded from such rights, Congress stated that the bill “explicitly denies procedural protections” to these types of political appointees— “presidential appointees, individuals in Schedule C positions [which are positions of a confidential or policy-making character] and individuals appointed by the President and confirmed by the Senate,” and that “[e]mployees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed” because they “explicitly serve at the pleasure of the President or the presidential appointee who appointed them.”<sup>137</sup>

We also discuss below the argument that Congress did not distinguish between career and noncareer positions in the SES in discussing the possibility that SES positions could involve policy-influencing duties. In brief, the SES was a new service, created in the CSRA and has its own distinct rules, rather than building on the existing structure of the competitive and excepted services. In the SES scheme, Congress did not need to address exclusions because the only SES appointees covered by the sections addressing procedural and appeal rights were career appointees. There was no attempt to distinguish between those whose duties could be regarded as policy-influencing and those whose duties could not be so characterized. Congress included separate provisions limiting the number of noncareer appointees.

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<sup>137</sup> H.R. Rep. No. 101-328, at 4-5, as reprinted in 1990 U.S.C.C.A.N. at 698-99.

Comment 4097 also suggested that concerns about Schedule F are misguided because the schedule would have been limited to a small group of senior policy-influencing positions. There are approximately 4,000 political positions in the civil service (though some commenters noted between 20-25 percent of those usually remain unfilled). *See* Comment 2134.<sup>138</sup> Of these, between 1,000 to 1,500 positions are Schedule C political appointees—a number that has stayed relatively steady since the 1950s. *See id.* Comment 4097 estimates Schedule F would have covered between two and three percent of the federal workforce, which would have grown the positions vulnerable to political favor (even if not explicitly “subject” to such favor) by over an order of magnitude, from 4,000 to 50,000 positions. Comment 4097 attempts to rationalize the scope of Schedule F by contending it would have been limited to “senior policy-influencing officials”—a term that does not appear in Executive Order 13957. But as explained above and in the proposed rule,<sup>139</sup> the GAO found that Schedule F was interpreted by agencies to have a broad reach, with one agency, for example, petitioning to place 68 percent of its workforce within Schedule F, including positions at the GS-9 level.<sup>140</sup>

Confirming that the number of employees that would have been subject to Schedule F extends beyond senior positions responsible for agency policy, Comment 4097 included a spreadsheet labelling a career line attorney at an agency’s general counsel’s office as a “policy” employee. OPM notes that government attorneys are generally Schedule A employees, and therefore, by definition, are specifically “not of a confidential or policy-determining

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<sup>138</sup> *See also* U.S. Civil Serv. Comm’n, “Maintaining the Integrity of the Career Civil Service,” p. 10 (1960), <https://babel.hathitrust.org/cgi/pt?id=uc1.aa0005815857&seq=20&q1=%22competitive+status%22>; U.S. Off. Of Pers. Mgmt., “General, Questions and Answers” (detailing the different types of political appointments, including presidential appointments requiring senate confirmation (PAS), presidential appointments not requiring senate confirmation (PA), noncareer Senior Executive Service positions, Schedule C positions, and others), <https://www.opm.gov/frequently-asked-questions/political-appointees-and-career-civil-service-positions-faq/general/which-types-of-political-appointments-are-subject-to-opmrsquos-pre-hiring-approval/>; P’ship for Pub. Serv., Center for Presidential Transition, “Frequently Asked Questions About the Political Appointment Process,” (estimating there are 1,200 PAS positions, 750 noncareer SES positions, 450 PA positions, and 1,550 Schedule C positions), <https://presidentialtransition.org/appointee-resources/ready-to-serve-prospective-appointees/frequently-asked-questions-about-the-political-appointment-process/>.

<sup>139</sup> 88 FR 63862, 63868.

<sup>140</sup> *See supra* note 110. A former OPM official involved in the Schedule F approval process told GAO that “positions above GS-11 were generally included” but OMB’s approved petition “also included positions at the GS-9 and GS-10 levels.” *Id.* at p. 19 & n.14.

character,”<sup>141</sup> but in any event, whatever limiting principles commenter may have in mind for justifying Schedule F, they remain unclear. While commenter states that two to three percent of the federal workforce would have been impacted by Schedule F, commenter then suggests that up to 10 percent of jobs<sup>142</sup> could fit its interpretation of confidential and policy positions, which would equate to approximately 250,000 employees. The number of positions that could be covered by a Schedule F-type action is thus indeterminate and without meaningful boundary.

Commenter added that, because of Schedule F’s allegedly limited scope, OPM’s recruitment concerns are “meritless.” It claimed that “Schedule F would have virtually no applicability to technical positions such as IT and cybersecurity that OPM cites as ongoing recruitment challenges.” This statement certainly does not capture the nature of cybersecurity and other technical positions which require the maintenance of confidences while fending off cyberattacks from foreign countries or domestic bad actors with respect to data breaches, for example. It is difficult to imagine situations where the requirement to maintain confidences would be more important. Commenter concluded that OPM does not “offer any evidence that making confidential and policy-influencing career positions at-will—as opposed to converting them to political appointments—would create recruitment challenges.” As detailed further in Section V.(B), regarding the impact of politicization on recruitment, hiring, and retention, OPM received a significant number of comments concerned about the negative impacts of Schedule F, or a similar effort, on federal civil service recruitment. Because of Schedule F’s unprecedented treatment of the confidential and policy exception in 5 U.S.C. 7511(b), the concerns about such a schedule were broad and not isolated to discrete parts of the workforce. For instance, concerned commenters included academic researchers showing the negative impact of politicization on

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<sup>141</sup> 5 CFR 213.3101 (describing Schedule A positions).

<sup>142</sup> See Comment 4097, p. 24 (surmising that 90% of jobs are not policy-influencing). Because there are millions of civil servants, each percentage point in this estimate equates to a significant number of potentially impacted employees.

recruitment to individuals, including those in IT and technical positions who expressed that the existence of an action like Schedule F would dissuade them from seeking federal employment.

*Comments Regarding Schedule F and Politicization in Hiring and Firing*

Comment 4097 also argued that, contrary to widespread opinion, Schedule F rejected the spoils system and was sufficiently protective from the dangers of politicization. Commenter contended that “if EO 13957 was intended to fill the bureaucracy with political loyalists, President Trump chose an extremely odd way of doing it. He could have directly converted career positions to political positions, dismissed career incumbents through a reduction in force, and filled the roles with political appointees.” None of these alternatives is simple or free of costs. For instance, additional Schedule C positions would require an agency to budget for and create new slots, obtain OPM’s approval of such slots, and pursue a variety of other procedural steps designed to sustain civil service protections and merit system principles. Reductions in force are complex and the outcomes are unpredictable. They have often been the subject of extended litigation.<sup>143</sup>

Commenter argued that the White House Office of Presidential Personnel would not have been involved in Schedule F appointments, but commenter does not address why that would promote efficiency or lead to less agency politicization. The prior administration was slow to fill even the political slots at its disposal and many remained unfilled. *See, e.g.*, Comment 2124 (“Increasing [politically-based appointments] by a factor of 5 or more will certainly mean that more jobs will go unfilled and more tasks will go uncompleted.”). Under Schedule F, agency political and career leadership could target, interview, and/or select politically-aligned applicants just as well as PPO.

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<sup>143</sup> *See, e.g., James v. Von Zemensky*, 284 F.3d 1310 (Fed. Cir. 2002) (construing whether a “staff adjustment” resulting in the separation of a physician in the Veterans Health Administration of the Department of Veterans Affairs, could be appealed under the reduction-in-force statute and regulations, notwithstanding Congress’ placement of VHA positions under title 38, U.S. Code, for at least some purposes); *Harants v. U.S. Postal Serv.*, 130 F.3d 1466 (Fed. Cir. 1997) (construing a reassignment during a Postal Service reorganization that the employee had accepted as an appealable reduction-in-force action in the context of complex developments, including intervening MPSB opinions, cancellations, and restorations, a stay of enforcement, and a subsequent reduction-in-force notice).



Regarding Schedule F’s purported protections from the dangers of politicization, an advocacy nonprofit organization argued that “Schedule F made sure to protect these policymaking employees from discriminatory firing based on political beliefs or party allegiance.” *See* Comment 3892; *see also* Comment 2346. Once hirings and firings are at-will, however, the employee might not have an entitlement to written notice of the reasons for the adverse action, an opportunity to respond, or a written decision.<sup>144</sup> Nor would the decision generally be appealable.<sup>145</sup> It would thus be, at a minimum, difficult for employees to protect themselves from actions based on political beliefs or party allegiance because no cause (or evidence) would be required prior to such an action. Under Schedule F, because such an employee would be at-will, the employer would need to give little or no reason prior to a termination. In short, Schedule F leaves innumerable ways for politics to factor into these traditionally merit-based decisions in a manner that would be difficult to detect or remedy.

Comment 4097 contended that “OPM’s concerns about a return to the patronage system also ignore the evidence that the Federal Government ended patronage because it had become obsolete” and passed the Pendleton Act because “patronage no longer served their interests.” Although the influence of politics in the civil service was greatly diminished following the Pendleton Act, it has taken consistent legislative, executive, and regulatory action to stem the tide of patronage over the past 140 years. For instance, Comment 2134 gave an overview of the election of 1936, which featured concerns about the return of the spoils system, and executive action in the 1950s to create Schedule C due to concerns that political actors were burrowing in as career civil servants. As previously mentioned, the CSRA was enacted in the aftermath of the Nixon Administration’s plan to implement the Malek Manual, a blueprint to replace the civil service merit system with a political hiring scheme that would begin by purging all Democrats from federal employment.

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<sup>144</sup> 5 U.S.C. 7513(b).

<sup>145</sup> 5 U.S.C. 7513(d).

Comment 4097 also contended that today’s rank-and-file government jobs are not enticing enough to invite patronage and that “the really big bucks aren’t in the political appointments game.” At the same time, commenter argued that confidential and policy positions are so important to the functioning of government that the President should have unfettered control over these positions. Executive Order 13957 likewise justified removing protections from these positions because the “importance of the functions they discharge.” Commenter seems to recognize the threat of unqualified individuals discharging important functions. OPM agrees that qualified individuals should discharge important functions, and this rule is based on OPM’s determination that injecting politicization into the nonpartisan career civil service (or creating the conditions where it can be injected by individual actors) runs counter to merit system principles and would not only harm government employees, agencies, and services, but also the American people that rely on them, as discussed in the proposed rule<sup>146</sup> and further below.

*Comments Regarding Schedule F as a Performance Management Tool*

One of the justifications for Schedule F was that it allegedly allowed agencies to address poor performance, but many commenters asserted that this rationale was flawed and a pretext for removing protections and culling the civil service of dissenting opinions. Comment 13, a former OMB official, commented that “[t]he proponents of Schedule F claim that it is needed for accountability and to be able to fire poor performers. Yet they offer little or no support for their claims. Thousands of poor performers are dismissed annually, and even more are transferred to other positions.” This commenter argued that the last Administration’s “own presidential appointees [were the ones] who most visibly resisted his directives, not career civil servants.”<sup>147</sup> Comment 2816, a former federal official, argued that Schedule F “relied on vague and conclusory assertions that competitive selection procedures inhibit the hiring of candidates with appropriate ‘work ethic, judgment, and ability to meet the particular needs of the agency,’ and

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<sup>146</sup> 88 FR 63862, 63881.

<sup>147</sup> Citing James P. Pfiffner, “President Trump and the Shallow State: Disloyalty at the Highest Levels,” *Presidential Studies Quarterly*, Vol. 53, Issue 3 (Sept. 2022), <https://doi.org/10.1111/psq.12792>.

that more ‘flexibility to expeditiously remove poorly performing employees’ was needed without any consideration of the countervailing considerations that favor strong employee protections.” See also Comment 3803. A professor argued that it was not civil service incompetence that spurred Schedule F, but *competence*. Comment 42. “This competence insisted on following scientific consensus on climate change. It insisted that cures such as ivermectin and hydroxyquinoline would not treat Covid-19. The legal expertise in the federal bureaucracy insisted that impounding funds that Congress had explicitly delegated for Ukraine was illegal. These are some of the most prominent examples of bureaucratic competence coming into conflict with the preferences” of the previous Administration. *Id.* Finally, commenters noted that, while some want to “eliminate incompetent people or redundant roles – [] allowing elected officials to hand-pick civil service members prevents neither.” Comment 2828.

OPM agrees that Schedule F was poorly designed as an effort to meaningfully improve performance management or allow managers to more effectively address performance issues. Agencies were directed to move employees occupying “confidential, policy-determining, policy-making, or policy-advocating” positions into Schedule F, thereby purportedly making them at-will employees who could be terminated without any adverse action procedures. But the characteristics of an employee’s job—including whether the employee works on policy—has nothing to do with an employee’s performance. Schedule F sought to streamline terminations based on the type of work that an employee performs, not based on how well the employee performs. It is therefore difficult to understand how Schedule F can be reconciled with its purported aim of addressing poor performance.

If the concern is that managers face some difficulties in attempting to take actions under chapter 75 or chapter 43, the solution is not for the Executive Branch to issue an executive order seeking to undermine those statutory provisions. Nor would such an executive order effectively address the complexity of the various remedial schemes Congress has created. For example, creating Schedule F will do nothing to prevent a particular employee from lodging a complaint

of unlawful discrimination under the various civil rights statutes; will do nothing to stop administrative judges of the Equal Employment Opportunity Commission from presiding over discovery in relation to such claims and adjudicating them; and may result in decisions adverse to managers that will then be non-reviewable in a Federal court. Similarly, excepting individuals from adverse action rights would likely lead to attempts to file constitutional claims in the Federal district courts, thereby defeating the benefits of the claim-channeling provisions of the CSRA.<sup>148</sup>

Still, some commenters argued that Schedule F was a valid tool to remove poor performers and increase accountability. For instance, Comment 7 contended that “Schedule F and similar tools ‘aim[] to increase accountability and efficiency in the Federal government by removing ‘poor-performing employees.’” *See also* Comments 45, 1811, 3130; 4097. Comment 4097, an advocacy nonprofit organization, argued that civil service protections and merit-based hiring procedures “make it difficult to hire the best candidates and prohibitively difficult to dismiss employees for all but the worst offenses.” With respect to merit-based hiring procedures, we observe that even if we accepted this premise as true, which OPM does not, commenter ignores the fact that merit-based hiring procedures contained in title 5 are the law of the land. If a commenter believes they “make it difficult to hire the best candidates” the solution is to make this argument to Congress, not attempt to evade the requirements established in title 5. We also note that many of the “difficulties” commenter observes arise from the Veterans’ Preference Act, as amended, which is codified throughout title 5’s provisions on hiring. An observer might argue that there should be no veterans’ preference, but that would seem a grave disservice to the sacrifice and commitment of veterans across the Nation. And even if a persuasive policy argument in favor of veterans’ preference reform could be made, it would have to be made to Congress. Finally, the merit-based hiring procedures are one of the ways agencies can defend themselves from unsupported assertions of illegal discrimination. Attempts to create unwarranted

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<sup>148</sup> OPM discusses performance management further in Section V.(B).

exceptions to avoid legal requirements have been counterproductive and resulted in substantial litigation.<sup>149</sup>

As to difficulties dealing with “poor performers,” there already exist a variety of tools to address inappropriate conduct and unacceptable performance and civil servants are removed using these tools, as described above and explored further below in the Section V.(B).

Commenter also does not address civil servants who are terminated during their probationary/trial periods or before they have met their durational requirements when their civil service protections would attach. The purpose of probation is to permit observation of new appointees on the job before their appointments became permanent. It is sometimes described as the final stage of the examining process. Such filtering, when done properly, addresses many performance issues early and grants the agency wide latitude to remove that worker.<sup>150</sup>

Commenter attributes any misalignment with a President’s political agenda (or “policy resistance”) as “misconduct” which justifies termination, even if such conflict cannot be proved. But a mere difference of opinion with leadership 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. To the contrary, identifying objections to government action early in internal discussions ultimately strengthens government policy by addressing meritorious considerations

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<sup>149</sup> See, e.g., *Nat’l Treasury Employees Union v. Horner*, 854 F.2d 490 (D.C. Cir. 1988), which overturned OPM’s decision to place all Professional and Administrative Career positions in Schedule B of the excepted service after entering into a consent decree that required OPM to develop a new examination for such positions. The Federal court of appeals, on review from a district court determination that OPM had violated the Administrative Procedure Act in excepting this broad category from the competitive service, noted that filling positions through the competitive process was the norm and OPM could depart from that norm only when “necessary” for “conditions of good administration,” quoting 5 U.S.C. 3302. The court also noted that OPM, while asserting that the cost of developing a new examination was prohibitive, did not present evidence that would meet the standard of review. *Cf. Gingery v. Dept. of Defense*, 550 F.3d 1547 (Fed. Cir. 2008) (holding that President Clinton’s creation of the Federal Career Intern Program, a Schedule B appointing authority, did not permit the agency to use OPM’s modified process for agency pass-overs of preference eligibles in an excepted service hiring process, in light of Congress’ command, at 5 U.S.C. 3320, to apply the same procedures used for the competitive service, i.e., the procedures specified in 5 U.S.C. 3318).

<sup>150</sup> On December 13, 2023, OPM issued guidance to agencies on Maximizing Effective Use of Probationary Periods, available at <https://www.chcoc.gov/content/maximizing-effective-use-probationary-periods>. This guidance advises agencies to periodically remind supervisors and managers about the value of the probationary period and to make an affirmative decision regarding the probationer’s fitness for continued employment. The guidance also provides practical tips for supervisors and recommends good management practices for supervisors and managers to follow during this critical assessment opportunity.

and explaining why other objections are unwarranted. Moreover, Executive branch employees have an affirmative obligation to report waste, fraud, and abuse to appropriate authorities, which could fall under commenter’s broad notion of “policy resistance”<sup>151</sup> and is another reason this notion is unworkable

Comment 4097 cited some examples of what commenter considers to be poor performance, misconduct, or other justifications for Schedule F. Comment 2822, a legal nonprofit organization, examined many of those examples and those in *Tales from the Swamp*, written by the same author as Comments 3156 and 4097 and cited throughout those two comments. It concluded that *Tales from the Swamp* “regularly engages in cherry-picking, slanted interpretation, and outright inaccuracy to justify its conclusions in support of Schedule F.” Regarding *Tales from the Swamp*’s complaints about agency losses in court, Comment 2822 stated it “makes a substantial and baseless leap” from the previous Administration’s “loss rate in court (true) to career staff sabotage being the culprit (unsupported).” Comment 2822 explained that “the most thorough report prepared on the” previous Administration’s “record in court found that the Administration regularly ‘ignored clear-cut statutory and regulatory duties,’ with losses on statutory interpretation grounds making up the bulk (117) of the administration’s losses in court.”<sup>152</sup> In many of these cases, “the Administration lost ‘because the agency had acted outside of the bounds of its authority or had adopted an interpretation that blatantly contradicted the statute at issue.’ These losses were the result of unlawful policy efforts by political decisionmakers, not the product of agency staff doing a poor job of building a rulemaking record.” Comment 2822 criticized *Tales from the Swamp*’s other examples of alleged poor performance<sup>153</sup> and finds “many of the anecdotes relied on by *TFTS* lack crucial context, or

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<sup>151</sup> See 5 CFR 2635.101(b)(11).

<sup>152</sup> Citing Bethan A. Davis Noll, “‘Tired of Winning’: Judicial Review of Regulatory Policy in the Trump Era,” 73 Admin. L. Rev. 353, 397-98, 397 fig.5 (2021), [https://www.law.nyu.edu/sites/default/files/DavisNoll-TiredofWinning\\_0.pdf](https://www.law.nyu.edu/sites/default/files/DavisNoll-TiredofWinning_0.pdf).

<sup>153</sup> These include Department of Education enforcement against for-profit colleges, FDA laboratory test oversight, USDA attempts to narrow food stamp eligibility, the rollback of offshore drilling safety requirements, re-issuance of the school nutrition rule, and the classical architecture mandate.

mischaracterize important facts about agencies' work" and the "only thing these anecdotes consistently show is that some political appointees" during the last Administration "occasionally found it challenging to implement their regulatory goals. But that experience is not unique to Trump-era political appointees, and it does not justify reorienting the civil service towards political fealty."

Many commenters argued that, instead of poor performance or accountability, Schedule F was motivated by a desire to increase political loyalty in nonpartisan career civil servants. A professor argued that the previous administration has touted the prior Schedule F as a way "to impose personal loyalty tests, and to use government as an instrument of his power. This is at odds with the purpose and traditions of the American state." Comment 50; *see also* Comments 448, 1779. Other commenters pointed to numerous public statements which, they argue, demonstrate the intent behind Schedule F, including calls from the previous Administration to "root out" political opponents, referring to civil servants as the "deep state" that needs to be "destroyed" or "brought to heel," and statements that they would "pass critical reforms making every executive branch employee fireable by the president of the United States." *See* Comments 50, 668, 2512 (citing news articles documenting the previous Administration and its supporters' desire to purge the civil service), 3398. Such firings would likely be at odds with statutory, regulatory, or constitutional protections and rights as explained in this final rule.

### 3. Political Appointees in Career Civil Service Positions

Executive Order 13957 could have facilitated burrowing in. "Burrowing in" occurs when a current (or recently departed) political appointee is hired into a permanent competitive service, nonpolitical excepted service, or career SES position without having to compete for that position or having been appropriately selected in accordance with merit system principles and the normal 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.”<sup>154</sup> 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.<sup>155</sup> Executive Order 13957, interpreted broadly, could have opened the door for agency heads to move current political appointees into new Schedule F positions, or transferred vacancies in existing positions to Schedule F, without competition and in a manner not based on merit system principles. In effect, this would have allowed political appointees on Schedule C appointments, who would normally expect to depart upon a presidential transition, to “burrow” into permanent civil service appointments.

#### *Comments Regarding Schedule F and Burrowing In*

One commenter argued that Schedule F would have reduced burrowing in because the burrowed employee would be removable at will anyway. *See* Comment 4097. That view overlooks the ability of burrowed employees to obtain a job in the first place because these employees could be hired into Schedule F without the usual filters for qualifications currently in place in the competitive civil service. Schedule F would have allowed unqualified employees to be hired, albeit at will, who may never have been able to enter the competitive service. Regardless of whether employees moved would be ultimately removable, the opening of the door to the conversion of Schedule C political appointees to Schedule F positions—or, indeed, the hiring of any number of new candidates because they were politically aligned with the existing administration—increased the risk of burrowing in. We discuss burrowing further in Section IV(A).

#### 4. Additional Comments Regarding the Potential Impacts of Schedule F

##### *Comments Regarding Potential Negative Outcomes of Schedule F*

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<sup>154</sup> U.S. Off. of Pers. Mgmt., “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](https://chcoc.gov/sites/default/files/2020%20Appointments%20and%20Awards%20Guidance%20Attachments_508.pdf).

<sup>155</sup> *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.



Several former and current civil servants, individuals, organizations, and members of Congress commented on what they perceived as the negative aspects of Schedule F. A former OMB official contended that Schedule F would inhibit, if not prevent, successful presidential transitions and would degrade the performance of government employees by replacing career civil servants with political appointees. Comment 13. A professor contended that “[t]aking qualified and even expert civil servants and making them weigh the tradeoff between voicing the views based on their expertise and keeping their jobs would utterly undermine their expertise.” Comment 42. Also “it would mean that presidents would not be getting advice based on expertise but on what employees thought they wanted to hear” and “Congressional will as expressed in the statutes that enable the executive branch to make policy would be discounted.” Not only would career civil servants and institutional expertise be harmed (*see* Comment 2267), but commenters, including Members of Congress, detailed the potential impact of Schedule F to communities, small businesses, and families across America (Comment 48); the environment (Comment 33); National Park Service personnel, national parks, and the public who values them (Comment 1094); critical infrastructure (Comment 2501); federal investigations and prosecutions (Comment 2616); and the SNAP program and other hunger safety nets (Comment 3149); to name a few.

Several commenters expressed concerns about the potential impact of Schedule F on whistleblowers. Comment 3340, a whistleblower protection nonprofit organization, argued that “Schedule F would have given the President blank check discretion to cancel the Whistleblower Protection Act by removing employees from the competitive service,” removing their civil service protections, and then firing them. *See also* Comments 3466, 3894. If Schedule F allowed removals at will, commenters claimed that it would be difficult to prove an employee was removed because of protected and important whistleblowing activities. Also, if an incumbent was in a “confidential, policy-making, policy-determining, or policy-advocating” position for the purposes of adverse action protections and excluded from such protections under section

7511(b)(2), as Schedule F attempted, then such a position would also presumably be excluded from the definition of “covered position” for the purposes of the prohibited personnel practices under section 2302(a)(2)(B)(i).

A professor commented that Schedule F would also have weakened legislative power. Comment 50 expressed that “[t]he Founders were deeply concerned with the amassing of centralized power, and Schedule F frustrates the institutional design of checks and balances. In particular, it weakens legislative power. The creation of the civil service system was a response to a spoils system that led to abuses of state resources and power.”

Another commenter identified possible costs of Schedule F. Commenter argued that “a likely consequence of Schedule F would be a greater reliance on private contractors to carry out the work of federal government agencies” and a “[g]reater reliance on contractors would, almost certainly, be more expensive than our current system.” Comment 2109. Commenter further noted that “the federal government is the source of a considerable amount of scientific and economic data that both businesses and researchers around the world trust and rely upon” and argued that this “data is trusted precisely because it is curated by career civil servants who are free from political influence. If concerns about political influence in the generation of this data begin to seep into the public consciousness, enormous amounts of social value will be lost.” *Id.*

#### *Comments Regarding Schedule F and the Pendleton Act*

One commenter who opposed the rule argued that the 19th-century reformers who created America’s civil service believed that tenure and job protections were “inimical to merit” and that “[t]he Pendleton Act consequently deliberately made minimal changes to the dismissal process” besides prohibiting removal for making or failing to make “political contributions.” Comment 4097. Commenter, an advocacy nonprofit organization, argued that Schedule F would have “returned the federal civil service to its foundations.” While the Pendleton Act focused on

merit-based hirings, Congress did address removals even at this early stage in the development of the career civil service—it forbade removals on political or religious grounds.<sup>156</sup>

Commenter adds that the reformers who created the civil service feared that requiring “a virtual trial at law” to dismiss an employee would “entrench incompetence and intransigence in the federal workforce” and that “[n]ot until the 1960s did the general federal workforce gain the ability to appeal dismissals. The experience of the past six decades has demonstrated the folly of that decision.” This may be commenter’s conclusion, but Congress has concluded otherwise and repeatedly strengthened employee rights during the period in question—through the CSRA, the Civil Service Due Process Amendments Act of 1990, and the Whistleblower Protection Act and its amendments.<sup>157</sup> Moreover, at the time of the Pendleton Act’s enactment, there was a rigorous debate about the extent of merit-based hirings and removals protections and the compromise position on the latter was that further removal protections were unnecessary at the time because hiring based on merit would “remov[e] the temptation to an improper removal.”<sup>158</sup> Commenter quotes from George William Curtis, one of the drafters of the Pendleton Act, regarding the “fear” of “virtual trial[s] at law,” but further context is important here too. Curtis’ longer quote starts “[h]aving annulled all reason from the improper exercise of the power of dismissal, we hold that it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an

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<sup>156</sup> See Ari Hoogenboom, “The Pendleton Act and the Civil Service,” *The Am. Historical Rev.*, Vol. 64, No. 2c, p. 307 (Jan. 1959) (“The Pendleton Act forbade removals on political or religious grounds.”); see also Nat’l Archives, *supra* note 18, quoting Pendleton Civil Service Reform Act of 1883, sec. 2 (“[I]t shall be the duty of [the commissioners of the Civil Service Commission]: First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, ... Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: ... [T]hat no person in the public service is for that reason 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.”)

<sup>157</sup> Public employees have been challenging their removals in court since at least the 1800s. See, e.g., *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230 (1839); *United States v. Wickersham*, 201 U.S. 390, 398-399 (1906).

<sup>158</sup> See, e.g., Debate in the Senate on the Civil Service Reform Act of 1883, December 14th, 1882, <https://digital.lib.niu.edu/islandora/object/niu-gildedage%3A24020>.

unfit or incapable clerk can be removed.”<sup>159</sup> Removing improper bases for removals was a key antecedent to the statement regarding virtual trials at law. Curtis added, “If the front door [is] properly tended, the back door [will] take care of itself.”<sup>160</sup> At the time, this meant that, if civil service restrictions prevented the President from appointing a hand-picked replacement for a person he removed, his incentive to remove for political reasons would be diminished.<sup>161</sup>

Regardless of how the Pendleton Act should be best interpreted, Congress has since established procedures set out in the CSRA and other laws, which channels employee appeals to an administrative agency, the MSPB, and reviewing courts.

*Comments Regarding Comparison of Schedule F to State-Level Civil Service Reforms*

Comment 4097 also argued that several states have adopted policies like Schedule F and that such efforts have proven successful. Commenter asserted that Arizona, Florida, Georgia, Indiana, Mississippi, Missouri, Texas, and Utah have instituted Schedule F-type reforms and concluded that “[e]valuations generally show positive results, while fears of a return to patronage failed to materialize.”

As explained in the following sections, OPM received comments from civil servants in these states that described the various ways in which they believe that their jobs have worsened because of these reforms. Also, a former federal official counters Comment 4097’s assertion about the benefits of these state reforms. *See* Comment 2816. The former federal official cited a “lengthy survey of state-level civil service changes that reduced civil service protections in the 2000s” which found that “in many cases, reforms were politically driven efforts to establish and defend political actors’ capacities . . . to carry out the agendas of elected executives, legislators, and other policy makers.” The study notes that some State governors “aggressively pushed reforms designed to remove merit system barriers to direct and tighten policy control over state

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<sup>159</sup> George William Curtis, President, Address at the Annual Meeting of the National Civil-Service Reform League, Nat’l Civil-Serv. Reform League (Aug. 1, 1883), in Proceedings at the Annual Meeting of the National Civil Service Reform League, pp. 3, 24-25.

<sup>160</sup> Paul P. Van Riper, “History of the United States Civil Service,” at p. 102 (1958).

<sup>161</sup> David Rosenbloom, “Federal Service and the Constitution,” at pp. 87-88; Van Riper, *supra* note 160, at p. 102.

agencies and their employees.” These types of initiatives, as with Schedule F, “are often ‘sold’ in terms of a need to enhance executive leadership and accountability for results and, inevitably, to allow the removal of the legions of ‘unresponsive, incompetent, insulated, bureaucrats’ who the public is easily convinced lurk in the shadows of state agencies.” The report continues that “there has been ‘[g]rowing awareness among policy makers, public employees and their organizations, and human resource professionals that’ state-level reforms to weaken civil service protections ‘have not delivered the benefits they promised and may well dampen enthusiasm for [similar] initiatives by the states that contemplate sudden, wholesale, changes in existing arrangements.’”

Comment 2816 continued that, in their study of civil service employee responses to Georgia’s reforms, “these authors found measurable decline in the number of employees saying they liked their jobs and an increase in those intending to leave employment within the coming year. Employees did not believe the reforms would result in high-performing employees being rewarded, did not trust that performance would take precedence over office politics, and did not believe as much as before the changes that performance appraisals were conducted fairly and believing they understood their job expectations.” The study concludes that “[o]ver 75 percent of state employees disagreed that the reforms ‘had resulted in a state workforce that is now more productive and responsive to the public.’” OPM finds this comment and study persuasive as a more rigorous examination than Comment 4097’s conclusions that some HR professionals believe at-will status is useful and an “essential piece of modern government management.” It also undercuts Comment 4097’s argument that OPM “ignore[s] the evidence from the states that at-will employment is both consistent with a merit system and can improve government performance.” Comment 4097 does not show that these changes are consistent with merit system principles nor that they improve performance. It also did not identify the metrics by which performance could improve; it just stated that they make employees more responsive and give management more flexibility.

*Comments Regarding Potential Effect of Schedule F on the Number of Political Appointees*

Commenters opposed to the rule argued that the civil service does not have enough political appointees and Schedule F would have given administrations greater control over the federal workforce and priorities. Comment 3190, a law school clinic, contended that “Schedule F proposed to expand the class of political appointees from roughly 4,000 positions to 20,000-50,000 positions” and that “[u]nder such a modest change, political appointees would still constitute only 2.5 percent of the federal workforce.” As explained further below and in Comment 2134, a joint comment by a nonprofit organization and former federal official, the number of political appointees has stayed relatively stable for 70 years, so such a change would be anything but “modest.”<sup>162</sup> Also, this comment appears to concede that a possible, and perhaps desired, effect of Schedule F was to create a new category of “political appointees.” This runs counter to Comment 3156, written by the same author as Comment 4097. Comment 3156 takes issue with Comment 50, saying Comment 50’s characterization of Schedule F positions as “political appointees is simply wrong.” Comment 4097 then argued that Schedule F was designed to “keep these policy-influencing positions in the career civil service,” such that they would not be political appointees. Even amongst proponents of Schedule F and opponents of this rulemaking, there are disagreements regarding what Schedule F meant and the breadth of its potential effects on the civil service. And one aspect of a “career” appointment, as that term has long been understood, is the opportunity to serve the United States across administrations with the concomitant accrual of career status and adverse action rights—an opportunity Schedule F would have jeopardized.

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<sup>162</sup> The overall number of federal employees has also remained relatively stable. In fact, there were more federal employees during the last years of the Reagan Administration than there are today. *See, e.g.*, U.S. Off. of Pers. Mgmt., “Executive Branch Employment Since 1940,” <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/>.

Ultimately, President Biden rescinded Executive Order 13957 before any positions could be placed into Schedule F. As noted above, on January 22, 2021, President Biden issued Executive Order 14003, “Protecting the Federal Workforce,” rescinding Executive Order 13957, stating that “it is the policy of the United States to protect, empower, and rebuild the career Federal workforce,” and that the Schedule F policy “undermined the foundations of the civil service and its merit system principles.”<sup>163</sup>

If a future Administration concludes that a policy that implements the principles of Schedule F is preferable to this rule and seeks to rescind this rule and replace it with such a policy, a future Administration would need to comply with the Administrative Procedure Act and principles of reasoned decision-making.<sup>164</sup> For example, to rescind this rule and replace it with a new Schedule F-type policy, a future Administration would need to, among other things: explain how the new policy is consistent with the carefully crafted legislative balance that Congress struck in the CSRA; set forth reasons for why it is departing from OPM’s prior determination, reconfirmed here, that creating a new schedule for at-will employees who are not political appointees—similar to Schedule F—is inconsistent with that balance; justify the departure from the fundamental principle that career Federal employees’ tenure should be linked to their performance rather than to the nature of their position; address whether that departure is consistent with the accrued property interests of employees, the settled expectations of career Federal employees’ tenure, and the decisions individuals have made in response to those expectations; explain why any novel definition of “confidential, policy-determining, policy-making, or policy-advocating character” is consistent with the CSRA; discuss why that novel definition is being adopted even though it departs from long-established understandings—reconfirmed in this preamble—of what that phrase means; and explain how a new policy would

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<sup>163</sup> E.O. 14003, 86 FR 7231, 7231 (Jan. 22, 2021), <https://www.federalregister.gov/documents/2021/01/27/2021-01924/protecting-the-federal-workforce>.

<sup>164</sup> *See, e.g., Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 101 (2015) (agencies under the Administrative Procedure Act must “use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

(1) ensure that new hires formerly required to go through the competitive hiring process have the knowledge, ability, expertise, and skills necessary to work effectively; (2) adequately protect career Federal employees against potential political retaliation or coercion; and (3) make certain that critical positions in the federal workforce currently and ably held by career Federal employees will continue to function even if they may be replaced by individuals regardless of qualification or suitability.

### **E. General Comments**

As explained in Section II, OPM received more than 4,000 comments regarding this rulemaking whereby commenters provided useful insights into various aspects of these regulatory amendments. The comments below relate to general concepts regarding the civil service, civil service protections, and merit system principles that inform this rulemaking. In the following sections, OPM considers comments related to specific provisions of this final rule, the need for this rule, regulatory alternatives, and the costs and benefits of this rule.

#### *Comments Regarding Why Civil Servants Should Be Nonpartisan*

As a baseline concept, many commenters agreed with OPM that career civil servants should be nonpartisan. An association of administrative law judges cited Alexander Hamilton in Federalist No. 79, as saying “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” Comment 1042. The association argued that “[t]he principles of merit service require the federal government to base hiring decisions upon experience and expertise, and serve to ensure a nonpartisan, expert federal workforce.” An individual commenter cited research that politicization of the civil service “has significant consequences for the proper functioning of government.” Comment 1427. This research included that of David Lewis (2008) on increased politicization of OPM during the 1980s and the resulting ill effects. Commenter argued that this report shows that politicization had “severe consequences for agency competence.” Experienced career professionals left the agency and it was hard to replace them. These developments, in turn, discouraged promising entry-level



candidates from applying to work in the agency, which resulted in decreased morale and difficulty conducting long-term planning. By the 1990s, commenter argued, the agency had suffered reputational damage. *See also* Comments 46 (supporting nonpartisan career civil service with studies showing politicization undercuts Federal Government performance and economic growth); 2822 (noting that civil service laws “emphasize responsibilities to the government, U.S. citizens, the Constitution, laws, and ethical principles” and not “political agendas”). One commenter suggested a reason for the differences in performance between neutral and politicized staff was that that “career civil servants who perceive their agencies to be politicized are less likely to invest in training and more likely to leave the agency” thereby reducing long-term government expertise. Comment 2446. OPM appreciates these views and agrees that the career civil service should remain nonpartisan.

Commenters further argued that the United States civil service is already more politicized than those of peer countries. A professor argued that, among those countries, the United States “is an outlier in terms of its existing level of politicization.” Comment 50. This is because “[w]e use about 4,000 political appointees to run the executive branch. Up to the top five layers of leadership in a department or agency can be appointees, a sharp contrast with most peer countries where only the top layer is part of the political class.” *Id.* Commenter noted that this presents a problem when Presidents invariably struggle to fill these slots, leading to delays in appointments and vacancies in leadership. *See also* Comments 2186 (“[T]he United States’ executive branch is more politicized than our peers.” (citing 2007 OECD survey)), 3359 (“Compared to other major democracies, the United States already maintains a higher number of political appointees.”).

Conversely, some commenters argued that career civil servants need more political alignment with an administration’s policies to be more “accountable” to the President. A former political appointee argued that a merit system “is important only as far as it helps the government better serve the American people,” and that “the American people are best served when the government is in the control of the President they chose to entrust with control over the

Executive Branch.” Comment 50; *see also* Comment 3892 (“The federal bureaucracy is not currently adequately or constitutionally accountable to the elected president.”). As explained in later sections, executive branch employees are already tasked with executing the administration’s policies and there is little evidence that further politicization improves government performance for the American people. Politicization is associated with poorer performance outcomes, as described below.

Some commenters opposed to the rule asserted that the Constitution allows a president to closely control executive branch civil servants. A law school clinic argued that, “as a general matter, the Constitution gives the president the authority to remove those who assist him in carrying out his duties,” because “[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities.” Comment 3190. For this proposition, commenter cited *Seila Law LLC v. Consumer Financial Protection Bureau*<sup>165</sup> (quoting *Free Enterprise Fund*).<sup>166</sup> Commenter cited general concepts in these cases regarding independent agencies—the CFPB in *Seila Law* and the SEC in *Free Enterprise Fund*—which explore the specific removal protections of principal officers therein, and the constitutionality of multiple layers of removal protections, as supportive of commenter’s propositions. But as explained above regarding *Free Enterprise Fund* and further in Section III(F), nothing in those holdings or their progeny conflict with this final rule regarding title 5 protections to the career civil service. Career employees, the vast majority of whom would not be considered inferior officers, are accountable through a supervisory chain that typically runs upwards through layers of political appointees. As the official ultimately responsible for the agency can generally be removed at the President’s will, and as those officials are ultimately responsible for the performance management of their subordinates, accountability is maintained. The fact that accountability in the form of removal may involve certain processes for those employees covered by adverse

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<sup>165</sup> 140 S. Ct. 2183, 2191 (2020).

<sup>166</sup> 561 U.S. at 513-14.

action procedures and, in some cases, appeal rights, does not make those protections unconstitutional.

Some commenters argued that a subset of civil servants actively work against the policies of conservative administrations. A legal organization opposed to the rule asserted that “[i]nsulating federal employees from removal and answerability emboldens political activists with the federal government to disrupt or delay Presidential initiatives.” Comment 2866; *see also* Comment 2652. Comment 3156, an advocacy nonprofit organization, further contended that “[a]ny authority civil servants purport to exercise derives its legitimacy from the election of the President, and any attempt by civil servants in the executive branch to undermine the lawful actions of a President are an attack on the Constitution and on democracy itself.” OPM does not agree that employing civil servants—without consideration of their political views—thwarts the agenda of any President, and commenter’s objections lack any well-founded support. Republican and Democratic administrations have achieved important policy goals with a nonpartisan career civil service whose members undoubtedly encompass a wide variety of personal political perspectives. One former civil servant explained that “[t]he Reagan and later administrations successfully implemented new policy directions with the professional Civil Service.” Comment 3038. A legal nonprofit organization concurred and added that civil servants “did not stop [the last Administration’s] deregulatory efforts” and to the extent that regulatory agenda was significantly delayed, “the best explanation is not left-wing civil servants’ resistance to a conservative agenda.” Comment 2822.

For example, in the first term of the George W. Bush Administration., agencies helped to establish new and reimagined personnel systems for both the Department of Homeland Security and the Department of Defense in response to the terrorist attacks on America on September 11, 2001.<sup>167</sup> Implementing these systems required two sets of complex regulations promulgated

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<sup>167</sup> *See* Homeland Security Act of 2002, Pub. L. 107-296 (2002); National Defense Authorization Act for Fiscal Year 2004, 108-36 (2003).

jointly by OPM and each agency. Government attorneys then vigorously defended these programs against legal challenges in the Federal courts.<sup>168</sup> As noted in the 2003 edition of *Biography of an Ideal*, with respect to DHS:

OPM successfully advocated the paramount importance of equipping the new Department with a modern human resources system that would make possible the flexible use of all aspects of the system as tools to help management accomplish strategic objectives and results. The legislation establishing DHS granted authority for the Secretary of Homeland Security and the Director of OPM to create, by jointly issued regulation after extensive employee involvement and consultation with stakeholders (such as unions, employee associations, academic experts, and executives in the corporate and nonprofit sectors), modern pay and job evaluation systems . . . .<sup>169</sup>

The career civil service fulfilled the tasks they were asked to perform to stand up these systems rapidly regardless of their personal politics or views.

*Comments Regarding Nonpartisan Career Civil Servants and Neutral Competence*

Several commenters supportive of this rule touted that a significant benefit of a nonpartisan career civil service is their “neutral competence.” A former OMB official who joined the agency in 1980 commented that, “[I]ike other OMB career staff, I was not primarily a Democrat or a Republican, but instead I strongly endorsed and practiced the ethos of ‘neutral competence’ that served the president, without regard to the party of the president.” Comment 13. An employee with the Bureau of Land Management commented that “[c]ivil service positions provide a continuous level of expertise and neutrality to the functioning of the federal government. Making these positions political appointees would destroy institutional knowledge and result in crippling inefficiencies.” Comment 3758; *see also* Comments 659, 678, 1818 (touting “value of the experience of those who have worked in [a policy] area and the need to insulate them from political pressures of a specific administration”). A federal policy analyst commented “I have worked closely and successfully with political appointees under the Obama,

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<sup>168</sup> *See, e.g., Nat’l Treasury Employees Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006) and *Am. Fed. of Gov. Employees v. Gates, rehearing denied*, 486 F.3d 1316 (D.C. Cir. 2007).

<sup>169</sup> U.S. Off. of Pers. Mgmt, *supra* note 20, at pp. 307-08.

Trump, and Biden administrations to issue regulations and policy guidance consistent with the policy priorities of those administrations.” Comment 3195. Commenter continued that “[n]aturally, I have personal opinions about the policy work I do, and I sometimes disagree with my politically appointed leaders about specific policies or projects. In fact, robust civil service protections have empowered me—and, collectively, my coworkers and other career employees—to occasionally share policy recommendations or serious concerns with agency leadership, which sometimes results in leadership changing course.” Commenter concluded that this is a “perfectly normal and healthy process, as career civil servants are supposed to provide candid deliberative advice to the politically appointed leaders which ultimately make the decisions. . . . At the same time, I and other career federal employees certainly understand that we are not decisionmakers. Elections in a democracy have consequences, and it is entirely appropriate for agencies to pursue the policy preferences of the elected President that appoints its leaders.” A former civil servant added “[h]istory makes the case that stable societies with healthy economies rely on steady, capable administration. For security, for uninterrupted routine transactions and for predictable decisions and communication. When things work, unfortunately, few people notice.” Comment 3038. A 32-year civil servant described serving under six presidents—three Republicans and three Democrats—and working “every day devoted to serving the Constitution, the laws and regulations, [] agency missions and the American people.” Commenter asserted that “our system thereby strikes an appropriate balance between presidential control and professional independence.” Comment 2371; *see also* Comments 2208 (33-year federal attorney who served under several administrations), 2258 (former HHS attorney who also served under several administrations).

A few commenters opposed to the rule argued that career civil servants are not politically neutral—they instead seek to influence policy through *politicized* competence. Comment 3156 argued that contrary to the premise of OPM’s rulemaking, career federal employees “have strong views on policy and actively desire to shape it.” Commenter asserted that they offer “politicized

competence” instead of “neutral competence.” An advocacy nonprofit organization commented that the federal civil service is not politically neutral because in the 2016 presidential election, for example, “federal employee donations—as recorded by the FEC—went 95 percent to the Democratic nominee for president.” Comment 3892. OPM recognizes that many federal civil servants have their own constitutionally protected political and policy preferences, which they are free to express subject to the requirements of the Hatch Act and other statutes and regulations. But even assuming commenter’s beliefs about the policy and political preferences of civil servants are accurate, these comments do not convincingly tie a civil servant’s personal beliefs to concrete and actionable unacceptable performance or misconduct.

Comment 4097, an advocacy nonprofit organization, tried to equate political misalignment with poor performance. Commenter argued that “scholars virtually universally accept the fact that federal employees have their own policy views and often seek to advance them.” Commenter cites one article, Nou (2019),<sup>170</sup> for this proposition, but Nou’s analysis is much more nuanced and measured. Nou’s article is about hierarchical dynamics in government and she qualifies the findings as “an initial exploration of the implication” of overt (not covert) civil servant disobedience. “The aim is to ... examine principles for normatively evaluating the practice.” The article’s “hope is to start, not end, more nuanced conversations—to move past simplistic references to the ‘deep state’ or ‘the resistance’ towards a greater appreciation of the complexity of intra-executive branch dynamics.” Nou’s preliminary conclusions are that “[b]ureaucratic resistance, broadly defined, is neither exceptional nor unprecedented.” Nou contends that “[e]ven the most ardent proponents of executive power may have to acknowledge that some forms of it are inevitable in hierarchies with imperfect information.” Nou also explains that it would be “difficult, if not impossible, to verify empirically” whether bureaucratic

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<sup>170</sup> See Jennifer Nou, “Civil Servant Disobedience,” Univ. of Chicago Law Sch., Public Law and Legal Theory Working Papers (2019), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2247&context=public\\_law\\_and\\_legal\\_theory](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2247&context=public_law_and_legal_theory).

resistance changed qualitatively under the previous Administration.<sup>171</sup> Nou’s article—focused on macro group dynamics—does not support commenter’s proffer that it is universally understood that civil servants advance their own policy views instead of those of the administration or their agencies.

Comment 4097 continued, arguing that “[s]cholars find it very clear that bureaucrats are not neutral parties in the policymaking process. Rather, they have their own set of interests that they actively work to protect.” For this, commenter also cited one article, Potter (2017b).<sup>172</sup> But commenter’s proposition does not align with Potter (2017b) nor with a related citation in the comment to Potter (2017a).<sup>173</sup> Potter does not examine the relationship between individual bureaucrats’ political ideologies and the speed with which they act. Instead, she explains that “[r]ules take a long time to complete” and “[b]ecause agencies make important—and binding—policy through rulemaking, political overseers keep a watchful eye over the process. Each branch of government—the president, Congress, and the courts—plays a role in overseeing agency rulemaking.” Potter continues that, “[w]hile each branch of government’s authority over rulemaking is exercised in a different manner, the key insight here is that each branch has the power to overturn an agency rule or, at a minimum, raise the agency’s cost of doing business.” Rule reversals and rebukes are significant setbacks with “long-term consequences for agency reputations, autonomy, and bureaucrats’ career trajectories.” Potter’s thesis is that agencies can anticipate, and possibly stave off, some types of oversight by pacing their rules to line up with a favorable president, Congress, and/or courts. Potter finds that “the pace of rules slows significantly when [any of these three] are more inclined to disagree with—and potentially punish—the agency issuing the rule in question.”<sup>174</sup> Instead of employees’ personal politics or

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<sup>171</sup> *See id.* at p. 351.

<sup>172</sup> Rachel Augustine Potter, “The strategic calculus of bureaucratic delay,” *Midwest Pol. Sci. Assoc.*, (2017b), <https://www.mpsanet.org/strategic-calculus-of-bureaucratic-delay/>.

<sup>173</sup> Rachel Augustine Potter, “Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking,” *Journal of Politics*, (2017a), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759117](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759117).

<sup>174</sup> Potter (2017b), *supra* note 172.

policy preferences, Potter finds that agencies time regulation strategically “[b]ecause bureaucrats seek to avoid negative political repercussions such as rule overturns or reprimands.”<sup>175</sup>

Comment 4097 expressed frustration with career civil servants in the last Administration, in which the author of the comment was a political appointee, but does not consider the roles and impacts of the court system or a divided Congress on the policy priorities of that Administration—two key factors that Potter highlights as impacting regulatory timing. Instead, Comment 4097 included a list of instances that allegedly show career employees withholding information from political appointees in the last Administration, refusing ideologically distasteful work, delaying and “slow-walking” work, providing unacceptable work product, leaking information, and being insubordinate. For these points, the comment largely cited a separate publication by the author of the comment, *Tales from the Swamp*. As described above, another commenter, Comment 2822, addressed and many of these examples.

In sum, Comment 4097 pointed to select articles and makes conclusions that the articles do not fully support and with which OPM does not agree. Still, commenter claimed OPM’s rulemaking ignores whether “federal employees may have their own goals and motivations or how they behave when their goals differ from the President’s” but, as shown in the proposed rule and here, OPM has thoroughly examined this dynamic, as has Congress when it enacted civil service protections and merit system principles that include disciplinary mechanisms for when employees do engage in improper behavior. Indeed, it is Congress’ views that are paramount, and this rule is in furtherance of the statutory scheme and protections that Congress enacted through the CSRA.

#### *Comments Regarding the Benefits of a Nonpartisan Civil Service*

Many commenters agreed with OPM that career civil servants provide experience and expertise that benefit the country. For instance, Comments 148 and 686 described the work civil servants do to protect “our legal system, our transportation networks, the safety of our food and

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<sup>175</sup> Potter (2017a), *supra* note 173, at p. 28.



drugs, our borders, our air and water, our farmlands, and so much more.” Several other commenters asserted that a professional and nonpartisan civil service bolsters legitimacy and public trust in government. As a result, the American public holds civil servants in higher esteem than elected officials and political officers. A former federal official argued that, while as of May 2022, “trust in career employees at government agencies had declined from previous years, a majority of Americans still reported having a great deal or fair amount of confidence in career employees to act in the best interest of the public; substantially more Americans believe this about career employees than about political appointees.” Comment 2186; *see also* Comment 2814 (a research and advocacy nonprofit organization, arguing “Americans tend to hold these public servants in relatively high esteem, recognizing their professionalism and independence” which “contrasts particularly with Americans’ views of elected officials and political officers.”). The former federal official cited a study which found that “emphasizing the technocratic expertise of agency officials, including that they could not be hired for their political views or fired for disagreements with political leaders,” resulted in a “statistically significant . . . [increase] in legitimacy scores.” The study found smaller increases in perceived legitimacy from emphasizing public participation and found no increase in perceived legitimacy from emphasizing the responsiveness of the agency action to the President’s priorities and White House staff. The study also cautioned that “the conclusion that expertise and political insulation boost legitimacy has a converse: those desiring to erode public support for agencies ought to weaken the civil service.” This risks a negative feedback loop concerning agencies’ legitimacy and civil-service protections (i.e., fewer protections lead to worse perceptions, which lead to fewer protections, and so on).

Relatedly, commenters noted that political appointees are associated with lower program performance. A professor cited studies to this effect.<sup>176</sup> Comment 50. The research found a

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<sup>176</sup> Citing David E. Lewis, “Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?” *The Journal of Pol.* 69, no. 4, pp. 1073-88 (2007), <https://www.jstor.org/stable/10.1111/j.1468-2508.2007.00608.x>.

“negative relationship between political appointment status and program performance, while showing that appointees selected because of their campaign or party experience were especially likely to undermine performance.”<sup>177</sup> The professor also cited findings that “[m]ore politicized environments undermine incentives for career bureaucrats to invest in their skills, and instead encourages them to look for work elsewhere.”<sup>178</sup> This proposition is supported by other comments that discuss the potential effects of politicization on recruitment, hiring, and retention (see Section V.(B)). Another professor noted that the “consensus,” as “evidenced by a large volume of peer reviewed research,” is that “highly politicized bureaucracies are less transparent, less responsive and less accountable to the public, less conducive to stable governance, less capable of operating effectively, and more prone to corruption and clientelism than those with more neutral bureaucratic structures.” Comment 1927.

This view regarding the performance benefits of career civil servants as compared to political appointees is not new. A few commenters pointed to a 1989 commission led by former Federal Reserve Chair Paul Volcker proposing that the U.S. “reduce the number of political appointees, pointing to the delays and performance problems associated with America’s reliance on often inexperienced appointees.” See Comment 3973 (an anti-poverty nonprofit organization). A similar recommendation “was made again in a 2003 report.” *Id.*

Data submitted by other commenters also highlight the benefits of civil service protections and merit system principles on performance outcomes and reducing government corruption. A professor asserted that a recent “systemic review of empirical research” on the use of merit-based processes across countries concluded that “factors such as meritocratic appointments/recruitment, tenure protection, impartiality, and professionalism are strongly associated with higher government performance and lower corruption.” Comment 50. A former

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<sup>177</sup> Citing Nick Gallo and David E. Lewis, “The Consequences of Presidential Patronage for Federal Agency Performance,” *Journal of Pub. Admin. Rsch. and Theory*, Vol. 22, Issue 2, pp. 219–43 (Apr. 2012), <https://doi.org/10.1093/jopart/mur010>.

<sup>178</sup> Citing Mark Richardson, “Politicization and expertise: Exit, effort, and investment.” *The Journal of Pol.* 81, no. 3, pp. 878-91 (2019), <https://doi.org/10.1086/703072>.

federal official presented that “a professional and independent civil service that is insulated from the whims of political appointees also has been shown to meaningfully reduce opportunities for corruption.” Comment 2816. This commenter cited a study of 520 experts across 52 countries that found, “even when controlling for a very broad range of political and institutional factors, bureaucratic professionalism is a statistically significant deterrent of corruption.”

This difference in performance is due in large part to civil service job stability and the opportunity to accumulate expertise. A former federal official cited one study that found that “previous experience within an agency’s bureau, and prior length of tenure, had significant positive impacts on program performance.” Comment 2186. While removing “low performers who are hampering an agency’s mission” is important, proposals that would “facilitate rapid mass firings of experienced employees to suit a presidential administration’s political agenda would likely impact the ability of agencies to preserve institutional knowledge and use it to improve agency operations over time.” Comment 1181, an individual, contended that research by political scientists Sean Gailmard and John Patty shows that the protections of the United States civil service system “generate better outcomes because they allow public officials a time horizon and security to invest in task-specific expertise in public sector skills. Politicizing the workplace does the opposite.”<sup>179</sup> *Id.*; see also Comments 50, 1759 (professors citing the same research). This commenter wrote that recent research confirms this point, “showing that more politicized environments undermine incentives for career bureaucrats to invest in their skills, and instead encourages them to look for work elsewhere.” Commenter concluded that, “[s]ince much of federal employment work is technical in nature, and requires deep knowledge of programs, this makes both task-specific knowledge and institutional experience important, and impossible to easily replace.”

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<sup>179</sup> Citing Sean Gailmard and John W. Patty, “Learning while governing: Expertise and accountability in the executive branch,” Univ. of Chicago Press (2012).

Comment 1427, an individual, cited James Rauch (1995), who researched city governments during the Progressive Era and argued that lessons learned there can apply to the Federal Government. Rauch demonstrates that the “institution of civil service protections was responsible for a greater focus on larger and longer-term infrastructure, which led to significantly increased economic development for cities with civil service protections over those without.” Commenter concluded that the same can be extrapolated to the Federal Government—“that civil servants with career protections will be able to focus on long-term projects with beneficial economic impact, rather than seeing their efforts driven only by their political patron.”

Comment 4097, an advocacy nonprofit organization, took issue with OPM’s assertion, in the proposed rule, that there is little evidence showing that firing of career civil servants without appropriate process will improve the government’s performance. In a footnote, commenter argued that performance between political appointees and career civil servants is not the relevant metric—it should be “how at-will career officials perform relative to tenured career officials.” Commenter then pointed again to “state HR directors” who report that at-will employment “is an essential modern management tool,” and that this rulemaking would deny federal agencies that “tool.”

It is the Federal statutory scheme, as demonstrated by Section 7511(b)(2), not OPM rulemaking, that is “denying” Federal agencies this purported “tool.” Through the CSRA, Congress chose to make removal protections the default for career employees, allowing only for limited exceptions.

In addition, commenter cited no data or studies demonstrating that at-will employees outperform “tenured career officials” in state, let alone federal, agencies. Also, unless a civil servant, whose protections are governed by title 5, is in their probation/trial period or has not met the durational requirements under 5 U.S.C. 7511, they will generally<sup>180</sup> have adverse action

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<sup>180</sup> For instance, they would not have adverse action protections if excluded from the definition of “employee” under 5 U.S.C. 7511(b)(2).

protections, as noted above. So the pool of at-will federal employees is difficult to gauge for a comparison. There is little doubt that at-will employment without initial procedures or back-end review makes firing easier, but that does not demonstrate that at-will employment produces better results. And although there is a legitimate purpose for a small cadre of Schedule C employees to act as confidantes and handle particularly sensitive tasks for presidential appointees, turning a large segment of the career staff—who do not ordinarily function in that fashion—into at-will employees would be an altogether different proposition and inconsistent with the historic trend of congressional enactments extending protections to larger segments of the workforce.

Moreover, at-will civil servants would suffer from the same deficiencies as political appointees under the studies cited above, in that they would lack the job stability that incentivizes “invest[ing] in task-specific expertise in public sector skills.” *See* Comment 1181. Also, as shown by Comment 2186, a former federal official, studies looking at state reforms leading to at-will employment found “[o]ver 75 percent of state employees disagreed that the reforms ‘had resulted in a state workforce that is now more productive and responsive to the public.’” For these reasons, Comment 4097 has not shown that hypothetical at-will federal employees would outperform career civil servants.

Commenters supportive of the rule also noted that career civil servants tend to be more moderate than political appointees. Comments 50, a professor, and 1227, an individual, cited research by Brian Feinstein and Abby K. Wood which looked at donation records and concluded that political appointees tend to be at ideological extremes on both the right and left, “while career officials tend to be more moderate.”<sup>181</sup> *See also* Comment 2822 (legal nonprofit organization).

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<sup>181</sup> *See* Brian Feinstein and Abby K. Wood, “Divided Agencies.” *S. Cal. L. Rev.* 95, 731 (2021), [https://southern-california-law-review.com/wp-content/uploads/2022/12/WoodFeinstein\\_Final.pdf](https://southern-california-law-review.com/wp-content/uploads/2022/12/WoodFeinstein_Final.pdf).

A few commenters opposed to the rule argued that career civil servants are too partisan and skew left compared to the public. *See* Comment 1958 (an advocacy nonprofit organization). Comment 3156, an advocacy nonprofit organization, examined donor information, and attempts to refute Comment 50's conclusions, above, by arguing that the federal workforce has "self-politicized" and that the premise "that civil servants are more moderate than political appointees—no longer holds." Whether or not there is probative value in examining donation differences between career civil servants and political appointees, no commenter established a connection between donation records or trends in donations to unacceptable performance by career civil servants. Federal workers are entitled to their political opinions and to support candidates on their free time (subject to the Hatch Act and other applicable laws). But they also must fulfill the duties of their positions appropriately or face an adverse action.

*Comments Regarding the Nonpartisan Career Civil Service's Support of Presidential Transitions*

Various commenters supportive of the rule argued that career civil servants are important because they provide stability and continuity between administrations. A former OMB official commented that his ability to provide nonpartisan, objective, informed analyses—"using the work of OMB's 400+ career staff—greatly assisted [administration] transitions." Comment 13.

A group of former OMB employees expressed a similar commitment to providing expertise through presidential transitions. Comment 2511 contended that having in place an effective and knowledgeable career staff "has proven to be a vital capability for new leaders after Inauguration Day—especially as new Administrations seek solid footing and/or confront unexpected challenges." Another former OMB employee added that "the virtues of institutional memory, dedication to democratic governance principles, and professionalism evident at OMB are comparably shared at every federal department and agency." Comment 2538. Career employees at OPM similarly play a significant role in advising incoming administrations as to options for filling critical positions during the first few days of the administration. OPM staff

produce a Presidential Transition Guide to Federal Human Resources Management Matters that assists incoming leaders on this point.<sup>182</sup>

A public service nonprofit organization concurred, writing “[c]areer employees allow a president to begin their administration by tapping into valuable institutional expertise that can help drive their agenda from day one, rather than starting from scratch.” Comment 44; *see also* Comment 46 (an individual). OPM agrees that civil servants are a valuable bridge across administrations, especially during the critical transition period. Our government, our democracy, and the American public rely on this smooth transition of power so that everything from the critical matters of the day to routine services are not stalled.

Beyond the transition period, political appointees rely on career civil servants to carry out their policies and missions, commenters argued. Comment 1493, a former political appointee, stated, “I relied heavily on the experience, expertise, and advice of senior career civil service employees in evaluating and managing programs, developing policy and regulatory proposals, investigating and resolving cases, and otherwise administering the laws Congress has authorized those agencies to implement and enforce. I depended on those employees to provide advice and guidance based not on their allegiance to a particular politician or political party, but rather on their thorough understanding of the applicable statutes and regulations, their institutional knowledge of the history of the agencies, and their substantial technical expertise.” Even friction between political appointees and career civil servants has benefits. OPM received a comment from a former Schedule C political appointee who expressed “[t]here was no problem accomplishing the agenda of the administration. In fact, the expertise and experience of the civil servants made it possible.” Comment 3522. Comment 2816, a former federal official, cited studies that found benefits to some “friction between political agency heads and career staff” which “have served to protect the public interest in a variety of ways.” For instance, these

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<sup>182</sup> For example, the Guide published for the 2020 election year is available at <https://www.opm.gov/about-us/reports-publications/presidential-transition-guide-2020.pdf>. The importance of an effective transition was also the subject of “The Fifth Risk” (2018), a book by author Michael Lewis.

agencies “tend to move more cautiously through rulemakings, utilizing less hurried rulemakings with particularly thorough records, with these rulemakings just as likely to produce final rules as in agencies with less internal conflict.”

*Comments Regarding the American Public and Government’s Reliance Interests*

Many commenters agreed with OPM that the American public relies on the nonpartisan civil service in all aspects of their lives. Comments 148 and 686 explained that these civil servants are “hired via fair processes, are often paid less than their private sector counterparts, and are retained via the benefit of steady work and pride of service.” A private sector scientist described benefiting from the “tremendous value provided by fellow scientists and engineers employed by our national agencies,” and from “the countless more who contribute to a functioning society.” Comment 451. An individual described relying “on multiple agencies” every day, from experts who protect consumers from fraudulent business practices to those who manage the infrastructure and transportation needs of the country. Comment 1201. Commenter concluded that “[a]llowing these workers to be fired for political reasons would be disastrous.” Comment 3641 (an individual) adds that politicization “would be bad for individuals and businesses” because many companies rely on civil servants and their “public data to make decisions.”

Several others commented about the many ways they and other Americans benefit from a nonpartisan career civil service. *See* Comments 136 (former air traffic controller who served for 25 years), 817 (an economic researcher whose work “relies heavily on the efforts of career civil servants across the Federal Government”), 842 (adding that other nations also rely on the work of our federal agencies), 1155 (plant scientist and assistant professor who works closely with career employees at USDA), 1157 (former DOE, FWS, NPS, Forest Service, Army Corps of Engineers, Bureau of Reclamation, EPA, and NOAA civil servant who was “consistently impressed with the dedication, expertise, and professionalism of staff”), 1299 (small business owner who works closely with federal agencies on climate change issues), 1518 (cancer



researcher who relies on HHS science and NIH grants), 2082 (small business owner who relies on the “stability of our government and its rules to conduct business”). An individual argued that even high-level political officials, such as members of Congress and the President, “rely on the advice, expertise, and execution capabilities of a professional civil service.” Comment 1047. By ensuring that the civil service is staffed by individuals chosen for their merit and “protected from political winds, we ensure a more stable, effective, and reliable government.” Comment 1047 concluded that, “[i]n essence, this rule isn’t just about protecting jobs; it’s about protecting the integrity of our government and the quality of our democracy. By ensuring that our civil service is merit-based, we are fostering an environment where the best and brightest can thrive, irrespective of the political climate.”

Many nonprofit organizations commented that Congress relies on a nonpartisan civil service to manage complex federal programs and therefore has an interest in legislating civil service protections and merit system principles. *See* Comments 2222, 2559, 2620, 3095 (coalition of public interest organizations), 3149, 3687. They contended that Congress directly creates agencies, details agency authority, and sets policy goals for the agency to achieve using its authority, and “may choose to grant an agency the authority to issue legislative rules, enforce provisions of law, or adjudicate claims.”<sup>183</sup> They asserted that, while “leaders in the executive branch may shape implementation of agency programs, the agencies (and their staff) are themselves supposed to be stewards of programs created, funded, and given direction by acts of Congress,” and protecting the expertise and experience of agency staff “ensures that agencies can fulfill this role.” A coalition of public interest organizations argued that “[a]gencies exist to carry out programs created and authorized by Congress that last much longer than any single administration, and our organizations see significant value in preserving the knowledge civil servants build over the course of many years carrying out these programs.” Comment 3095. A

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<sup>183</sup> Citing Todd Garvey & Sean M. Stiff, “Congress’s Authority to Influence and Control Executive Branch Agencies,” *Cong. Rsch. Serv.*, R45442, p. 10 (Mar. 2023), <https://crsreports.congress.gov/product/pdf/R/R45442>.

legal nonprofit organization concluded that, while “[s]ome critics argue that the role of civil servants is ‘diligently following orders and implementing policies of elected officials,’ or ‘accomplishing the agenda of a president’ rather than protecting ‘the office of the president [or] their institutions,’” civil servants instead have “responsibilities to the Constitution, to Congress, to the law, and to the American people. The critics’ exclusive focus on implementation of a president’s agenda misunderstands and distorts the structural role of our civil servants.”

Comment 2822 (citations omitted). OPM agrees that Congress, as a co-equal branch of government, has a vested interest in a well-functioning federal workforce, especially since that workforce is tasked with carrying out the programs Congress authorizes. Congress plays an important role in legislating civil service protections, as it has done regularly since 1883.

Another concern of politicization expressed by commenters is that it lowers responsiveness to the public and Congress. A professor cited research for this proposition.<sup>184</sup> Comment 50; *see also* Comment 3687 (a science advocacy organization) (discussing the “virtuous circle” of feedback from positive customer experiences leading to improved employee performance and back again). Commenter explained that, while “Senate-confirmed appointees have been shown to be more reliable trustees of Congressional intent based on scrutiny in appointment, inserting thousands of unilateral appointments into the civil service would effectively impede Congress’s ability to provide oversight.”

Commenters cited data showing the many benefits that federal civil servants provide to Americans across the country. Comment 44, a public service nonprofit organization, argued that the approximately 2.2 million civil servants are “primarily located outside of the Washington D.C. region.” At least 80% of the federal workforce is located across the country as well as around the world. Commenter continued, “[o]ur nation’s federal employees deliver essential services including Social Security and Medicare benefits, assist small businesses, care for

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<sup>184</sup> See Abby K Wood and David E Lewis, “Agency Performance Challenges and Agency Politicization,” *Journal of Pub. Admin. Rsch. And Theory*, Vol. 27, Issue 4, pp. 581-95 (Oct. 2017), <https://doi.org/10.1093/jopart/mux014>.

veterans, disrupt international criminal syndicates, maintain the safety of our transportation systems, protect the food supply, find cures for diseases, carry out the nation's foreign policy, and advance our national security." OPM agrees that civil servants are fanned out across the country and the world, which allows them to be more responsive to constituents regarding the local and international functions of government.

*Comments Regarding Regulated Entities' Reliance Interests*

Another benefit of a nonpartisan civil service, many nonprofit organizations commented, is that they provide valuable certainty to regulated entities. *See* Comments 2222, 3095 (coalition of public interest organizations), 3149, 3687, 3973. They argued that regulatory certainty provides "a stable framework for regulated entities, partners, and federal grantees to understand their regulatory obligations and plan for the future, including across presidential administrations." This predictability provides the "certainty that these entities need to make investments, ensure compliance with legal requirements, and focus on delivering impact in their work rather than navigating uncertain and ever-changing legal frameworks." Further, "stable regulatory frameworks advance values of uniformity and fairness." By contrast, "substantial turnover in federal staff in service of whipsaw changes to federal regulations can cause turmoil for partners and regulated entities." They concluded that "purges of agency staff are a poorly-tailored and excessively blunt tool for policy change, handicapping agencies' ability to actually develop and implement new policies while also potentially misdiagnosing barriers to policy change as personnel-related rather than legal, political, or practical." OPM agrees with these commenters and their conclusions regarding benefits the nonpartisan civil service provides to regulated entities.

*Comments Regarding Concerns About Politicization of the Nonpartisan Civil Service*

OPM received several comments from individuals concerned about a politicized civil service and the effects of politicization on them, their communities, and larger society. *See* Comments 80, 502, 1030. Comment 373, an individual, argued that the amount of "institutional

knowledge and training that would be lost if these roles ever became [politically] appointed would be unfathomable” and that the people that would be paying the cost from this constant churn would be ordinary citizens who rely on the “daily affairs of government that no one ever thinks about.” An individual from Ohio stated that government employees account for a significant percentage of the workforce in that state. Comment 312. Commenter concluded that protecting the federal workforce “is vital to protecting Ohio’s economy.” *Id.* Comment 460, an individual, concluded that the “rule will reinforce public trust in our government institutions and ensure that civil servants can carry out their duties without undue political interference, thus maintaining the high standards of public service that our society expects and deserves.”

OPM also received several comments from current and former civil servants who are concerned about improper political influence and removals. These included concerns like, “[a]s a government employee, I have worked with both [Republican and Democrat] appointees. I have never feared for my job because of the civil service protections. My expertise is what I am paid for, not my political party.” Comment 470; *see also* Comments 60, 1991. An attorney and current civilian employee of the U.S. Department of Health and Human Services, expressed “I have long planned to build my career primarily in public service. While not without its flaws, the minor miracle of the modern civil service system is a major motivating factor in my decision to pursue this career in public service and in particular to focus on the federal government.”

Comment 1401. Commenter adds “[t]he already-published plans” of some organizations to “fundamentally alter or eviscerate the civil service system—and ultimately to vitiate the concept of professionalism itself—would, in the micro, certainly require me to rethink my own career and would, more broadly, drastically threaten the functioning of our United States government.”

OPM received similar comments from a career employee in the Department of Defense (Comment 1349), a member of the Foreign Service (Comment 2320), a federal contractor (Comment 2338), and a contractor at the Office of Community Oriented Policing Services (Comment 2749), to name a few.

Finally, commenters were concerned that experiences from other countries and states with a politicized civil service showed possible downsides of further politicizing the civil service. Comment 74 contended that, “[a]s a scholar of India who has watched the politicization of the bureaucracy unfold under the current ruling party and its deeply detrimental effects on public welfare and civic society,” politicization “represents an existential threat to democracy and state functioning in the US.” Comment 1649 stated “I have lived in a country with a political rather than merit based civil service and can testify as to the appalling impact of that system on public safety, institutional integrity, and community trust. There are many things that don’t work well in the American system, but our civil service is one of the few that does.” And Comment 2186, a former federal official, cited a 2005 report for the European Institute of Public Administration which argued that efforts to weaken state-level civil service protections had a “tendency to punish state employees” with “demoralizing ‘bureaucrat bashing’ rhetoric of the ideologically and politically driven reformers.” But there has been “[g]rowing awareness among policy makers, public employees and their organizations, and human resource professionals that” state-level reforms to weaken civil service protections “have not delivered the benefits they promised and may well dampen enthusiasm for [similar] initiatives by the states that contemplate sudden, wholesale, changes in existing arrangements.”

#### **F. 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.<sup>185</sup> The Director also has authorities Presidents have conferred on OPM pursuant to the President’s statutory authority.<sup>186</sup>

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<sup>185</sup> See 5 U.S.C. 1103(a)(5)(A). This authority does not include functions for which either the MSPB or OSC is primarily responsible. Among other authorities, the 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.

<sup>186</sup> See Presidential rules codified at 5 CFR parts 1 through 10.

As explained here, in enacting the CSRA, Congress conveyed broad regulatory authority over Federal employment directly to OPM throughout title 5.<sup>187</sup> 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<sup>188</sup> 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 services and of moving between these services. Since its inception in 1978, OPM has used that same authority, as well as other 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, and of moving between, these services. OPM has used these authorities to create government-wide rules for Federal employees regarding a broad range of topics, such as hiring, promotion, performance assessment, pay, leave, political activity, retirement, and health benefits.<sup>189</sup> 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.<sup>190</sup>
- 5 CFR 212.401(b), promulgated in 1968,<sup>191</sup> well before the CSRA, provides that “[a]n employee in the competitive service at the time his position is first listed under Schedule A,

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<sup>187</sup> See, e.g., 5 U.S.C. 1103, 1302, 3308, 3317, 3318, 3320; Chapters 43, 53, 55, 75.

<sup>188</sup> President Jimmy Carter, “Reorganization Plan” No. 2, secs. 101 and 102 (May 23, 1978). The plan specifies in section 102 that “[e]xcept 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.”

<sup>189</sup> See, e.g., 5 CFR parts 2, 6, 212, 213, 335, 430, 550, 630, 733, 734, 831, 890.

<sup>190</sup> 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).

<sup>191</sup> See 33 FR 12408 (Sept. 4, 1968).

B, or C remains in the competitive service while he occupies that position.” This regulation, as discussed further in Section IV(A), 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 involuntarily into the excepted service (such as administrative law judges).<sup>192</sup>

- 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 understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.”<sup>193</sup>
- 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 services, with specific exceptions that include political appointees.<sup>194</sup>
- 5 CFR part 752 implements chapter 75 of title 5, U.S. Code, and sets forth 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 services meeting the section 7511 criteria.<sup>195</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> See 55 FR 9407 (Mar. 14, 1990), as amended at 58 FR 58261 (Nov. 1, 1993).

<sup>194</sup> 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).

<sup>195</sup> See 74 FR 63532 (Dec. 4, 2009), as amended at 85 FR 65985 (Oct. 16, 2020); 87 FR 67782 (Nov. 10, 2022).

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.”<sup>196</sup> 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.”<sup>197</sup>

#### *Comments Regarding OPM’s Statutory Authority*

Several commenters, as discussed further in Section IV regarding the specific regulatory amendments, argued that regulatory changes proposed by OPM in its proposed rule fell within OPM’s statutory authority. Certain Members of Congress commented that these are “critical regulatory updates that would continue the efforts of the Pendleton Act of 1883 and the Civil Service Reform Act of 1978.” Comment 48, *see also* Comment 2134 (joint comment by nonprofit organization and former federal official, providing extensive background on this point, as summarized in Section IV).

A few comments, like Comment 4097, commented that OPM does not have the statutory authority to issue the regulatory amendments in this rule. OPM will discuss these arguments further in the following section because they relate to the specific amendments. *See* Sec. IV.

#### *Comments Regarding the President’s Constitutional Authority*

A few commenters argued that this rule would improperly restrict the powers of the President and is, therefore, unconstitutional. A former political appointee argued that the rule “is an attempt to usurp Presidential authority by the bureaucrats in the Executive Branch sworn to serve the Constitution.” Comment 45. Comments 462 and 2012 (submitted by the same

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<sup>196</sup> 5 CFR 6.1(a).

<sup>197</sup> 5 CFR 6.1(b).



individual) argued that “[a]ll employees of the Executive Branch serve at the sole discretion of the President and any laws, rules, regulations, or guidelines that restrict this discretionary power subvert the authority of the U.S. Constitution and as such are unconstitutional.” As described above, in Executive Order 14003, the President declared that “[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government.”<sup>198</sup> The President ordered that “[i]t is the policy of the United States to protect, empower, and rebuild the career Federal workforce,” and that the Federal Government “should serve as a model employer.” The Order described Executive Order 13957 (and Schedule F), as “unnecessary to the conditions of good administration,” and therefore revoked Executive Order 13957 because it “undermined the foundations of the civil service and its merit system principles, which were essential” to the Pendleton Act’s “repudiation of the spoils system.” Far from usurping the President’s authority, this rule effectuates the discretionary authority and policy positions of the President.

Also, while it is true that the President has broad and significant authority over the civil service, such as the power to create excepted service schedules when “necessary” and when “conditions of good administration warrant” or direct OPM to issue regulations, it is not the case that all employees of the Executive Branch serve “at the sole discretion” of the President. This argument disregards 140 years of precedent and the role of Congress in shaping the civil service—which is tasked with executing Congressional programs—as expressed most notably in the Pendleton Act, the Lloyd-La Follette Act, the CSRA, and other statutory changes designed to protect the civil service from actions contrary to merit.

Comments 2866, a legal organization, and 4097, an advocacy nonprofit organization, made a related argument that this final rule would violate Supreme Court precedent in *Free Enterprise Fund*, which the commenters argued “held that the President has general authority to remove subordinates, and it is unconstitutional to shield inferior officers from Presidential

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<sup>198</sup> 86 FR 7231.

control.” These comments suggest that OPM’s construction in this final rule would “give inferior officers with substantive policymaking or administrative authority binding removal protections.” As previewed in Section III(E), above, relating to a similar comment, nothing in this rule conflicts with *Free Enterprise Fund* or its progeny.

First, these comments are mistaken in their assertion that “many senior career officials are inferior officers.” OPM is not aware of any judicial decision holding so and the comments cite none. Instead, the comments cite Justice Breyer’s dissent in *Free Enterprise Fund*, which listed several civil service positions that the dissent worried might be imperiled and subject to at-will removal under the majority’s analysis. The majority, however, responded to Justice Breyer’s concerns by explaining that “none of the [civil service] positions [the dissent] identifies are similarly situated to the [PCAOB].”<sup>199</sup> The Court went on to clarify that “many civil servants within independent agencies would not qualify as ‘Officers of the United States’” because they do not “exercise[e] significant authority pursuant to the laws of the United States.”<sup>200</sup> Neither the comments nor the *Free Enterprise* dissent explained which, if any, civil service positions might exercise such “significant authority,” or which are “established by law.”<sup>201</sup> That is not surprising, as even in 1879, ninety percent of the government’s workforce was undoubtedly composed of employees rather than officers, and “[t]he applicable proportion has of course increased dramatically since” then.<sup>202</sup>

Second, inferior officer status, even where it applies, does not require employees to be at will. The Supreme Court has consistently upheld for-cause and good-cause removal restrictions for inferior officers. Over 130 years ago, the Supreme Court held that Congress may constitutionally provide removal restrictions to inferior officers in the military. In *United States v. Perkins*,<sup>203</sup> an inferior officer in the Navy challenged his removal without cause as unlawful,

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<sup>199</sup> 561 U.S. at 506.

<sup>200</sup> *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

<sup>201</sup> U.S. art. II, § 2, cl. 2.

<sup>202</sup> 561 U.S. at 506 n.9. (citing *United States v. Germaine* 99 U.S. 508, 509 (1879)).

<sup>203</sup> 116 U.S. 483 (1886).

as Congress had provided that such inferior officers could be removed in peacetime only pursuant to a court-martial sentence.<sup>204</sup> The Supreme Court agreed, holding that it “ha[d] no doubt” that Congress “may limit and restrict the power of removal” for inferior officers.<sup>205</sup>

*Perkins* was consistent with the contemporaneous judgment of both Congress and the President that merit-based appointments and removals from federal positions were in the Nation’s interest. When Congress enacted the Pendleton Act, it provided for merit-based selection and prohibited removal based on partisan politics<sup>206</sup> and those removal restrictions applied to inferior officers appointed by the President.<sup>207</sup> President McKinley strengthened those removal restrictions by amending the Civil Service rules to prohibit removals “except for just cause and upon written charges filed with the head of the department.”<sup>208</sup> And Congress soon thereafter codified those restrictions to provide that “no person” in the Civil Service may be removed “except for such cause as will promote the efficiency of said service.”<sup>209</sup>

Those longstanding removal restrictions constitutionally apply to inferior officers. In *United States v. Arthrex, Inc.*,<sup>210</sup> as discussed above, the Supreme Court explained that administrative patent judges can properly serve as inferior officers with restrictions on their removal, so long as their decisions are subject to review by a superior who is accountable to the President. Although the Federal court of appeals had invalidated the officers’ removal restrictions,<sup>211</sup> the Supreme Court reinstated them.<sup>212</sup> *Arthrex* is just another decision confirming the principle that Congress may permissibly restrict removal of inferior officers, as it has for over a century.

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<sup>204</sup> *Id.* at 483-84.

<sup>205</sup> *Id.* at 485.

<sup>206</sup> 22 Stat. 403, 403-04 (1883).

<sup>207</sup> *See* 29 Cong. Rec. 416-17 (1897).

<sup>208</sup> *United States v. Wickersham*, 201 U.S. 390, 398 (1906).

<sup>209</sup> Lloyd La-Follette Act, Pub. L. No. 62-336, sec. 6, 37 Stat. 539, 555 (1912).

<sup>210</sup> 141 S. Ct. 1970, 1986-87 (2021).

<sup>211</sup> *Id.* at 1987.

<sup>212</sup> *Id.*

Indeed, the independent counsel in *Morrison v. Olson*,<sup>213</sup> constitutionally enjoyed a restriction on her removal except for “good cause.”<sup>214</sup> By statute, the independent counsel had “full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice,” could conduct “grand jury proceedings and other investigations,” could pursue “civil and criminal” litigation, and could appeal any adverse court decisions.<sup>215</sup> The Supreme Court nonetheless held that the independent counsel was constitutionally subordinate to the Attorney General because, “[m]ost importantly, the Attorney General retains the power to remove the counsel for ‘good cause,’ a power that we have already concluded provides the Executive with substantial ability to ensure that the laws are ‘faithfully executed.’”<sup>216</sup> Accordingly, the Court held that the independent counsel properly served as an inferior officer, and that the removal restriction “does not violate the separation-of-powers.”<sup>217</sup> And *Free Enterprise Fund* confirmed that the holdings in *Morrison* and *Perkins* continue to stand for the proposition that Congress may enact certain “restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.”<sup>218</sup>

Third, these comments suggest that inferior officers within independent agencies cannot have any removal restrictions. Both the Trump and Biden Administrations, however, have consistently taken the position that inferior officers within independent agencies can constitutionally have removal restrictions.<sup>219</sup> As the Solicitor General explained in 2018, when inferior officers within an independent agency can be removed for “failure to perform adequately or to follow agency policies,” such removal restrictions “afford[] a constitutionally sufficient degree of accountability and Executive Branch control.”<sup>220</sup>

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<sup>213</sup> 487 U.S. 654 (1988).

<sup>214</sup> *Id.* at 663.

<sup>215</sup> *Id.* at 662.

<sup>216</sup> *Id.* at 696.

<sup>217</sup> *Id.* at 697.

<sup>218</sup> 561 U.S. at 483.

<sup>219</sup> See, e.g., Resp. Br. 45-55, *Lucia v. SEC*, No. 17-130 (U.S. Feb. 21, 2018); Petr. Br. 44-65, *SEC v. Jarkesy*, No. 22-859 (U.S. Aug. 28, 2023).

<sup>220</sup> Resp. Reply Br. 17, *Lucia v. SEC*, No. 17-130 (U.S. Apr. 16, 2018).

The comments' comparisons of civil service removal restrictions to those at issue in *Free Enterprise Fund* fail to describe the materially significant difference in degree of those restrictions. The inferior officers in *Free Enterprise Fund* could be removed only for willful violations of federal securities laws, willful abuse of authority, or failure to enforce compliance with the securities laws "without reasonable justification or excuse."<sup>221</sup> Thus, the inferior officers of the PCAOB could not be removed "for violations of *other* laws," and could not be removed even if they were to "cheat[] on [their] taxes."<sup>222</sup> Those "rigorous" removal restrictions,<sup>223</sup> applied to the Board's inferior officers, who had "significant independence in determining [their] priorities and intervening in the affairs of regulated firms (and the lives of their associated persons) without ... preapproval or direction" by any other officer.<sup>224</sup> By contrast, members of the civil service can be removed for "the efficiency of the service,"<sup>225</sup> subject to the civil service's prohibited personnel practices which, as a general matter, is both good policy and constitutional. And members of the civil service are overseen by other officers within the Executive Branch, who can direct policy and approve or disapprove of their actions. The Court in *Free Enterprise Fund* noted that the removal provisions that apply to the more general civil service are substantially different from the stringent removal restrictions for the PCAOB, and the Court made clear that "[n]othing in our opinion" should "be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."<sup>226</sup>

Other commenters supportive of the rule argued that it in no way infringes on the President's legal authority. Comment 422, an individual, explained that "the proposed rule does not eliminate the ability of the executive to, within the confines of legislation, execute policy decisions or discretion" and "the proposed provisions retain the distinction between the career civil service and political/excepted appointments, who retain their abilities to direct policy within

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<sup>221</sup> 561 U.S. at 486 (quoting 15 U.S.C. 7217(d)(3)).

<sup>222</sup> *Id.* at 503.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 505.

<sup>225</sup> 5 U.S.C. 7513(a).

<sup>226</sup> 561 U.S. at 507.

the delegation of authority provided to by law.” As explained above, OPM agrees that the President has significant power over the civil service and this final rule does not infringe on those powers. Instead, it makes regulatory changes, in line with OPM’s authorities (some conferred directly by Congress and others conferred by the President, by re-delegation of an authority conferred upon him by Congress) to clarify and reinforce statutory texts and advance the President’s policy, as stated in Executive Order 14003, “to protect, empower, and rebuild the career Federal workforce.”

#### *Comments Regarding Regulatory Justifications*

Some commenters argued that the rule is procedurally unlawful because it is a pretext to block Schedule F. Comment 164, a form comment, stated that “[t]he attempt to counter Schedule F through this rule amounts to a Deep State Protection Scheme that would undemocratically undermine to [sic] core constitutional principle that executive power is vested in the president.” Comment 101, another form comment, stated there is a “discrepancy between the stated purpose of the rule and its actual intended purpose” which, the comment contends, is to prevent Schedule F. Comment 1958, an advocacy nonprofit organization, argued that “[r]egulations are supposed to be responsive to specific problems. OPM’s proposal is not an attempt to address an ongoing, active problem. Instead, it is a blatant defensive play” against Schedule F. Comments 2866, a legal organization, and 3156 argued that *Department of Commerce v. New York*<sup>227</sup> held that the stated intent behind the actions of executive agencies cannot be different from the agencies’ actual motivation.” They also argue that “OPM’s stated intent of enhancing efficiency is demonstrably different from their actual motivation of impeding future implementation of Schedule F to undermine future administrations.”

As explained extensively in the proposed rulemaking and in this final rule, OPM set forth a variety of reasons for promulgating this final rule. And, far from hiding concerns about

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<sup>227</sup> 139 S. Ct. 2551, 2573 (2019).

Schedule F, the proposed rulemaking includes extensive discussion<sup>228</sup> about the prior Schedule F and OPM's view that its implementation would have constituted a stark and unwarranted departure from 140 years of civil service protections and merit system principles. The proposed rule and this final rule note that Schedule F sought to exploit the exception in section 7511(b)(2). As observed in the proposed rule<sup>229</sup> and by several commenters responding to that notice,<sup>230</sup> however, Congress, OPM, and other agencies had long understood the meaning of the phrase "confidential, policy-determining, policy-making, or policy-advocating character" to be a gloss on the description of positions that could be placed in Schedule C of the excepted service at 5 CFR 213.3301(a), i.e., "positions of a confidential or policy-nature." In light of the issuance of Executive Order 13957, and its departures from the common understanding of the meaning of section 7511(b)(2), OPM determined to issue this rule. Among other reasons, the rule elucidates the proper scope of the exception in 5 U.S.C. 7511(b)(2) and clarifies any confusion that may have been introduced by the promulgation of the now-revoked order and schedule.

OPM is authorized by Congress and the President, throughout title 5, to regulate the civil service and carry out the purposes of the civil service statutes. OPM does not and cannot prevent a President from creating excepted service schedules or from moving employees, and this rule does not do that. Instead, the rule promulgates certain definitions clarifying the meaning of statutory language based on longstanding legislative history and intent, legal precedent, and past practices.

#### **IV. Regulatory Amendments and Related Comments**

In this section, OPM discusses the regulatory amendments to 5 CFR parts 210, 212, 213, 302, 432, 451, and 752 and related comments. The first subsection discusses the retention of status and civil service protections upon an involuntary move to or within the excepted service (revisions to parts 212 and 752). The second discusses the definition for positions of a

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<sup>228</sup> See 88 FR 63862, 63867-69, 63874, 63878.

<sup>229</sup> *Id.* at 63883.

<sup>230</sup> See, e.g., Comment 2134, a joint comment by a nonprofit organization and former federal official, at pp. 12-33.

“confidential, policy-determining, policy-making or policy-advocating” character as used in 5 U.S.C. 7511(b)(2) (revisions to parts 210, 213, 302, 432, 451, and 752). And the third discusses processes for moving employees and positions to or within the excepted service and related appeal rights (revisions to part 302).

#### **A. Retention of Status and Civil Service Protections Upon a Move**

OPM amends 5 CFR part 752 (Adverse Actions) to reflect OPM’s longstanding interpretation of 5 U.S.C. 7501 and 7511 and the congressional intent underlying the statutes, including exceptions to civil service protections outlined in 5 U.S.C. 7511(b). These amendments clarify that “employees,” under 5 U.S.C. 7501, 7511(a), in the competitive service or excepted service will retain the rights previously accrued upon an involuntary move from the competitive service to the excepted service, or from one excepted service schedule to another, or any subsequent involuntary move, unless the employee relinquishes such rights or status by voluntarily encumbering a position that explicitly results in a loss of, or different, rights. The rule also conforms the regulation for non-appealable adverse actions with statutory language in 5 U.S.C. 7501 and Federal Circuit precedent to clarify which employees are covered. OPM amends 5 CFR part 212 (Competitive Service and Competitive Status) to further clarify a competitive service employee’s status in the event the employee and/or their position is moved involuntarily to Schedules A, B, C, or any schedule created after the promulgation of this rule.

A voluntary movement is generally characterized by an employee initiating a reassignment, conversion, or transfer by pursuing and accepting an offer to serve in a different position, either at the employee’s own agency or another Federal agency. A voluntary move may extinguish accrued rights, depending on the circumstances of each such situation.<sup>231</sup> If, on the other hand, an agency initiates an action to move the employee’s position from the competitive

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<sup>231</sup> See, e.g., *Garcia v. Dep’t of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006); *Shoaf v. Dep’t of Agriculture*, 260 F.3d 1336, 1341-42 (Fed. Cir. 2001); *Staats v. U.S. Postal Serv.*, 99 F.3d 1120, 1123 (Fed. Cir. 1996) (regarding voluntariness in the retirement context).



service to the excepted service or from one schedule in the excepted service to another, based on the nature of the position, that movement will be regarded as involuntary, vis a vis the incumbent, and should not affect previously accrued rights. Similarly, if an employee is reassigned to a different position by the agency, on the agency's own initiative, to better meet agency needs, the reassignment or conversion will be regarded as involuntary and should not affect previously accrued rights.

As noted above in Section III(B), 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 subchapter II, 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 the MSPB may prescribe regulations.

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 the MSPB. 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 the 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 received several overarching comments regarding the proposed changes to Parts 212 and 752. OPM will discuss these comments, followed by specific comments related to these regulatory changes.

*Comment Regarding the History of Status and Rights Upon an Involuntary Move*

A joint comment from a nonprofit organization and a former federal official provided an extensive history of retention of accrued status and civil service protections upon the involuntary movement to an excepted service schedule or within the excepted service and agreed with OPM that this rulemaking would reinforce and clarify the longstanding legal interpretations and practice pertaining to employees' retention of accrued civil service status and protections. *See* Comment 2134. Commenter concluded that OPM's proposed regulatory provisions on retention are a clarification, rather than an expansion, of rights. Because of its thorough citation to facts and sources relevant to these regulatory changes, OPM will summarize portions of the comment here.

Commenter began the analysis with a detailed historical treatment of status and civil service protections and then turned to *Roth v. Brownell*,<sup>232</sup> a key precedent on this issue, and its progeny.

Commenter detailed that, before *Roth*, the enactment of the Veterans Preference Act of 1944 enhanced the civil service rights of preference eligible employees. Consistent with the Ramspeck Act of 1940 and applicable executive orders,<sup>233</sup> the CSC's regulations at the time acknowledged that some employees in excepted service positions enjoyed competitive status.

Commenter noted that, in 1950, the United States Court of Claims reviewed the CSC's regulations applicable to nonveterans and explained that "employees serving under other than a probational or temporary appointment in the competitive service, *and employees having a competitive status who occupy positions in Schedule A and B*, shall not be removed or demoted except for such cause as will promote the efficiency of the service and in accordance with set procedures." (emphasis in original).<sup>234</sup>

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<sup>232</sup> 215 F.2d 500 (D.C. Cir. 1954), *cert. denied sub nom, Brownell v. Roth*, 348 U.S. 863 (1954).

<sup>233</sup> Citing Ramspeck Act, Pub. L. 76-880, sec. 1, 54 Stat. 1211 (1940), [https://www.loc.gov/resource/lisalvol.lisal\\_054/?sp=1245&st=image](https://www.loc.gov/resource/lisalvol.lisal_054/?sp=1245&st=image); E.O. 9830 (Feb. 24, 1947), <https://www.archives.gov/federal-register/codification/executive-order/09830.html>; E.O. 8743 (Apr. 23, 1941), <https://www.archives.gov/federal-register/codification/executive-order/08743.html>.

<sup>234</sup> Citing *Lamb v. United States*, 90 F. Supp. 369, 372-73 (Ct. Cl. 1950) ("[W]e conclude that a government employee having competitive status and serving in an excepted position in Schedule A, must be separated from such

In 1953, President Eisenhower created Schedule C in Executive Order 10440, which purported to strip employees, “[e]xcept as may be required by the Veterans’ Preference Act,” of accrued procedural protections upon their movement to Schedule C.<sup>235</sup> President Eisenhower then issued Executive Order 10463, which purported to remove accrued procedural protections from employees in Schedule A, as well. An unfavorable decision in *Roth v. Brownell* would later lead President Eisenhower to revoke and replace both executive orders.

Commenter explained that, in *Roth*, the D.C. Circuit considered a decision by Attorney General Herbert Brownell to challenge these civil service protections. Though plaintiff, Roth, had been appointed to the competitive service under the Ramspeck Act and President Roosevelt’s 1941 Executive Order, a 1947 order by President Truman moved his position to a reestablished Schedule A. In 1953, the Eisenhower Administration moved his Schedule A position to Schedule C and purported to remove his civil service status and procedural protections. The Executive Director of the CSC had stated in a letter to Roth that career employees whose jobs were moved to Schedule C retained their civil service protections. The D.C. Circuit ruled for plaintiff and ordered his reinstatement. The court held that neither of these moves stripped Roth of the competitive status and protections he had accrued, explaining that “[t]he power of Congress thus to limit the President’s otherwise plenary control over appointments and removals is clear,” and “[i]t is immaterial here that the President has long been ‘authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof . . . [because] [c]omplete control over admissions does not obviate the removal requirements of the Lloyd-La Follette Act.’”<sup>236</sup>

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position in accordance with the Civil Service Regulations, regardless of the length of time he has occupied such excepted position.”).

<sup>235</sup> Citing E.O. 10440, sec. 6.4 (Mar. 31, 1953) (“Except as may be required by the Veterans’ Preference Act, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedule C or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedules A and B of persons who have competitive status, however they may have been or may be appointed.”), <https://www.presidency.ucsb.edu/documents/executive-order-10440-amendment-civil-service-rule-vi>.

<sup>236</sup> *Roth*, 215 F.2d at 501-02.

Commenter explained that, a month after the *Roth* decision, President Eisenhower issued Executive Order 10577, revoking Executive Orders 10440 and 10463.<sup>237</sup> The new Executive Order provided that “an employee who is in the competitive service at the time his position is first listed under Schedule A, B, or C shall be considered as continuing in the competitive service as long as he continues to occupy such position.” In January 1955, the CSC issued new guidance consistent with the court’s order in *Roth* and Executive Order 10577, redefining for Federal agencies the coverage of the competitive civil service and the removal protection of certain Federal employees under the Lloyd-La Follette Act. The CSC explained that an employee who is serving with competitive status in a competitive position at the time his position is listed under Schedules A, B, or C, continues to be in the competitive service during his occupancy of that position (thus the employee is entitled to the removal protection of the Lloyd-La Follette Act, which applies to the competitive civil service). The CSC also explained that, where proposed appointees to a Schedule A, B, or C position are serving in the competitive service, the employees shall not be appointed until they are advised in writing that acceptance of the excepted appointment will result in their leaving the competitive service. This will put the employees clearly on notice that, upon acceptance of the excepted position, they will no longer be under the protection of the Lloyd-La Follette Act.<sup>238</sup> A few days after this issuance, the CSC published a Federal Register notice to codify the Eisenhower Administration’s recognition of these rights.<sup>239</sup>

In giving its instructions to agencies about movement of employees after January 23, 1955, to Schedule A, B, or C positions, the CSC also took steps to protect employees who were

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<sup>237</sup> Citing E.O. 10577 (Nov. 23, 1954), <https://www.presidency.ucsb.edu/documents/executive-order-10577-amending-the-civil-service-rules-and-authorizing-new-appointment>.

<sup>238</sup> Citing Press Release, U.S. Civil Serv. Comm’n, 1 (Jan. 24, 1955).

<sup>239</sup> Citing Appeals from Employees Entitled to But Denied Protection of Lloyd-La Follette Act, Civil Serv. Comm’n Prop. Reg. 5 CFR pts. 9 & 20, 20 FR 599, 601 (Jan. 28, 1953), [https://archive.org/details/sim\\_federal-register-find\\_1955-01-28\\_20\\_20/mode/2up](https://archive.org/details/sim_federal-register-find_1955-01-28_20_20/mode/2up).

moved prior to that time. It stated that employees in three groups who were moved prior to January 23, 1955, would still be considered to be in the competitive service.<sup>240</sup>

Commenter showed that contemporaneous legal analyses, such as a 1955 law review article, concluded that *Roth* had confirmed the durability of personally accrued status, at least in the case of an involuntary move.<sup>241</sup> That same year, the Comptroller General demonstrated the broad applicability of *Roth* by confirming the appropriateness of the National Labor Relations Board's award of backpay to a similarly situated employee who had been improperly removed.<sup>242</sup>

On May 12, 1955, the CSC highlighted the difference between an employee's voluntary and involuntary movement to Schedule C, explaining that under civil service rules, "a vacant Schedule C job may not be filled by the appointment of an employee serving in the competitive service until the employee has been given notice in writing that acceptance of the position will result in his leaving the competitive service. Leaving the competitive service would result in his giving up the job-removal protections of the Lloyd La Follette Act." On the other hand, "if an occupied job in the competitive civil service is moved to Schedule C, an incumbent who has civil-service status continues to have the removal protection of the Lloyd-La Follette Act during his occupancy of the position."<sup>243</sup>

As commenter demonstrated, the next several presidential administrations did not differ in their interpretation regarding the retention of status and rights. Under President Lyndon Johnson, for example, the CSC codified the principle of retained status at 5 CFR 212.401(b).<sup>244</sup> OPM notes that this regulation remained unchanged until this final rule, which, consistent with

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<sup>240</sup> Citing Press Release, U.S. Civil Serv. Comm'n, pp. 1-2 (Jan. 24, 1955).

<sup>241</sup> Citing De Seife, Rodulphe, 5 Cath. U.L. Rev. 110 (1955), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3073&context=lawreview>.

<sup>242</sup> Citing Gov. Accountability Off., Op. for Guy Farmer, Chairman, NLRB (July 25, 1955), <https://www.gao.gov/products/b-123414>.

<sup>243</sup> Citing Press Release, U.S. Civil Serv. Comm'n, 3 (May. 12, 1955).

<sup>244</sup> Citing Revision of Regulations, U.S. Civil Serv. Comm'n, Final Reg. 5 CFR ch. I, subch. B (other than pt. 213), 33 FR 12402-08 (Sep. 4, 1968) ("An 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."), [https://archives.federalregister.gov/issue\\_slice/1968/9/4/12396-12526.pdf#page=23](https://archives.federalregister.gov/issue_slice/1968/9/4/12396-12526.pdf#page=23).

the intent of the original regulation, modifies the regulation to cover any newly created schedules.

Under President Ford, the CSC acknowledged the continuing relevance of *Roth* in a memorandum emphasizing that employees retained accrued status and civil service protections upon movement to positions designated as confidential or policy-determining.<sup>245</sup> A related handout for officials with presidential transition responsibilities explained that Schedule C employees with status were entitled to appeal their removal to the CSC under the commission's regulations at 5 CFR part 752.<sup>246</sup>

Still further, a decade after enactment of the CSRA, and during the Reagan Administration, OPM issued a government-wide advisory that cited *Roth* as establishing the guiding principle for removing employees with status from Schedule C positions, explaining that an employee who was serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who is still serving in that position may be removed from that position only "for such cause as will promote the efficiency of the service" and in accordance with the procedures established by 5 U.S.C. 7511 *et seq.* and part 752 of OPM's regulations.<sup>247</sup>

Commenter also referenced subsequent cases and administrative opinions where this reasoning prevailed. For instance, in *Saltzman v. United States*,<sup>248</sup> the Court of Claims held that the plaintiff, despite occupying a position that was now in the excepted service, was entitled to the civil service protections afforded to competitive service employees, explaining that "Plaintiff never lost the rights he acquired under the Lloyd La Follette Act when he acquired permanent competitive status in the classified civil service."

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<sup>245</sup> Citing Memo. from Raymond Jacobson, Exec. Dir., CSC, 5 (Nov. 10, 1976), <https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf>.

<sup>246</sup> Citing CSC, Procedures for Removals from Excepted Positions, p. 2 (1976), <https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf>.

<sup>247</sup> Citing Memo. from Constance Horner, Dir., U.S. Off. of Pers. Mgmt. to heads of departments and agencies, "Civil Service and Transition to a New Presidential Administration," pp. 8-9 (Nov. 30, 1988), <https://www.cia.gov/readingroom/docs/CIA-RDP90M01364R000800330004-0.pdf>.

<sup>248</sup> 161 Ct. Cl. 634 (1963).

Commenter then discussed *Stanley v. Department of Justice*,<sup>249</sup> where the Federal Circuit reviewed the adverse action rights of term-limited Bankruptcy Trustees who were moved into Schedule C because they were proclaimed to be encumbering positions that were “confidential, policy-determining, policy-making or policy-advocating” in character. As explained below in response to another contention in Comment 4097, this 2005 ruling was entirely consistent with the longstanding view that an employee cannot be stripped of status involuntarily but can waive it voluntarily.

Analogous principles apply to employees subject to transfers of functions.<sup>250</sup> In 1980, for instance, the Comptroller General agreed with OPM guidance determining “that employees who transfer to the Peace Corps would be transferred incident to a transfer of functions and accordingly would retain their status as employees with competitive civil service appointments notwithstanding that the Peace Corps’ appointment authority is solely under the Foreign Service Act of 1946 as amended.”<sup>251</sup>

Further, the MSPB has held that a determination under 5 U.S.C. 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position.<sup>252</sup> The MSPB has also required agencies to follow applicable procedures when making determinations under 5

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<sup>249</sup> 423 F.3d 1271 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1098 (2006).

<sup>250</sup> See 5 U.S.C. 3503, 5 CFR 351.301-302.

<sup>251</sup> Citing Matter of Clement J. Zalocki, House of Reps., B-19818 L/M, 1980 WL 16731 (Comp. Gen. 1980), <https://www.gao.gov/products/b-198187-lm>.

<sup>252</sup> Citing *Thompson v. Dep’t of Justice*, 61 M.S.P.R. 364 (Mar. 30, 1994) (No. DE-1221-92-0182-W-1), *subsequent history at* 70 M.S.P.R. 251, *aff’d*, 106 F.3d 426 (Fed. Cir. 1997), *Chambers v. Dep’t of the Interior*, No. DC-0752-004-0642-M-2, 2011 WL 81797 (M.S.P.B. Jan. 11, 2011) (Member Rose concurring) (inadvertently citing paragraph (b)(8) instead of (b)(2): “For the section 7511(b)(8) exclusion to be effective as to a particular individual, the appropriate official must designate the position in question as confidential, policy-determining, policy-making, or policy-advocating before the individual is appointed.”); *Owens v. Dep’t of Health & Human Servs.*, 2017 WL 3400172 (July 31, 2017) (No. AT-0752-17-0516-I-1) (citing *Briggs* for the proposition that “a determination under 5 U.S.C. § 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position”); *Vergos v. Dep’t of Justice*, 2003 WL 21417091 (June 6, 2003) (No. AT-0752-03-0372-I-1) (citing *Thompson* for the proposition that a “determination under the 5 U.S.C. § 7511(b)(2) is not adequate unless it is made before the employee is appointed to the position”). See also *King v. Briggs*, 83 F.3d 1384, 1387 (Fed. Cir. 1996) (noting, in affirming a Board decision reinstating the Executive Director of the Council on Disabilities, that the administrative judge who adjudicated the Director’s appeal had found that “the Council ‘had never made a determination that [Briggs’] position was a confidential, policy-making, policy-determining, or policy-advocating position,’ and thus excluded from the definition of employee in section 7511(a),” and “even if the Council had made such a determination, ‘it never communicated that fact’ to Briggs.”).

U.S.C. 7511(b)(2). In *Blalock v. Department of Agriculture*,<sup>253</sup> for example, the MSPB rejected an agency's claim that it had removed employees from their Schedule A positions by reduction-in-force (RIF) procedures and appointed them to new Schedule C positions. It found that this RIF was improper and the redesignation was not a "reorganization." Therefore, the agency could not have conducted a RIF and the agency's abolishment of their Schedule A positions constituted individual adverse actions against the incumbents. The MSPB directed the agency to reinstate preference eligible employees whom it had separated without adhering to applicable adverse action procedures.

OPM appreciates Comment 2134 providing such extensive and detailed factual history and agrees with the comment's analyses and conclusion that "OPM correctly characterized as 'longstanding' the executive branch's interpretations of sections 7501 and 7511 of title 5, as well as the congressional intent as to the meanings of those sections."

*Comments Regarding Property Interests in a Position and the Retention of Accrued Status and Rights Upon an Involuntary Move*

A coalition of national and local unions agreed with OPM's contention in the proposed rule,<sup>254</sup> as recognized in Supreme Court precedent, that in light of congressional enactments creating various prerequisites to a removal for employees who meet specified conditions, employees can earn a property interest in their positions once they satisfy their probationary/trial period or their durational requirement of current continuous service under 5 U.S.C. 7511 and retain those rights upon an involuntary move from the competitive service to the excepted service or within the excepted service. *See* Comments 41.

Commenters supportive of the rule argued that the President cannot take away a vested property right through an executive order. The same coalition of national and local labor unions wrote that no President, through an "Executive Order or other action can override the

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<sup>253</sup> 28 M.S.P.R. 17, 20 (1985), *aff'd sub nom.*, *Huber v. MSPB*, 793 F.2d 284 (Fed. Cir. 1986).

<sup>254</sup> *See* 88 FR 63862, 63865-66, 63877.



Constitution or Chapter 75” and remove the property interest that certain career employees accrue in their continued federal employment. *See* Comment 41. A former federal official argued that OPM’s rulemaking regarding part 752 would help protect career civil servants against “arbitrary adverse actions while serving in their positions” and would help preserve those employees’ protections even when a competitive service position is moved into the excepted service. *See* Comment 2816. Commenter continued that this rule would reduce the risk of misapplying the civil service statutes by using rescheduling to bypass civil service protections. OPM agrees with the contention regarding property rights and the expected benefits of this rule.

A commenter opposed to the rule argued that the President can use rescheduling to eliminate civil service protections. Comment 4097 conceded that OPM accurately explains in the proposed rule that the Supreme Court has held that civil service protections give government employees a property interest in their job, and that those same cases also state that the government cannot constitutionally remove these property interests without due process. Commenter contended, nevertheless, that the government can eliminate civil service procedures and, in doing so, extinguish the underlying property interest previously created. The cases and examples commenter cited in support (*see* Comment 4097, fn. 8), however, involve state legislative action, not executive action, to alter or remove civil service protections. This appears to be in line with *Loudermill* which instructs that a “legislature may elect not to confer a property interest in public employment, [but] it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.”<sup>255</sup> Federal appellate courts have held that rights conferred on state employees by legislative action can be revoked, but that revocation also requires legislative action.<sup>256</sup> Also, it is unclear which, if any, cited cases removed protections from incumbents as opposed to unencumbered positions, which could run contrary to *Roth* and its progeny as explained above.

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<sup>255</sup> 470 U.S. at 541.

<sup>256</sup> *See, e.g., id.*; *Correa-Ruiz v. Fortuno*, 573 F.3d 1, 14-15 (1st Cir. 2009); *Gattis v. Gavett*, 806 F.2d 778, 779-81 (8th Cir. 1986).

Commenter also argued that, in light of section 7511(b)(2), courts have held that federal agencies can declare positions policy-influencing and thereby eliminate civil service removal requirements that previously attached, citing *Stanley v. Department of Justice*<sup>257</sup> and *Stanley v. Gonzales*.<sup>258</sup> OPM disagrees with commenter’s characterization of these two cases, in which the Federal and Ninth Circuits heard challenges to the removal of two U.S. Trustees who were serving five-year terms. The original text of the statutory provision concerning U.S. Trustees, 28 U.S.C. 581, provided that the Attorney General could remove a U.S. Trustee only for cause.<sup>259</sup> In 1986, however, Congress amended the statute to eliminate the “for cause” requirement.<sup>260</sup> At the time the trustees were initially appointed, no Attorney General had made a determination that the position should be considered confidential, policy-determining, policy-making, or policy-advocating. Later, however, Attorney General Janet Reno declared U.S. Trustee positions to be “confidential, policy-determining, policy-making or policy-advocating” in character, and therefore not subject to chapter 75’s protections.<sup>261</sup> Several years later, Attorney General John Ashcroft fired the Trustees.<sup>262</sup> Commenter argued that the “courts upheld these dismissals because the trustees now occupied policy-influencing positions; they no longer had MSPB appeal rights.” But this glosses over the actual facts of these cases. As noted by Comment 2134, and as explained in *Stanley v. Department of Justice*, even though Attorney General Reno made this determination, the Department of Justice acknowledged in writing “that Trustees appointed prior to the proclamation would not be affected—they would retain appeal rights—but that all those appointed after the proclamation were exempt from the due process provisions contained in Title 5.”<sup>263</sup> And these appointments were subject to a term of five years. Accordingly, any rights in the original appointment would have ended at the end of that term. The initial five-year terms

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<sup>257</sup> 423 F.3d 1271 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1098 (2006).

<sup>258</sup> 476 F.3d 653 (9th Cir. 2007).

<sup>259</sup> 423 F.3d at 1273-74.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 1273.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

of these two Trustees later expired. When the individuals affected voluntarily accepted *new* appointments to subsequent five-year terms, those appointments were now subject to Attorney General Reno's intervening determination that the positions were confidential, policy-determining, policy-influencing, or policy-advocating. During the Trustees' second five-year term, a new presidential administration removed them. The Federal Circuit found that the intervening determination by Attorney General Reno, before their voluntary acceptance of a second term, deprived them of any entitlement to particular procedures before they could be terminated from the positions.

Thus, far from demonstrating that "courts have held that federal agencies can declare positions policy-influencing and thereby eliminate civil service removal requirements that previously attached," *Stanley v. Department of Justice* demonstrates only that when Congress excepts a position from the competitive service by statute and confers authority on the agency head to remove without cause, and when the agency head thereafter determines that the position is policy-influencing, the subjects of new appointments *thereafter* will not be entitled to procedural or appeal rights under chapter 75 and 5 U.S.C. 7701.

Reliance upon the related *Stanley v. Gonzales* case also does not support commenter's position. In that case, the Ninth Circuit affirmed a holding by a Federal district court that that court lacked jurisdiction over Ms. Stanley's new constitutional claims arising from the same facts. Although Ms. Stanley argued that the CSRA did not preclude her from pursuing relief directly under the Constitution, the Ninth Circuit concluded that it could not even reach that question because she had failed to allege a colorable constitutional claim. More specifically, in concluding she could not state a cognizable property interest in her position, the Ninth Circuit focused on the key details that Stanley was on a time-limited second appointment and that, by statute (citing 28 U.S.C. 581), she could be removed without cause by the Attorney General.

There is nothing about these decisions that is inconsistent with OPM's position that a career employee's accrued rights cannot be stripped involuntarily.

A former political appointee opposed to the rule argued that OPM claimed it is acting in accordance with statutory text, legislative history for that text, and Congressional intent but there is nothing in the CSRA that states congressional intent to preserve rights upon a move. *See* Comment 45. Commenter argued that OPM's rulemaking is speculative with regard to the intent of the statutes, especially "since neither 5 U.S.C. 7501 nor 5 U.S.C. 7511 clearly state their intents" and "neither statute talks about or insinuates 'congressional intent.'" It is unclear what this commenter is attempting to convey. The language in chapter 75 does not provide an explicit definition for certain terms used therein. OPM notes, however, that congressional intent is not always spelled out in statutory text, especially in a comprehensive statute that deals with many discrete topics. In that situation, courts, regulated entities, and others seeking to interpret statutory language may look to traditional tools of statutory interpretation, including structure, statutory and legislative history and other indicia of intent, as well as relevant precedents. As explained throughout this final rule, these statutes have extensive statutory and legislative history and there are precedents that support OPM's rulemaking. The extensive history discussed in Comment 2134, for example, supports OPM's rule regarding the retention of status and rights upon an involuntary move.

A nonprofit organization opposed to the rule commented that 5 U.S.C. 7501 and 7511 refer to current continuous service in a same or similar position, but do not contemplate a move from the competitive service to the excepted service. *See* Comment 1811. The organization asserted that OPM offers no case law "relevant to this specific instance" and because "the current regulations do not address this particular situation," commenter believes rulemaking "is not the proper way for OPM to address this concern." Instead, "Congress ought to clarify worker protection here." The reference to current continuous service relates to how rights are accrued in the first place. Once an employee has accrued the requisite service, different considerations apply with respect to the consequences of an involuntary move of a position or person from the competitive to the excepted service. A different advocacy nonprofit organization stated that

“OPM does not have the authority to permanently attach removal protections.” *See* Comment 1958. Moreover, commenter argued that “worker classifications exist to tie different levels of protection to different types of jobs.” Allowing a worker to carry over a protection to a new classification “undercuts the purpose of worker classifications.” Commenter argued that this “provision is a significant change in law, not a mere clarification[.]”

OPM will make no revisions based upon these comments. As explained previously, *Roth* held that once a Federal employee has accrued civil service status and procedural rights, the employee retains the status and rights even if the employee’s position is later moved to an excepted service schedule that would otherwise lack such status and rights. *Roth* was consistent with the cases that followed, such as *Loudermill* and its progeny, which OPM describes here and in the proposed rulemaking. In the absence of specific examples, we are unaware what commenter means by “different levels of protection” for “different types of jobs.” An “employee” as defined in section 7511, who has met the requisite service requirement, is entitled to the procedures specified in section 7513, whether the employee is in the competitive service or the career excepted service.

A nonprofit organization opposed to the rule commented that employees moved from the competitive service to the excepted service should not as a matter of policy retain their accrued rights. Comment 1811. Commenter asserted that the changes to part 752 would make terminations harder for agencies by strengthening civil service protections. OPM notes that these revisions largely clarify the status quo so they would not make it more difficult to remove employees for the efficiency of the service or pursuant to the optional procedures in chapter 43 for action based on unacceptable performance. Section 212.401(b) of this part, promulgated in 1968, already 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.” As noted in the proposed rule,<sup>264</sup> this regulation was intended to preserve civil service

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<sup>264</sup> *See* 88 FR 63862, 63869.

protections and adverse action rights when positions are moved. Comment 1811 then argued that “[w]hen employees move from the Competitive Service to the Excepted Service, it is not logical that their accrued worker protections should follow them. They will report to new supervisors, have new work, and different responsibilities.” For the reasons described above regarding Comment 2134 and its analysis of *Roth* and its progeny, OPM disagrees that such retention of rights is illogical. On the contrary, it is well grounded in decades of civil service precedent and practice. Without these protections, an agency might try to defeat accrued rights by reassigning individuals to new positions in another service or schedule. Although we believe the case law would already make such an attempt futile, we have chosen to clarify our regulations by addressing the consequences of such a move explicitly in this final rule. Moreover, there is nothing to support the contention that moving an employee to the excepted service would necessarily result in new supervisors, new work, or different responsibilities.

*Comments Regarding the Regulatory Changes and Creation of “New Rights”*

Two commenters opposed to this rule argued that it grants new rights that are contrary to statute. One former political appointee argued that “Congress has distinguished between the competitive service and exempted [sic] service” in that they are different classifications with different hiring processes, responsibilities, and protections. Comment 45. Commenter continued that it “is unfair that civil servants who have worked in the exempted [sic] service for years would not have protections, while those who had just been moved from the competitive service would have protections, solely by virtue of their previous classification.” We assume, for purposes of responding to this comment, that commenter meant to refer to the excepted service, as there is no “exempted service” category.<sup>265</sup> Commenter appears to suggest that excepted

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<sup>265</sup> The confusion may arise from section 302.101(c) of this part, which lists a small set of positions in the excepted service that are also exempt from the part 302 procedures that would normally apply to the hiring of employees into the excepted service. As noted above, section 3320 of title 5, U.S. Code, requires appointing authorities hiring individuals into the excepted service to use the same procedures described in sections 3308 to 3318 of title 5 to effectuate veterans’ preference. OPM’s regulations at part 302 are intended to provide the means for an agency to meet that requirement. Part 302 provides for limited exemptions where compliance is essentially impossible (e.g., attorney positions, for which Congress has forbidden examination in annual appropriation provisions). For those discrete positions, veterans’ preference must still be applied as far as administratively feasible. 5 CFR 302.101(c).

service employees do not have civil service protections. Excepted service positions may accrue the same adverse action rights as competitive service employees once they satisfactorily complete their probationary/trial period or satisfy their durational requirement. *See* 5 U.S.C. 7511. Following a decade of experience under the CSRA, Congress *expanded* the scope of employees covered by adverse action procedures in the 1990 Amendments by conferring such rights on employees who had been appointed to career excepted service positions and had accrued 2 years of continuous service in the same or a similar position.<sup>266</sup> The main exception to this, as discussed throughout this rule, are those excluded under 5 U.S.C. 7511(b), including political appointments requiring senate confirmation, Schedule C political appointees, and presidential appointments. Also, as explained previously, for almost 60 years, executive action, legal precedent, and regulations have recognized that civil servants moved involuntarily from the competitive service to the excepted service keep their rights.

Another commenter argued that 5 U.S.C. 7511(b) categorically exempts policy-influencing excepted service positions from chapter 75's adverse action procedures and OPM has no authority to extend civil service removal restrictions to employees in such positions. Comment 4097.<sup>267</sup> This misstates this final rule. OPM is not extending civil service protections to employees excluded by section 7511(b). OPM's regulatory amendments elaborate upon and clarify the retention of rights upon an involuntary move and further define the exception in 5 U.S.C. 7511(b)(2), as explained further in Section IV(B), based on its longstanding interpretation of the statute, elucidated by legislative and statutory history, additional indicia of intent, and precedent. Commenter then contended that OPM fails to cite any cases holding that employees retain removal restrictions after their positions are determined to be policy-influencing and

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<sup>266</sup> *See* Civil Service Due Process Amendments Act, 101 Pub. L. 376 (Aug. 17, 1990).

<sup>267</sup> We also note that section 7511(b)(2) does not *automatically* exempt policy-influencing General Schedule positions from chapter 75 protections. The position must be placed in the excepted service by the President, OPM, or Congress, and a determination must be made, by the appropriate person or entity, as described in more detailed subparagraphs under subparagraph (b)(2), that the position is of a confidential, policy-determining, policy-making, or policy-advocating character. The provision is not self-executing, as the *Stanley* cases demonstrate. In the absence of a determination by the appropriate party, and communicated at the time of appointment, section 7511(b)(2) would not limit adverse action rights.

instead OPM cited two cases “that deal with an entirely different issue.” (referring to footnote 117 of the proposed rule, which cites *McCormick v. Department of the Air Force* (2002) and *Greene v. Defense Intelligence Agency* (2005)). See Comment 4097. OPM did not cite either of those cases for this proposition. They were cited in this rulemaking because OPM is making conforming regulatory changes based on the precedent, holding that once an employee satisfactorily completes their probationary/trial period *or* durational requirement under 5 U.S.C. 7511, they are entitled to adverse action rights. Footnote 117 from the proposed rule states, “[t]hese 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.”<sup>268</sup> That is precisely the reason these two cases were cited. Also, as previously explained, longstanding precedent shows that employees retain adverse action protections if moved to or within the excepted service. See also Comment 2134, (detailing precedent, starting with *Roth* and including the *Stanley* cases, which explain that incumbent employees can retain rights even after their position is found to be policy-influencing).

Finally, some commenters opposed to the rule argued that pay and privileges should flow with the position, not the person. One professor emeritus commented that a basic principle of the civil service has been that pay and privileges flow to the position and it would be inconsistent for individuals to permanently carry with them the attributes and protections that applied to their previous positions. Comment 3953, see also Comment 4097 (“Nothing in title 5 says or implies those restrictions follow individual employees.”). Comment 3953 continued that it would be unreasonable to expect that individuals who move from “career to noncareer positions” would, or could, permanently carry with them the protections they once enjoyed. But federal workers become “employees” entitled to rights under chapter 75 based on their ability to complete a probationary/trial period and continuous service in a position or similar position.<sup>269</sup> Once those

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<sup>268</sup> See 88 FR 63862, 63871.

<sup>269</sup> See 5 U.S.C. 7501, 7511.



rights are earned, employees retain that status even if they are moved to an excepted service schedule or within the excepted service, so long as the move was involuntary. A move from “career to noncareer positions” would only retain adverse action rights, as explained above, if such a move was involuntary. For instance, a voluntary movement from the competitive service to Schedule C would require an acknowledgment from the employee that adverse action rights would be waived.<sup>270</sup> A contrary rule would allow Federal workers to be reclassified at the whim of an agency without regard to how the civil service system has operated for decades, despite longstanding reliance on these protections by the Federal workforce.

OPM is promulgating the following changes to 5 CFR parts 212 and 752:

## **Part 212—Competitive Service and Competitive Status**

### **Subpart D—Effect of Competitive Status on Position**

#### *Section 212.401 Effect of competitive status on position*

Part 212 addresses competitive service and competitive status and this final rule revises the regulations in 5 CFR 212.401(b) regarding the effect of an employee’s competitive status on the employee’s position. This final rule establishes that a competitive service employee whose position is first listed under Schedule A, B, C, or any future excepted service schedule remains in the competitive service for the purposes of status and protections, while the employee continues to occupy the position or any other positions to which the employee is moved involuntarily.

As described throughout this final rule, OPM’s longstanding view is that Federal employees maintain the civil service status and protections that they have accrued. Since 1968, civil service regulations have provided 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.<sup>271</sup> OPM is updating 5 CFR 212.401(b) consistent

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<sup>270</sup> See 5 CFR 302.102 (regarding processes for voluntary movements).

<sup>271</sup> 33 FR 12402, 12408 (Sept. 4, 1968).

with this final rule to establish that a competitive service employee whose position is first listed involuntarily under any future excepted service schedule remains in the competitive service. OPM is updating to account for the possibility of new excepted service schedules which may be established after promulgation of this rule or other efforts to involuntarily move positions to or within the excepted service.

*Comments Regarding Amendments to 5 CFR 212.401*

One commenter opposed to the rule expressed a view that OPM believes is a misreading of the regulatory change. Comment 3190, a law school clinic, argued that the rulemaking creates “a new pathway for burrowing” because it would amend 5 CFR 212.401(b) to allow that 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” the effective date of final rule, to remain in the competitive service.<sup>272</sup> Commenter argued that, under such a provision, an outgoing administration could burrow personnel by promoting ideologically aligned competitive service civil servants to Schedule C positions. A president would then be stuck with individuals who oppose his agenda, even though Schedule C positions are “policy determining” positions that often “involve a close and confidential working relationship with the head of an agency or other key appointed officials.”<sup>273</sup> OPM believes this concern is misplaced. The portion of the regulation that commenter identifies, relating to Schedules A, B, and C, is not a “new” revision in this final rule. That language already existed in 5 CFR 212.401(b) prior to this rule’s amendment and dates to 1968.<sup>274</sup> The final rule adds the language, “or whose position is otherwise moved from the competitive service and listed under a schedule created subsequent to [effective date of final

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<sup>272</sup> 88 FR, 63862, 63882.

<sup>273</sup> *Id.* at 63872.

<sup>274</sup> Citing Revision of Regulations, Civil Serv. Comm’n Final Reg. 5 C.F.R. ch. I, subch. B (other than pt. 213), 33 FR 12402-08 (Sep. 4, 1968) (“An 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.”), [https://archives.federalregister.gov/issue\\_slice/1968/9/4/12396-12526.pdf#page=23](https://archives.federalregister.gov/issue_slice/1968/9/4/12396-12526.pdf#page=23). Fifty-five years later, this regulation remains unchanged. 5 C.F.R. § 212.401(b).

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, or any other positions, in sequence to which the employee is moved involuntarily, as has been the case for almost 60 years.

As explained above and in Comment 2134, the original language in 5 CFR 212.401(b) was added during the Johnson Administration to track judicial decisions finding that employees retained accrued status and civil service protection upon an involuntary movement to excepted service positions. Regarding Schedule C, specifically, the CSC in 1955 noted the difference between an employee’s voluntary and involuntary movement to that schedule. Regarding a voluntary move, the CSC explained that competitive service employees would lose adverse action rights. It stated, “a vacant Schedule C job may not be filled by the appointment of an employee serving in the competitive service until the employee has been given notice in writing that acceptance of the position will result in his leaving the competitive service. Leaving the competitive service would result in his giving up the job-removal protections of the Lloyd La Follette Act.” Conversely, in the case of an involuntary movement, the CSC noted that a competitive service employee would retain their rights, explaining, “if an occupied job in the competitive civil service is moved to Schedule C, an incumbent who has civil-service status continues to have the removal protection of the Lloyd-La Follette Act during his occupancy of the position.” *See* Comment 2134.<sup>275</sup> OPM also issued an advisory during the Reagan Administration that explained, “[t]he only Schedule C employees covered by statutory appeal procedures [under 5 U.S.C. 7513] and who, therefore, may appeal removal actions to the Merit Systems Protection Board (MSPB) are those who were serving in a position in the competitive service when OPM authorized its conversion to Schedule C and who still serve in those positions (i.e., have status in the position—cf. *Roth v. Brownell*, 215 F.2d 500 (D.C. Cir. 1954)).” *See* Comment 2134 (brackets in original). In that advisory, OPM continued, “[a]n employee who was

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<sup>275</sup> Citing Press Release, U.S. Civil Serv. Comm’n, p. 3 (May 12, 1955).

serving in a position in the competitive service when OPM authorized its conversion to Schedule C and is still serving in that position may be removed from that position ‘for such cause as will promote the efficiency of the service.’ Moreover, the action must be taken in accordance with the procedures established by 5 U.S.C. 7511 *et seq.* and part 752 of OPM’s regulations. These procedures provide for the right: (1) to a 30-day advance written notice which states the reasons for the proposed removal specifically and in detail; (2) to reply personally and in writing; (3) to be represented; (4) to have the reply considered; and (5) to a written decision stating the reasons for the action. The employee may appeal the action to MSPB.” For these reasons, OPM disagrees with Comment 3190 and the conclusions that this provision regarding Schedules A, B, and C is new or problematic.

Other commenters were generally supportive of this regulatory change. Comment 2134, a joint comment by a nonprofit organization and former federal official, was supportive but suggested that § 212.401(b) be revised to clarify that competitive status is defined in § 212.301. OPM will adopt this suggestion and revise § 212.401(b) to specifically reference an employee in the competitive service who had competitive status as defined in § 212.301. This revision reduces the risk of inconsistent interpretation or application of the regulations by referring to competitive status with uniform language.

This comment also suggested that OPM revise § 212.401(b) to address the movement of employees and not only the movement of positions. The comment also suggested that OPM revise the rule to make explicit that employees who otherwise meet the conditions of § 212.401 retain their competitive status regardless of the number of times the position or employee is moved involuntarily (so long as the sequence is not broken by a voluntary decision to apply for and accept a different position, in which case, different rules may apply). OPM will revise the language to clarify, based on the context and history described above, that once status and rights are accrued, the key to determining whether they are retained upon a move is whether the move was voluntary or involuntary. The number of times the employee is moved is immaterial to this

analysis if all such movements are involuntary. OPM will therefore revise the end of § 212.401(b) accordingly.

## **Part 752—Adverse Actions**

Part 752 addresses the procedural requirements for suspensions of 14 days or less, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less for covered employees.

### *General Comments Regarding Amendments to 5 CFR Part 752*

One management association offered strong support for OPM's proposed changes. Comment 2849. It stated, with respect to the part 752 amendments, that "[i]f an administration can bypass the civil service framework established by Congress in the CSRA by moving employees to a new excepted service, it would undermine the intention of the CSRA and make its extensive employee protections obsolete." Another management association said that, with respect to part 752, OPM's rule provides sufficient protections and clarity. Comment 763.

A national union stated the proposed language for part 752 "would effectively deter moving a federal employee's position to the excepted service for the purpose of retaliation, circumvention of due process, or discriminatory action against any federal employee." Comment 3278. A different national union stated that one reason for their support of the amendments to part 752 was because "employees will not feel safe reporting fraud, waste, and abuse unless they have the ability to challenge arbitrary, unfounded, and/or unreasonable disciplinary actions." Comment 2640.

A local union stated that OPM's proposed language to amend 5 CFR part 752 "ensures that employees moved into excepted positions retain their critical rights and should be enacted as proposed." Comment 1042. The local union maintained that adverse action procedures and appeal rights ensure that Federal employees are retained based on merit and are protected from retaliation and discrimination, including due to their political affiliation. This commenter further asserted that the rights accrued in a prior Federal position should not be lost solely because the

employee has been moved involuntarily, as such an approach would encourage retaliation and limit agencies' ability to recruit top candidates due to applicants' fears that they could eventually lose protections they earned in that federal position by administrative reassignment.

Another organization said that they "particularly support" the amendments to part 752 to clarify that employees who are moved from the competitive service or from one excepted service schedule to another retain the protections they had already accrued. Comment 1904.

As stated above, other commenters expressed general disapproval of OPM's regulatory amendments to part 752. OPM is not persuaded to make any revisions based on those comments for the reasons stated above, namely the comments are at odds with existing protections in chapter 75 that OPM's final rule clarifies, and the statutory text, legislative history, and legal precedents construing it.

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

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees. 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 changes conform this subpart with statutory language to clarify which employees are covered by subpart B when an agency takes an action for such cause as will promote the efficiency of the service.

#### *Section 752.201 Coverage*

This section describes when an employee has or retains coverage under the procedures of this subpart. Paragraphs (b)(1) through (b)(6) of 5 CFR 752.201 enumerate the conditions under which an individual would qualify for coverage. OPM's revision to 5 CFR 752.201(b)(1) prescribes that, even if an agency intends to suspend for 14 days or less an employee in the competitive service who is serving a probationary or trial period, the employee is entitled to the procedural rights provided under 5 U.S.C. 7503 if the individual has completed 1 year of current service in the same or similar position under other than a temporary appointment limited to 1 year or less.

As set forth in the proposed rule,<sup>276</sup> OPM is revising subpart B of part 752 to conform to the Federal Circuit decisions in *Van Wersch v. Department of Health & Human Services*<sup>277</sup> and *McCormick v. Department of the Air Force*.<sup>278</sup> These cases now guide the way the 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 the 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 1 or 2-year requirement, and was not in a temporary appointment limited to 1 or 2 years, depending on the service.<sup>279</sup>

In a prior rulemaking,<sup>280</sup> 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 construing 5 U.S.C. 7501 to do so in light of the Federal Circuit’s interpretation of similar statutory language in 5 U.S.C. 7511. In this rule, OPM modifies language in 5 CFR 752.201(b)(1) to conform to that understanding (and thus with the statutory language in 5 U.S.C. 7501, as construed by the Federal Circuit in a precedential

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<sup>276</sup> 88 FR 63862, 63871, 63881.

<sup>277</sup> 197 F.3d 1144 (Fed. Cir. 1999).

<sup>278</sup> 307 F.3d 1339 (Fed. Cir. 2002).

<sup>279</sup> See *McCormick*, 307 F.3d at 1341-43; *Van Wersch*, 197 F.3d at 1151-52.

<sup>280</sup> U.S. Off. of Pers. Mgmt., “Career and Career-Conditional Employment and Adverse Actions,” 73 FR 7187 (Feb. 7, 2008).

decision). OPM's revision to section 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 1 year of current continuous service in the same or similar position under other than a temporary appointment limited to 1 year or less.

*Comments Regarding Amendments to 5 CFR 752.201*

Some commenters discussed OPM's changes to conform regulations to Federal Circuit precedent in *Van Wersch* and *McCormick* and most were supportive. A coalition of national and local unions expressed support for aligning the language of section 752.201(b)(1) for suspensions of less than 14 days "with the language of 5 U.S.C. 7501 and its interpreting jurisprudence." Comment 41. An organization emphasized its support of OPM's change to section 752.201 regarding the employees eligible for grievance rights for suspensions. Comment 1904.

One former political appointee opposed to the rule questioned how an individual meets the criterion for "continuous service" in this regulatory change. Comment 45. Commenter asked how "continuous service" applies to individuals who are teleworking or "not turning on their government computers given certain data from the Government Accountability Office about the 'massive increase in telework and underutilization of office buildings.'" OPM is unclear whether this is a serious inquiry, but notes that the term "current continuous employment" is defined in 5 CFR 752.201(d) for suspensions of 14 days or less as "a period of employment or service immediately preceding a suspension action without a break in Federal civilian employment of a workday," and does not turn on whether the employee is exercising flexibilities such as remote work or telework. Although commenter raised concerns about "continuous service" with respect to section 752.201, OPM also notes that the language is present in subpart D of part 752 as it applies to regulatory requirements for removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs for 30 days or less. In section 752.402, the term "current



continuous employment” is defined as “a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.” This rulemaking does not amend these definitions. Apart from the fact that these definitions are unrelated to an individual’s use of telework or occupancy in government office buildings, we note that, during a lengthy period starting in March 2020 and extending into the beginning of the Biden Administration, Federal office buildings were closed to all but a few employees whose work required their physical presence, making it unavoidable that most employees were working from alternative locations.<sup>281</sup> Accordingly, the need to monitor whether employees are actually working when not in the agency’s brick-and-mortar workplace is not a new consideration and can be addressed, as always, through traditional performance management tools. OPM has already issued extensive guidance on this topic.<sup>282</sup>

In addition, the amended regulations section 752.201(b)(1) through (b)(6) explain 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.

One joint comment by a nonprofit organization and former federal official supportive of the rule argued that OPM’s proposed language for section 752.201(b)(1), (b)(2), and (b)(6) provides coverage if the employee is moved involuntarily and “still occupies that position or a similar position[.]” Comment 2134. Likewise, commenter noted that section 752.201(b)(4) applies only if the employee still occupies that position. Commenter stated that these provisions collectively may be too narrow to achieve OPM’s purpose and that the “number of involuntary moves should not be relevant to the coverage of this subsection.” Commenter noted that an agency might deliberately move an employee to a dissimilar position for the purpose of stripping the employee of their rights. For these reasons, the organization “suggest[s] that OPM end these

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<sup>281</sup> See, e.g., U.S. Off. of Mgmt. and Budget, M-20-15 (Mar. 15, 2020); M-20-16 (Mar. 17, 2020); M-20-23 (April 20, 2020).

<sup>282</sup> See U.S. Off. of Pers. Mgmt., “2021 Guide to Telework and Remote Work in the Federal Government,” <https://www.opm.gov/telework/documents-for-telework/2021-guide-to-telework-and-remote-work.pdf>.

paragraphs with the following language: ‘that position or another position to which the employee is moved involuntarily.’”

OPM agrees with commenter that the revision suggested would better meet and strengthen the policy that OPM is advancing with the final rule, and we will revise these provisions accordingly. OPM’s proposed rule was based the procedural rights in section 752.201(b)(1), (b)(2), and (b)(6) in Subchapter I of chapter 75, title 5, U.S. Code. The definitions for that subchapter are codified at 5 U.S.C. 7501, which defines an employee as “an individual in the competitive service who is not serving a probationary or trial period under an initial appointment 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.” (emphasis added). OPM agrees with commenter, though, that the “same or similar positions” language used in chapter 75 relates to how rights are accrued in the first instance. Based on the precedent described above, the key factor to whether accrued status and rights are retained following a move to or within the excepted service is whether the move was voluntary or involuntary. The position to which an employee is involuntarily moved need not be the “same or similar” for the employee who has already accrued rights to continue to retain such rights. OPM will therefore revise the provisions in paragraphs 5 CFR 752.201(b)(1), (b)(2), and- (b)(6) by clarifying that the provision applies where the employee is moved involuntarily and continues to occupy that position or any other position to which the employee is moved involuntarily. In addition, based on the precedent explained above, OPM will revise 5 CFR 752.201(b)(3) through (5) to apply the same language.

The final rule also establishes a new 5 CFR 752.201(c)(7) to make clear 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, consistent with congressional intent and as described more fully below.<sup>283</sup>

An agency commented that the “inclusions/exclusions in 5 CFR 752.201 appear to conflict.” Comment 2766. The agency explained that the subsection of the proposed regulation addressing employees included at § 752.201(b) indicates that in many cases, “an employee will be covered if the employee is moved involuntarily into the excepted service (or [into a] different schedule[ ]of the excepted service) and still occupies this position.” The agency noted, however, that the subsection addressing employees excluded at § 752.201(c) would preclude coverage of individuals whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character. The agency noted that subsection (c) does not specify that the exclusion would apply only if the individual lacked the accrued rights referenced in paragraph (b). The agency then recommended a change to § 752.201(c)(7) to address the perceived conflict.

Based on this agency’s comment, OPM is persuaded that a change is necessary to effectuate the policy advanced by this final rule consistent with statutory text, legislative history, and legal precedents. As Comment 2134 noted, under *Roth* and other precedents, it is well-established that when an employee with accrued rights is involuntarily moved from the competitive service to an excepted service schedule without such rights, the employee retains the accrued rights while the employee remains in that position or any subsequent position to which the employee is involuntarily moved. OPM will accept the agency’s recommendation to revise the exclusion at § 752.201(c)(7) by clarifying that the exclusion does not apply if the incumbent was moved involuntarily to such a position after accruing rights as delineated in § 752.201(b).

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

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<sup>283</sup> Please see also the discussion in Section IV(B) regarding the definition of the phrases “confidential, policy-determining, policy-making or policy-advocating” and “confidential or policy-determining.”

This subpart addresses the procedural requirements for removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less for covered employees. This includes, but is not limited to, adverse actions based on misconduct or unacceptable performance. The 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*

The changes add language to provide that an “employee” (i.e., for purposes of this part, an individual who has accrued adverse action rights by completing probation or a current continuous service requirement) 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 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 moving the employee’s position involuntarily into the excepted service, or within the excepted service. These regulatory changes are consistent with how similar statutory rights have been interpreted by Federal courts and the MSPB when employees change jobs by moving to a different Federal agency.<sup>284</sup>

Paragraph (c) of 5 CFR 752.401 enumerates the conditions under which an individual would qualify for coverage. The amended regulation explains that those individuals retain their status if moved involuntarily unless specifically prohibited by law.

Consistent with the proposed rule,<sup>285</sup> OPM’s final rule revises § 752.401(c) to clarify that employees in the competitive and excepted services who have fulfilled their probationary or trial

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<sup>284</sup> See, e.g., *McCormick*, 307 F.3d at 1341-43; *Greene v. Def. Intel. Agency*, 100 M.S.P.R. 447 (2005).

<sup>285</sup> 88 FR 63862, 63871.

period requirement or the durational requirements under 5 U.S.C. 7511 will retain the rights conferred by subchapter II if moved involuntarily from the competitive service to the excepted service or within the 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.

*Comments Regarding Amendments to 5 CFR 752.401*

One former political appointee opposed to the rule cited language in the proposed rule regarding the retention of rights on an *involuntary* move or the relinquishment of rights on a *voluntary* move and characterized it as OPM wanting “employees being transferred to have the authority to determine if they relinquish their pay/benefits/protections” which would be, commenter argued, the “equivalent of placing someone on paid leave but allowing them to decide how much pay to receive while they are gone.” Comment 45. OPM disagrees with this assessment. This section of OPM’s proposed rule addressed rights following the movement of an employee and differentiated between voluntary and involuntary movements.<sup>286</sup> It is not, as Commenter seems to suggest, similar to leave following a disciplinary action. As explained in the proposed rule and this final rule, absent a voluntary movement, accrued rights are established in statute, as confirmed by case law construing the statute, and cannot be taken from employees by involuntarily moving them. Commenter’s comparison of the retention of rights following a move to an employee’s rights following a disciplinary action is therefore inapt.

As with 5 CFR 752.201, Comment 2134, which strongly supported the proposed amendments, requested modifications to ensure that if “an agency moves an employee involuntarily more than once, the employee” would “retain any applicable status and civil service protections.” Comment 2134. Commenter contended that an agency might deliberately move an employee multiple times to a dissimilar position for the purpose of stripping the employee of rights. Commenter noted that OPM’s proposed language for § 752.401(c)(3), (4), (5), and (7)

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<sup>286</sup> See 5 CFR 302.102 (regarding processes for voluntary movements).

provides coverage if the employee is moved involuntarily and “still occupies that position or a similar position[.]” Commenter recommended “replacing language that refers to a subsequent movement to a ‘similar position’ with language that refers to any position to which an employee is moved involuntarily.” For these reasons, commenter recommended adding the language, “or another position to which the employee is moved involuntarily” directly after “and still occupies that position” in each of these paragraphs.

OPM is persuaded that this concern is well-founded and that the change would strengthen the policy that the final rule advances. OPM will revise these provisions accordingly. Section 752.401(c)(3) covers an “employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission[.]” Section 752.401(c)(4) covers certain individuals in the Postal Service, and § 752.401(c)(5) covers certain nonpreference eligibles in the excepted service. OPM’s proposed rule focused on the fact that all such individuals derive their rights and protections from 5 U.S.C. 7511 (a)(1)(B) or (a)(1)(C), both of which require the work to have been performed “in the same or similar positions[.]” With respect to § 752.401(c)(7), the language covers an employee who previously “was” in the competitive service with competitive status and is currently in the excepted service. As explained above, OPM agrees with commenter that the “same or similar positions” language used in chapter 75 relates to how rights are accrued in the first instance and the key factor in determining whether accrued status and rights are retained following a move to or within the excepted service is whether the move was voluntary or involuntary. OPM will therefore revise the provisions in 5 CFR 752.401(c)(3), (c)(4), and (c)(5) to replace the words “a similar position” with the words “any other position to which the employee is moved involuntarily.” In addition, OPM will revise 5 CFR 752.401(c)(6) and (c)(8) to apply the same language. In 5 CFR 752.401(c)(7), OPM will replace “a similar position” with the words “any other position to which the employee is moved

involuntarily.” OPM will also correct a typographical error by changing the period at the end of 5 CFR 752.401(d)(2)(iii) to a semicolon.

In addition, the final rule modifies 5 CFR 752.401(d)(2) to make clear 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 D of part 752. In this final rule, OPM defines these terms as descriptors for the positions held by noncareer political appointees, as discussed in Section IV(B).

As with 5 CFR 752.201, an agency asserted that the “inclusions/exclusions in 5 CFR 752.401 appear to conflict.” Comment 2766. The agency expressed that the subsection addressing employees excluded at section 752.401(d) would preclude coverage of individuals whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character but does not specify that the exclusion would apply only if the individual lacked the accrued rights referenced in paragraph (c). The agency then recommended a change to 5 CFR 752.401(d)(2) to address the perceived conflict. Based on this agency’s comment, OPM is persuaded that a change is necessary for the same reasons explained above relating to 5 CFR 752.201. OPM will revise the exclusion at § 752.401(d)(2) by clarifying that the exclusion does not apply if the incumbent was moved involuntarily to such a position after accruing rights as delineated in § 752.401(c).

Finally, this final rule revises 5 CFR 752.401(c)(2)(ii) to reflect the repeal of 10 U.S.C. 1599e, effective December 31, 2022, by the National Defense Authorization Act for Fiscal Year 2022.<sup>287</sup> The repeal restores a 1-year probationary period for covered Department of Defense employees (and also reduces the alternative continuous service prong to 1 year). With respect to OPM’s amendment to reflect the repeal of the 2-year probationary period in the Department of Defense, an individual disagreed with OPM’s chosen language, stating that the proposed regulation would “codify an erroneous reading of the clear language” of sections 7501 and 7511

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<sup>287</sup> See Pub. L. 117-81, 135 Stat. 1541, Sec. 1106(a)(1).

of title 5, U.S. Code. Comment 474. Commenter expressed concern that under OPM's proposed regulation, individuals who were in a 2-year probationary period at the time of their appointment (due to the now-repealed law) would not benefit from the conforming amendment that modified 5 U.S.C. 7511 to remove references to the now-repealed 2-year period. Commenter discussed both Department of Defense guidance and multiple canons of statutory construction. Commenter stated that the provision in 5 CFR 752.401(c)(2)(ii) in the proposed rule should be deleted in the final rule to reflect the language of 5 U.S.C. 7501(1) and 7511(a)(1)(A)(ii).

OPM will not adopt commenter's suggested revision but will make a clarification. Section 1106 of Public Law No. 117-81 had two sections, (a) and (b). Section (a) repealed a 2-year probationary period in the Department of Defense. Section (b) provided the "Technical and Conforming Amendments." Section (a) states that the modifications of probationary periods created by the repeal "shall only apply to an individual appointed as such an employee on or after the effective date specified" by the statute.<sup>288</sup> The amendments to the U.S. Code that follow in section (b) are alterations intended to conform the code to the intent of the legislation, including the repeal of similar provisions in 5 U.S.C. 7501 and 5 U.S.C. 7511. OPM interprets Pub. L. 117-81 section 1106(a)(1) to mean that someone who was on a 2-year probationary period (or 2-year continuous service requirement) under section 1599e as of the effective date of the repeal, must still complete one of those 2-year periods notwithstanding the repeal. Anyone hired on or after the effective date, need only complete a 1-year period. The current regulatory text indicates that covered employee includes an employee "[e]xcept as provided in section 1599e of title 10, United States Code, who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." OPM will therefore revise this provision to clarify that the 2-year probationary period applies to individuals hired prior to December 31, 2022, the date that section was otherwise repealed by Public Law 117-81, section 1106.

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<sup>288</sup> See Pub. L. 117-81, Sec. 1106(a)(1).



### *Additional Comments Regarding Amendments to 5 CFR Part 752*

A former federal official supportive of the rule suggested that OPM clarify that the changes proposed in 5 CFR part 752 include SES Positions. Comment 2816. Commenter included proposed language that would modify 5 CFR 752.601, which deals with regulatory requirements for taking adverse action relating to the SES. Commenter suggested adding “including such an employee who is moved involuntarily into the excepted service and still occupies that position or a similar position” at the end of 5 CFR 752.601 (c)(1)(i), (ii), (iii), and (2)(i). OPM agrees with the policy goal that SES employees maintain their adverse action protections, but we will not make any changes in response to this comment. As described further in Section IV(B), this rule addresses the competitive and excepted services, specifically the retention of status and rights upon an involuntary movement from the competitive service into or within the excepted service, the exclusion of adverse action rights for excepted service positions of a “confidential, policy-determining, policy-making or policy-advocating character,” and processes for moving employees and positions from the competitive service into or within the excepted service. As described above, the SES is its own separate service that it is not governed by provisions applicable to the competitive or excepted services. Any transfer of SES employees and positions would be governed by the SES statute and regulations. Importantly, the exception to adverse action rights under 5 U.S.C. 7511(b)(2) does also not apply to the SES. The career SES is governed by separate adverse action procedures that, unlike the rules governing the competitive and excepted services, make no mention of whether a position is of “a confidential, policy-determining, policy-making or policy-advocating character.”<sup>289</sup> For these reasons, as explained more fully below in Section IV(B), OPM will make no modifications to the rule based on this suggestion.

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

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<sup>289</sup> See 5 U.S.C. 7541-7543.

Part 210 of title 5, Code of Federal Regulations, addresses basic concepts and definitions used throughout the Civil Service regulations in 5 CFR chapter I, subchapter B. This final rule adds a definition for the phrases “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining.” Positions of this character are excepted from the chapter 75 protections described above.

OPM defines these phrases to make explicit OPM’s interpretation of this exception in 5 U.S.C. 7511(b)(2)—grounded in the statute, traditional tools of statutory interpretation, and longstanding policy—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.

OPM is also defining these phrases as descriptors for the positions held by noncareer political appointees because the phrases are currently used in the regulations to describe, among other things, a “position” or the “character” of a position. OPM is 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 in this section and in the proposed rule,<sup>290</sup> 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 other politically appointed officials who have direct responsibility for carrying out the Administration’s political objectives. These political

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<sup>290</sup> 88 FR 63862, 63871-73.

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, among others, employees appointed by the President, with or without Senate confirmation,<sup>291</sup> and employees in the excepted service “whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character.”<sup>292</sup> 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.”

Chapter 75 does not specifically define the phrase as used in the 5 U.S.C. 7511(b)(2) exception, but as described in the proposed rule—and as made further clear by public comments—this is a term of art and the history of the phrase and the exception have long meant political appointees.

#### *Comments Regarding the Need to Clarify the Exception*

Several commenters agreed with OPM that the phrase in this exception needs further clarification because of the risk it could be read, counter to the history of its usage, unreasonably broadly to strip rights from career civil servants. One commenter discussed the difficulty in identifying which employees have duties that are of a “[c]onfidential, policy-determining, policy-making, or policy-advocating” character if the phrase is interpreted not to mean, as has been broadly understood for decades, political appointees. Comment 6. Merely being in an office or position titled “policy,” “policy analysis,” “policy implementation” or such is not determinative. Likewise, some employees with a title such as “policy analyst” or in an office

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<sup>291</sup> See 5 U.S.C. 7511(b)(1), (b)(3).

<sup>292</sup> See 5 U.S.C. 7511(b)(2).

with a policy or planning-related title may be mid- or lower-level. And countless federal employees work on issues that relate to or touch upon policy. Thus, commenter argued, OPM's proposal to define these policy positions as used in 5 U.S.C. 7511(b)(2) to noncareer political appointees will be "helpful in limiting the adverse impacts" of politicization to policy roles. Another commenter argued that, without these changes, there is a risk of overbroad classification of positions as "policy-making," potentially subjecting a substantial number of federal employees to unwarranted political interference. Comment 2516. Commenter argued that this interference could adversely impact employees' ability to perform their duties effectively and could potentially paralyze the essential functions of their agencies. Therefore, "the need for clear delineation in the interpretation of these terms is paramount to prevent unintended consequences that could impede vital government services." *Id.*, see also Comment 3491. A professor emeritus noted that the different potential interpretations of the exception are represented in the various estimates on the potential scope of Schedule F. See Comment 3953. Commenter showed that, in the early days of Schedule F, the estimates were "in the thousands." Since then, the proponents have varyingly suggested that the number would be at least 50,000 and perhaps as many as 100,000.<sup>293</sup> In public discussions, some Schedule F supporters have made clear that their goal is for all 2.2 million federal employees to serve at the pleasure of the president. *Id.*

Conversely, a former political appointee argued that the statutory exception was clear and did not require further definition. See Comment 45. OPM believes that the phrase itself—"confidential, policy-making, policy-determining or policy-advocating"—may be, when viewed in isolation, capable of more than one interpretation. But employing the standard tools of statutory interpretation, including past practice, legislative history, intent, and legal precedents,

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<sup>293</sup> Citing, for example, Drew Friedman, "Divide over Schedule F reveals deeper need for federal workforce reform, Partnership says," Federal News Network (July 3, 2023), <https://federalnewsnetwork.com/workforce/2023/07/divide-over-schedule-f-reveals-deeper-need-for-federal-workforce-reform-partnership-says/>.

provides that the best reading of the exception refers to noncareer political appointees typically listed in Schedule C.

*Comment Regarding the History of the Exception*

The same joint comment by a nonprofit organization and former federal official that extensively detailed the historical treatment of accrued status and civil service protections upon an involuntary move to an excepted service schedule, summarized in Section IV(A), also commented at length regarding the executive branch's historical understanding that the exception for "confidential, policy-determining, policy-making or policy-advocating" positions applies only to a small class of political appointee positions. *See* Comment 2134. This phrase and the related phrase, "confidential or policy-determining," have "been used with consistency for between seven and nine decades." This history is important because, as OPM recounts in its proposed rule and in this final rule, a common understanding of the terminology gave meaning to the language of 5 U.S.C. 7511(b) when Congress enacted the CSRA. Commenter concluded, after exhaustively detailing the relevant history, that OPM's proposed regulatory definition is fully consistent with the phrase's historical meaning.

Commenter also showed that the executive branch has consistently designated only around 1,500 positions as confidential or policy positions and has applied that definition to political appointees with no expectation of continued employment beyond the presidential administration during which the appointment occurred. *See* Comment 2134.

Because of the extensive citation to facts and history relevant to this regulatory change, OPM summarizes commenter's arguments here.

Commenter began with the legal context of the exception. While the phrase "confidential, policy-determining, policy-making or policy-advocating" is not further defined in chapter 75, commenter argued that other sections of the U.S. Code make clear that this phrase refers to political appointees. Commenter cited as examples four laws that directly state that incumbents of "confidential, policy-determining, policy-making or policy-advocating" positions are political

appointees. One law applicable to the Department of Homeland Security declares plainly that “the term ‘political appointee’ means any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.”<sup>294</sup> Congress used similar language in laws applicable to the Department of Agriculture,<sup>295</sup> the National Aeronautics and Space Administration,<sup>296</sup> and the Department of Veterans Affairs.<sup>297</sup> Commenter also showed that Congress has enacted laws that apply restrictions to classes of political appointees that include incumbents of positions of a “confidential, policy-determining, policy-making or policy-advocating” character, including laws with government-wide applicability.<sup>298</sup>

Further illustrating the political nature of positions excluded under 5 U.S.C. 7511(b)(2), commenter cited a law applicable to the Social Security Administration that imposes an aggregate limit on the total number of noncareer (i.e., political) SES positions and confidential or policy positions.<sup>299</sup>

In addition to pointing to Congress’ understanding of the phrases, commenter also extensively detailed the history of these phrases through various administrations, beginning in 1936 with the Roosevelt Administration, and concluded that this context further supports OPM’s definition in this rulemaking. The history confirms that these phrases have the same meaning,

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<sup>294</sup> Citing 6 U.S.C. 349(d)(3) (“For purposes of paragraph (1)—(A) the term ‘career employee’ means any employee (as such term is defined in section 2105 of title 5), but does not include a political appointee; and (B) the term ‘political appointee’ means any employee who occupies a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.”).

<sup>295</sup> Citing 7 U.S.C. 6992(e)(2).

<sup>296</sup> Citing 5 U.S.C. 9803(c)(2).

<sup>297</sup> Citing U.S. Dep’t of Veterans Affairs, “VA’s Administrations,”

<https://www.ruralhealth.va.gov/aboutus/structure.asp#:~:text=VA%20is%20the%20federal%20government's,Veterans%20their%20families%20and%20survivors>.

<sup>298</sup> Citing 5 U.S.C. 4107(b)(3), 5753(a)(2), 5754, 5758, 10104(d), *see also* 12 U.S.C. 4511, 5584; 22 U.S.C. 3983(d)(3); 38 U.S.C. 308(d)(2).

<sup>299</sup> Citing 42 U.S.C. 904(c), *see also* 5 U.S.C. 1215(b) (Office of Special Counsel statute that requires that office to notify the President of a Hatch Act violation by “an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate,” which reinforces political meaning of the phrase), 2 U.S.C. 1601 (Lobbying Disclosure Act listing “confidential, policy-determining, policy-making, policy-advocating” with other political appointees and executive and military officers).

refer to political appointees, and cover only a small number of positions in the executive branch (roughly 1,500).

As commenter points out, at least as early as the Roosevelt Administration, the executive branch sought to treat confidential and policy positions differently than it treated career excepted and competitive service employees.<sup>300</sup> In 1937, President Roosevelt called for converting all positions other than “policy-forming” positions to the classified (i.e., competitive) service, a position with which the CSC agreed.<sup>301</sup>

Further, as commenter noted, and as OPM explained in its proposed rulemaking, the Roosevelt Administration’s Brownlow Committee, studying the executive branch organization, issued a report explaining that its conception of policy-determining positions was extremely narrow and such positions should be “relatively few in number,” consisting mainly of “the heads of executive departments, under secretaries and assistant secretaries, the members of the regulatory commissions, the heads of a few of the large bureaus engaged in activities with important policy implications, the chief diplomatic posts, and a limited number of other key positions.”<sup>302</sup>

Testifying before Congress, Louis Brownlow, the committee chair, explained the meaning of this policy-determining position exception: “[P]olicy-determining officers should be political officers and, in my opinion, should change when the President changes.”<sup>303</sup>

Contemporaneous materials support this meaning of the term “policy-determining.”<sup>304</sup>

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<sup>300</sup> Citing Democratic Party Platform of 1936 (June 23, 1936) (“For the protection of government itself and promotion of its efficiency, we pledge the immediate extension of the merit system through the classified civil service ... to all non-policy-making positions in the Federal service.”), <https://www.presidency.ucsb.edu/documents/1936-democratic-party-platform>.

<sup>301</sup> Citing Task Force on Pers. & Civil Serv., Report on Personnel and Civil Service, 6 (1955) [https://www.google.com/books/edition/Report\\_on\\_Personnel\\_and\\_Civil\\_Service/ytR9zYFWVtwC](https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC); U.S. Civil Serv. Comm’n, Fifty-Fourth Report, 2 (1937), <https://babel.hathitrust.org/cgi/pt?id=hvd.hl29qu&seq=10&q1=policy&format=plaintext>.

<sup>302</sup> Citing “Hearings on Reorganization of the Executive Departments, before Joint Comm. on Gov’t Org.,” 75th Cong., 112 (1937) (testimony of Louis Brownlow), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015022777190&seq=124&q1=policy&format=plaintext>.

<sup>303</sup> *Id.*

<sup>304</sup> Citing “Civil Service Aide Defends Federal Plan, Cites Administration’s increase in Employes Under System,” Cincinnati Post (May 11 1936); Nat’l Civil Service Reform League, “The Civil Service in Modern Government, A Study of the Merit System,” p. 19 (1937), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015005609923&seq=27>.

President Roosevelt then pursued the Committee's recommendation and issued Executive Order 7916,<sup>305</sup> adopting the term "policy-determining" in lieu of the term "policy-forming" which his Administration had initially used. The order created a framework for giving employees in excepted service positions, other than those in "policy-determining" positions, competitive status.

Two commissions led by former President Herbert Hoover agreed with the same reading of this exception. During the Truman Administration, the first Hoover Commission recommended a civil service exception for "policy-making" positions, saying that "[t]op policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of the decentralized civil service system recommended in this report."<sup>306</sup> Later, a second Hoover commission determined the term "policy-determining" was "used to describe positions which should properly be reserved for political executives, and hence not be converted to classified status."<sup>307</sup>

The Eisenhower Administration maintained this same distinction between career positions and political positions. In March 1953, the White House issued a press release describing "types of positions that do not belong in the Civil Service System" which included (1) those positions that received a delegation to shape the policies of the Government and (2) those where the duties required a close personal and confidential relationship.<sup>308</sup> As commenter noted, the focus of this press release was Schedule A because, at the time, career positions had been comingled with political positions under that schedule. Later that month,

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<sup>305</sup> Citing E.O. 7916 (June 24, 1938), <https://www.presidency.ucsb.edu/documents/executive-order-7916-extending-the-competitive-classified-civil-service>.

<sup>306</sup> Citing U.S. Dep't of Justice, "Hiring Procedures for Attorneys," 3 Op. O.L.C. 140, 145, n.7 (1979) ("[Attorneys] were, pursuant to Exec. Order No. 8743, in the competitive service."), [https://www.justice.gov/d9/olc/opinions/1979/04/31/op-olc-v003-p0140\\_0.pdf](https://www.justice.gov/d9/olc/opinions/1979/04/31/op-olc-v003-p0140_0.pdf).

<sup>307</sup> Citing Task Force on Pers. and Civil Serv., Report on Personnel and Civil Service, p. 6 (1955) (emphasis added), [https://www.google.com/books/edition/Report\\_on\\_Personnel\\_and\\_Civil\\_Service/ytR9zYFWVtwC](https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC).

<sup>308</sup> Citing Press Release, The White House, p. 1 (Mar. 5, 1953) (signed by James C. Hagerty, Press Sec'y to the President).



President Eisenhower created a new home for political positions through Executive Order 10440, which established Schedule C for both types of positions described in the press release. The order combined these types of positions, referring to them as “positions of a confidential or policy-determining character.”<sup>309</sup>

The CSC explained that Schedule C aimed “to enable the Administration to make appointments directly to those positions involving the determination of major executive policies” and identified the purpose of the new schedule for positions of a confidential or policy-determining character: “This action was taken in order to make a clear distinction between jobs which belong in the career service and those which should be subject to change with a change in administration.”<sup>310</sup>

As commenter asserts, the Eisenhower Administration recognized that the universe of political positions was small and showed restraint in redesignating or creating Schedule C positions. By mid-1954, there were only 1,086 Schedule C positions.<sup>311</sup> This understanding about the limited nature of this Schedule and corresponding restraint has endured to this day.

The precedent from 1936-1960 gave meaning to the phrase “confidential or policy-determining” by recognizing that it applied to political appointees and only a small number of positions. As commenter showed, Presidents Kennedy, Johnson, Nixon, Ford, and Carter solidified that meaning by continuing to recognize the appropriate scope of the phrase “confidential or policy-determining.” Under those five presidents, the number of confidential and policy-determining positions remained consistent, never exceeding 1,590 positions.<sup>312</sup>

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<sup>309</sup> Citing E.O. 10440 (Mar. 31, 1953), <https://www.presidency.ucsb.edu/documents/executive-order-10440-amendment-civil-service-rule-vi>.

<sup>310</sup> Citing Memo. From Philip Young, Chairman, CSC, to Heads of Dep’ts and Indep. Estabs. (Apr. 1, 1953); CSC, 70<sup>th</sup> Annual Report, p. 2 (Nov. 16, 1953), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112069434923&seq=532&q1=policy-determining&format=plaintext>.

<sup>311</sup> Citing Press Release, U.S. Civil Serv. Comm’n, p. 2 (Aug. 6, 1954); U.S. Civil Serv. Comm’n, Schedule C Approvals and Disapprovals by Agency Based Upon Civil Service Commission Decisions (Jul. 23, 1954).

<sup>312</sup> Citing Mike Causey, “Reagan’s Plum Book Plumper Than Carters,” Wash. Post (May 11, 1984), <https://www.washingtonpost.com/archive/local/1984/05/11/reagans-plum-book-plumper-than-carters/4b45ea11-5f41-4b0b-a3c3-f0e4b5774543/>; Attachment to Memo. from Raymond Jacobson, Exec. Dir., U.S. Civil Serv. Comm’n, to Dirs. Of Pers., at p. 5 (Nov. 10, 1976), <https://www.fordlibrarymuseum.gov/library/document/0067/1563179.pdf>; H. Comm. On Post Off. And Civil Serv.,

By the time Congress enacted the CSRA in 1978, the meaning of “confidential or policy-determining” was firmly established as referring only to a small class of political positions. In enacting the CSRA, Congress opted for the slightly longer and more descriptive phrase “confidential, policy-determining, policy-making or policy-advocating.” But as commenter showed, the two phrases have always meant the same thing.

Congressional deliberations over the CSRA exception for “confidential, policy-determining, policy-making or policy-advocating” positions reflected a contemporaneous understanding that the legislature’s longer phrase referred to the same thing as the executive branch’s shorter phrase.<sup>313</sup> During hearings on the bill that would become the CSRA, participants used the terms “policy-determining,” “policy-making” and “policy-advocating” interchangeably. Floor debate in the Senate, for example, discussed reports of the two Hoover Commissions,<sup>314</sup> demonstrating that Congress was aware of the history of the terms when it enacted the CSRA. The House Committee on the Post Office and Civil Service issued a report in 1978 that showed congressional understanding and approval of the historical use of the “confidential or policy-determining” exception, stating “[a]n employee whose position is of a confidential or policy determining character, generally political appointees, would not be entitled to the benefits of this legislation.”<sup>315</sup> The House Committee continued that the CSC “issues regulations to define positions which are of a policy or confidential nature, and the committee believes the current regulatory definitions for these positions are adequate.”

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94<sup>th</sup> Cong., the Merit System in the United States Civil Service, p. 22 n.1 (Comm. Print 94-10 1975) (monograph by Bernard Rosen),

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015078700211&view=1up&seq=1&q1=%22schedule+c%22>.

<sup>313</sup> Citing “Hearings on H.R. 12080, Civil Service Amendments of 1976, Before the Subcomm. on Manpower and Civil Serv., H. Comm. on Post Off. and Civil Serv.,” Serial No. 94-67, 29 (1976),

<https://babel.hathitrust.org/cgi/pt?id=pur1.32754078079963&seq=33&q1=advocating&format=plaintext>.

<sup>314</sup> Citing 124 Cong. Rec. (Senate) 27540 (Aug. 24, 1978) (remarks of Senator Charles Percy (R-IL)) (“The Hoover Commission believed that in a true career service, the employee could go as far as his ability and initiative and qualifications indicated, excepting only decisionmaking or confidential posts. It held: [‘]Top policy-making officials must and should be appointed by the President. But all employment activities below these levels, including some positions now in the exempt category, should be carried on within the framework of (the civil service system).[’]”), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1978-pt20/pdf/GPO-CRECB-1978-pt20-7-1.pdf>.

<sup>315</sup> Citing H.R. Rep. No. 95-1207, at 5 (1978),

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015087614379&seq=1053&q1=policy-determining>.

Commenter showed that the House of Representatives committee responsible for the CSRA explicitly indicated in its 1978 report that it meant for the new language, “confidential, policy-determining, policy-making or policy-advocating,” to cover only the types of positions that the executive branch had already included in Schedule C or designated as noncareer (i.e., politically appointed) executive positions.<sup>316</sup>

This limitation, confining the language to political appointees, was well understood after the CSRA’s enactment as well. In 1990, when Congress amended 5 U.S.C. 7511 to grant nonpreference eligible employees a right to appeal removals and other major adverse actions to the MSPB, the relevant congressional committee was again clear in describing confidential and policy positions as political appointees.<sup>317</sup>

In 1992, a bipartisan group of senators and congressional representatives filed an amicus brief emphasizing that “the effective synonym for confidential policy positions is ‘political appointees.’”<sup>318</sup> Their brief cited an MSPB decision that had said the phrase was, “after all, only a shorthand way of describing positions to be filled by so-called ‘political appointees.’”

Comment 2134 also showed that, in 1994, the Senate Select Committee on Ethics reaffirmed this common understanding. Following the enactment of the Hatch Act Reform Amendments, the committee issued guidance on a new prohibition applicable to members of Congress regarding personnel action recommendations or statements for “all non-political Federal employment.” This meant that the prohibition did not apply to political appointments. The committee specifically noted that the prohibition did not apply to recommendations for presidential appointments or for positions determined to be of a “confidential, policy-

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<sup>316</sup> Citing H. Comm. on Post Off. and Civil Serv., Legislative History of the Civil Service Reform Act of 1978, vol. II, 242 (Comm. Print 96-2 1979), <https://babel.hathitrust.org/cgi/pt?id=ucl.b4177360&seq=242&q1=policy-determining&format=plaintext>.

<sup>317</sup> H.R. Rep. 101-328, 5, 1990 U.S.C.C.A.N. 695, 699 (“Schedule C, positions of a confidential or policy-determining character. These 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.”).

<sup>318</sup> Citing Amicus Curiae Brief of Sens. Charles Grassley and David Pryor and Reps. Connie Morella, Patricia Schroeder, and Gerry Sikorski, reprinted in “Hearing on S. 1981 To Extend Authorization of Appropriations for the U.S. Office of Special Counsel, and for Other Purposes before S. Comm. on Gov’t Affairs, Subcomm. on Fed. Servs., Post Off., and Civil Serv.,” 102d Cong., 101-10 (1992), <https://babel.hathitrust.org/cgi/pt?id=pst.000022216847&seq=59&q1=policy-determining&format=plaintext>.

determining, policy-making, or policy-advocating character.”<sup>319</sup> The committee understood the term of art to mean political positions.

Finally, commenter noted that OPM further affirmed the common understanding of this phrase when it responded to questions posed by Senator Christopher Shays (R-CT) during a hearing in 1996. Illustrating the consistency of OPM’s position on the meaning of the phrase it now defines, OPM wrote: “OPM has authority to except positions from the competitive service on the basis that they are of a confidential or policy-making, policy-determining, or policy-advocating character (‘political’ positions).”<sup>320</sup>

Commenter concluded, correctly, that this extensive history shows that the “terms mean precisely what OPM’s proposed definition says they mean. They describe positions meant to be filled by political appointees who have no expectation of continuing beyond the terms of either the president who appointed them or the term-limited presidential appointees they support.” The history also reveals there are few such positions. The number has remained steady at around 1,500 positions and has never exceeded 1,800 positions.

#### *Other Comments Regarding the History of the Exception*

Several other comments supportive of the rule concurred with OPM’s understanding that Congress intended the phrase “confidential, policy-determining, policy-making or policy-advocating” to mean political appointees. A labor union expressed that the clarification is consistent with the general understanding that the exception was intended to only cover political appointees and was not intended to extend to all federal employees whose jobs touch on policy in some way, which, if read broadly, could encompass a substantial portion of the federal civil

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<sup>319</sup> Citing “Dear Colleague” Letter from the Senate Select Committee on Ethics to United States Senators, 1 (Mar. 2, 1994), reprinted in the 1996 Senate Ethics Manual, 1996 Ed., 238, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015038182369&seq=256&q1=advocating>; *see also* U.S. Off. of Pers. Mgmt., “The status of the Senior Executive Service,” p. 12 (1994) (“Executive branch agencies are barred from accepting or considering prohibited political recommendations and are required to return any prohibited recommendations to the sender, marked as in violation of the law. Presidential appointees and employees in confidential, policy-making or policy-advocating positions are exempted from the regulations.”).

<sup>320</sup> Citing “Hearing before the S. Comm. on Govt’l Affairs,” 104th Cong, S. Hrg. 104-483, 20, 92 (Feb. 7, 1996) (responses of Off. of Pers. Mgmt. to Questions for the Record by Rep. C. Shays (Mar. 21, 1996) as read into the record by Chairman Ted Stevens (R-AK)), <https://babel.hathitrust.org/cgi/pt?id=uc1.b5141898&seq=1&q1=policy-determining>.

service. Comment 40. The potential for turning the exception into one that “eats the rule” is clear and the rule is a sensible approach to prevent such future abuses. *Id.* A coalition of national and local unions agreed with OPM’s contention that there has been a long, consistent understanding that this exception should encompass only a category of political appointees. Comment 41.

*Comments Opposing this Regulatory Change*

An advocacy nonprofit organization opposed to the rule argued that the legislative history for this exception merely confirms that it covers Schedule C political appointees. Comment 4097. But commenter contended that the legislative history does not state that the policy influencing exception covers only political appointments and excludes career employees. OPM disagrees with this position for the reasons detailed in the proposed rule, this final rule, and Comment 2134. Since at least 1936, this phrase and the resulting exception in 5 U.S.C. 7511(b)(2) have been understood to mean political appointees. Commenter cites nothing that counters this extensive record. Even if there were some uncertainty regarding the scope of section 7511(b)(2), OPM would adopt the same definition because it is the best reading of the statute, reflects the understanding articulated by Congress in enacting the CSRA and, as discussed throughout this preamble, reasonably reinforces and clarifies longstanding civil service protections and merit system principles.

The same commenter opposed to the rule argued that OPM’s clarification of the longtime understanding of this exception would be unconstitutional. Comment 4097 argued that OPM “does not appear to have considered the implications of its interpretation: accepting this construction would render many inferior officers’ civil service protections unconstitutional.” For this, commenter again cited *Free Enterprise Fund*. For the reasons explained above in Sections III.(E), (F), OPM does not agree with this conclusion or that *Free Enterprise Fund* supports commenter’s position. That case dealt with an independent agency with multiple layers of removal protections for their inferior officers (which generally do not exist in agencies where the President can remove a Secretary, Director, or other agency head at will). In *Free Enterprise*

*Fund*, the second layer of protection was also “significant and unusual”<sup>321</sup> and the Court specifically said that other civil servants, like members of the SES, did not have such rigorous protections even when they worked in independent agencies, and further noted that many such employees would not qualify as constitutional officers. *Free Enterprise Fund* casts no doubt on the constitutionality of the civil service within independent agencies and that decision provides no support to commenter’s assertion that lower-ranking employees in all agencies must lose civil service rights if they work on policy or that somehow confirming their rights is unconstitutional. And commenter made no showing that career civil servants working on policy matters, especially below the ranks of the SES—those to which this definition would apply—are always, or by definition, inferior officers, nor is OPM aware of any judicial decisions holding so.

One former political appointee appears to have argued that 5 U.S.C. 7511(b)(3)<sup>322</sup> already exempts presidential appointees from adverse action protections, so OPM’s definition applicable to the exception in 7511(b)(2) would be superfluous. *See* Comment 45. But subsections 7511(b)(1)-(3) exclude three distinct types of political appointments from the definition of “employee,” and by extension, from adverse action rights.<sup>323</sup> The first excludes high-level presidential appointees requiring Senate confirmation (PAS).<sup>324</sup> The third excludes other presidential appointees who do not require Senate confirmation.<sup>325</sup> The middle category, and the subject of this regulatory change, excludes those in positions determined to be of a “confidential, policy-determining, policy-making or policy-advocating character”—traditionally

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<sup>321</sup> 561 U.S. at 506.

<sup>322</sup> Commenter argued “Chapter 75 §7511 (c) says that all Presidential appointees are exempt. However, other subsections enumerate other categories for exemption. Chapter 75 §7511 (b)(2) outlines exemptions for policymaking employees. If Congress had intended that ONLY political appointees be exempt, they would not have outlined under what circumstances other employees would have been exempt for policymaking reasons. Therefore, Congressional intent was for there to be members of the civil service who are considered ‘policymaking.’” Comment 45. Commenter cited 5 USC 7511(c) but appears to mean 7511(b)(3). Also, OPM never argues that only political appointees are excepted from adverse action rights. It is defining the exception in 5 USC 7511(b)(2) to mean political appointees.

<sup>323</sup> *See supra* note 138 (detailing the different types and numbers of political appointments).

<sup>324</sup> *See* 5 U.S.C. 7511(b)(1).

<sup>325</sup> *See* 5 U.S.C. 7511(b)(3).

understood to refer, in the main, to Schedule C political appointees.<sup>326</sup> The creation of such a position is approved in advance by OPM. Although the appointments are approved by the Presidential Personnel Office, the individuals selected are actually appointed by the head of the agency (or a designee) where the individual will be assigned. Section 7511(b)(2) was enacted as part of the Civil Service Due Process Amendments Act of 1990,<sup>327</sup> where Congress sought, *inter alia*, to eliminate the general exclusion of nonpreference eligible excepted-service employees from “independent [MSPB] review.”<sup>328</sup> Accordingly, unlike the presidential appointees discussed in (b)(1) and (b)(3), which are automatically excluded from the adverse action procedures in chapter 75, some person or entity must make an affirmative determination whether a position in the excepted service is of a “confidential, policy-determining, policy-making, or policy-advocating” character, a description which, as we have noted above, was consistent with Congress’ understanding of the unique set of excepted service positions comprising Schedule C. Subparagraph (A) of section 7511(b)(2) specifies that any such determination must be made by the President, for a position that the President has excepted from the competitive service; subparagraph (B) specifies that any such determination must be made by OPM, for a position that OPM has excepted from the competitive service; and subparagraph (C) specifies that any such determination must be made by the President or the agency head for a position that Congress itself has excepted from the competitive service. As noted above, Congress explained that “the 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.” Congress stated that the bill that would become the Civil Service Due Process Amendments Act of 1990 “explicitly denies procedural protections” to these types of political appointees—“presidential appointees, individuals in Schedule C positions [which are positions

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<sup>326</sup> See 5 U.S.C. 7511(b)(2). Paragraph (b)(2) also specifies who may make the determination for positions that Congress itself excepts from the competitive service. See 5 U.S.C. 7511(b)(2)(C). An example of such a position is the U.S. Trustee position discussed in *Stanley v. Dep’t of Justice*, 423 F.3d 1271 (Fed. Cir. 2005).

<sup>327</sup> Pub. L. No. 101-376, § 2, 104 Stat. 461, 461-62.

<sup>328</sup> H.R. Rep. No. 101-328, at 3, as reprinted in 1990 U.S.C.C.A.N. 695, 697.

of a confidential or policy-making character] and individuals appointed by the President and confirmed by the Senate,” and that “[e]mployees in each of these categories have little expectation of continuing employment beyond the administration during which they were appointed” because they “explicitly serve at the pleasure of the President or the presidential appointee who appointed them.”<sup>329</sup> By enacting section 7511(b)(3), therefore, Congress intended to exclude from the procedural and appeal rights of 5 U.S.C. chapter 75 a discrete group of political appointees separate from those described in section 7511(b)(2), namely those individuals appointed directly by the President<sup>330</sup> but who do not require Senate confirmation.

Some commenters opposed to the rule argued that career civil servants, not just political appointees, can be “policymakers” and excluded from the definition of “employee” and stripped of rights under 5 U.S.C. 7511(b)(2). One former political appointee contended that career civil servants significantly impact policy in agencies across the Federal Government and that it makes little sense to say they are not policymakers. *See* Comment 45. Comment 4097, an advocacy nonprofit organization, argued that the CSRA expressly applies the terms “policy-determining” and “policy-making” to career positions. To support this point, commenter points to 5 U.S.C. 3132, which relates to the duties of both career and noncareer SES and states that SES members exercise “important policy-making, policy-determining, or other executive functions.” 5 U.S.C. 3132(2)(E). Commenter concludes similar phrasing in 5 U.S.C. 7511(b)(2) must also apply to career members of the competitive and excepted services. OPM disagrees, for multiple reasons.

As an initial matter, the terminology and the structure of 5 U.S.C. 7511(b) are different from 5 U.S.C. 3132. As explained extensively throughout this final rule, the phrase “confidential, policy-determining, policy-making or policy-advocating,” as Congress used it in 5 U.S.C. 7511(b)(2), is a term of art with a clear history and a consistent usage. By contrast, Congress, in

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<sup>329</sup> H.R. Rep. No. 101-328, at pp. 4-5, as reprinted in 1990 U.S.C.C.A.N. at 698-99.

<sup>330</sup> *See, e.g.*, 5 CFR 213.3102(c); U.S. Off. of Pers. Mgmt., “Frequently Asked Questions: Political Appointees and Career Civil Service Positions FAQ” (listing various types of political appointments), <https://www.opm.gov/frequently-asked-questions/political-appointees-and-career-civil-service-positions-faq/general/which-types-of-political-appointments-are-subject-to-opmrsquo-s-pre-hiring-approval/>.



enacting the provisions establishing the SES, was writing on a clean slate and used a different statutory structure and language. Section 3132(2)(E) describes the SES as exercising “*important* policy-making, policy-determining, *or other executive functions*” (emphasis supplied), a new formulation of characteristics. Congress, in creating the SES, also established a different mechanism to provide flexibility for hiring a certain number of noncareer appointees, while limiting such appointments pursuant to a numerical formula.<sup>331</sup>

Further, Comment 4097’s comparison to language in the SES cuts against its larger argument—that Congress contemplated that career civil servants, by the function of having confidential or policy responsibilities, can and should lose adverse action rights. As commenter points out, the law acknowledges that all SES positions, career and noncareer, “exercise[] important policy-making, policy-determining, or other executive functions,” yet the *career* SES appointees under these positions are entitled to adverse action protections.<sup>332</sup> And these protections do not include any exception for career SES officials, similar to 5 U.S.C. 7511(b)(2), for positions of a “confidential, policy-determining, policy-making or policy-advocating” character.<sup>333</sup> To the contrary, all career SES officials who have completed a probationary period—again, officials who, by statute, “exercise important policy-making” and “policy-determining” functions—receive adverse action protections.<sup>334</sup> It does not follow that Congress would create a statutory scheme where the SES could have policy responsibilities and adverse action rights but a lower-ranking strata of career civil servants—managed by that SES—could lose adverse action rights the moment they worked on policy.

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<sup>331</sup> See 5 U.S.C. 3133.

<sup>332</sup> See 5 U.S.C. 7541-7543.

<sup>333</sup> As explained, the exception at 5 U.S.C. 7511(b)(2) does not apply to the SES. That exception applies to the excepted service and whether those civil servants have adverse action rights. But the excepted service does not include the SES. See 5 U.S.C. 2103(a) (defining “excepted service,” and stating, “[f]or the purpose of this title, the ‘excepted service’ consists of those civil service positions which are not in the competitive service or the Senior Executive Service.”).

<sup>334</sup> The Subchapter on adverse actions establishes the at-will status of noncareer SES by simply defining “employee” for purposes of that Subchapter as career employees, at section 7541(1)). Thus, there was no need, in crafting, sections 7541-7543, to make an exception similar to 5 U.S.C. 7511(b)(2), for positions of a “confidential, policy-determining, policy-making or policy-advocating” character.”

A professor emeritus opposed to this rule made a related argument that, in practice, career civil servants perform policy roles. *See* Comment 3953. Commenter argued that OPM’s definition of the statutory exception fails to recognize that there is a significant number of career employees who exercise “confidential, policy-determining, policy-making, or policy-advocating” roles within the government. The rulemaking, commenter argued, therefore presumes a separation of policymaking and policy implementation and between political appointees and career officials that does not exist. As explained above, however, this final rule does not say that only political appointees should or do work on policy. Instead, it clarifies the longtime understanding of the exception in 5 U.S.C. 7511(b)(2) as political appointees.

Comment 4097 further argued that a 1994 amendment to 5 U.S.C. 2302, relating to prohibited personnel practices, shows that career incumbents “can lose statutory protections if their positions are declared policy-influencing.” Section 2302(a)(2)(B) defines “covered position” with respect to any personnel action, but excludes from coverage any position which is, “*prior to the personnel action* ... excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.” 5 U.S.C. 2302(a)(2)(B) (emphasis added). Commenter suggests that the 1994 amendment added “prior to the personnel action” to this clause, and this means that Congress contemplated the designation of a position as confidential, policy-making, policy-determining, or policy-advocating and the subsequent removal of those positions as “covered” under section 2302. That career incumbent, according to commenter, would then lose the corresponding protections from prohibited personnel practices *after* the position’s move to the excepted service. Section 2302(a)(2)(B) clarifies that the status of the underlying position at the time of the personnel action determines whether the incumbent can pursue relief pursuant to section 2302. OPM notes that this final rule deals with adverse action rights under 5 U.S.C. chapter 75 and corresponding regulations, but not prohibited personnel practices. Adverse action protections and the ability to seek corrective action in response to a prohibited personnel practice are two separate types of rights with distinct

processes. Nothing about the 1994 amendments change the meaning of the exclusion in section 7511(b)(2) as explained above. OPM, moreover, agrees that a select few employees have been moved from the competitive service to Schedule C because conditions of good administration warranted such a move, or have been placed in the excepted service by Congress, via a statute creating unique appointment and removal provisions, as in the *Stanley* cases.<sup>335</sup> But as these cases show, when it comes to adverse action rights, even the incumbents of confidential, policy-determining, policy-making, or policy-advocating positions, when moved to Schedule C, retain previously accrued adverse action rights if the move was involuntary.

*Comments Regarding the MSPB's Interpretation of this Exception*

Other commenters supporting the rule contended that the MSPB has interpreted the phrase to mean political appointees. A coalition of national and local labor unions noted, as did OPM in its proposed rule,<sup>336</sup> that the MSPB has construed this phrase for decades. Comment 41. The Board has explained that the phrase “confidential, policy-determining, policy-making or policy-advocating” is “only a shorthand way of describing positions to be filled by so-called ‘political appointees.’”<sup>337</sup>

One commenter opposed to the rule argued that MSPB decisions have “little relevance here” since chapter 75 gives the President, OPM, and agency heads responsibility for determining that positions are policy-influencing. Comment 4097. Commenter argued that MSPB case law does not and cannot determine the scope of these exceptions. The MSPB is authorized to hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board.<sup>338</sup> Subject to otherwise applicable provisions of law, it may take final action on any such matter.<sup>339</sup> It may order any Federal agency or employee to comply with any

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<sup>335</sup> See also 5 CFR 6.8(c) (moving USDA Agriculture Stabilization and Conservation state executive directors and Farmers Home Administration state directors into Schedule C).

<sup>336</sup> See 88 FR 63862, 63872.

<sup>337</sup> Citing *Special Counsel v. Peace Corps*, 31 M.S.P.R. 225, 231 (1986).

<sup>338</sup> 5 U.S.C. 1204(a)(1).

<sup>339</sup> *Id.*

order or decision it issues and enforce compliance with any such order.<sup>340</sup> It is true that the MSPB cannot compel the Federal Circuit or the Supreme Court to adopt a different position, but MSPB's interpretations of title 5's terms are nevertheless significant. Where possible, it is prudent to interpret statutes harmoniously and in a manner that will not expose agencies to unwarranted liability. Also, as Comment 2134 described, Congress itself has relied on the MSPB decisions and viewed them as persuasive in defining terms in title 5. In 1992, a bipartisan group of senators and congressional representatives filed an amicus brief emphasizing that "the effective synonym for confidential policy positions is 'political appointees.'" *See* Comment 2134. Their brief cited an MSPB decision that said the phrase was, "after all, only a shorthand way of describing positions to be filled by so-called 'political appointees.'" *Id.* OPM is not simply deferring to existing MSPB decisions, but rather has considered those decisions and finds their reasoning to be compelling and in accord with our own. The fact that multiple agencies within the Executive Branch with authority to interpret and apply title 5 have reached the same determination about what this title 5 term of art means only underscores the persuasiveness of that conclusion.

Finally, a former political appointee argued that "policy-making" under 5 U.S.C. 7511(b)(2) is not determined by how employees are hired—as a political appointee or career civil servant—but rather, it is determined based on holding an excepted position. Comment 45. Under 5 U.S.C. 3302, however, excepted service positions can be created for a variety of reasons when conditions of good administration warrant. 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 thereto through competitive examination are not practicable. Merely holding an excepted service position does not make someone a policy-making employee nor does working on policy necessitate being in an excepted service.

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<sup>340</sup> 5 U.S.C. 1204(a)(1)(2).

As Congress described during the 1990 Amendments, the “key to the distinction” between those civil servants on whom appeal rights are conferred and those to whom such rights are not conferred is the “expectation of continuing employment with the Federal Government.” Some commenters opposed to this rule ignore this distinction. Comment 4097 argued that certain employees would not enjoy adverse action rights but would keep their jobs if they “faithfully advanced the President’s agenda.” Such a scheme would be directly contrary to this “key” distinction that Congress identified as animating the adverse action exceptions.

Improperly applying the phrase “confidential, policy-determining, policy-making, or policy-advocating” 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, even when the Senior Executives to whom such individuals report retain protections, would be inconsistent with the statute. OPM’s rule, on the contrary, is the best reading of the statute—as confirmed by the statutory scheme, congressional intent, legislative history, 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 certain positions who will ensure that the specific policies of the Administration will be pursued. The phrase 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.”<sup>341</sup> In this final rule, therefore, OPM is making explicit this longtime, consistent understanding.

OPM is promulgating the following changes to 5 CFR parts 210, 213, 432, 451, and 752:

**Part 210—Basic Concepts and Definitions (General)**

**Subpart A—Applicability of Regulations; Definitions**

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<sup>341</sup> *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).

## *Section 210.102 Definitions*

The final rule amends 5 CFR 210.102 to add a definition for the phrase “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining” 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 political appointments from the civil service protections, which are identified by their 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 carry no expectation of continued employment beyond the presidential administration during which the appointment occurred. OPM defines the phrase as descriptors for the positions held by noncareer political employees because the phrase is currently used in the regulations to describe, among other things, a “position” or the “character” of a position.

OPM also conforms 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. Additional comments related to this definition are addressed here.

### *Comments Regarding Amendments to 5 CFR 210.102*

An oversight nonprofit organization supportive of this rule suggested that it would be improved if OPM provided a list of the positions that do not meet the definition of “confidential, policy-determining, policy-making, or policy-advocating.” Comment 3894. This commenter was especially concerned that OPM enumerate the non-confidential, policy-determining, policy-making, and policy-advocating positions involving national security, public health, emergency management, whistleblower protection, government ethics, audits, legal and regulatory interpretation, budget development and execution, medical and scientific research, and data collection and analysis. Commenter suggested that an explicit enumeration is necessary to ensure that the appropriate positions in critical areas are not mistakenly categorized as confidential,

policy-determining, policy-making, or policy-advocating. OPM will not make revisions based on this comment. OPM has adequately and thoroughly clarified the exception in 5 U.S.C. 7511(b)(2) by explaining that it applies to noncareer political appointees. It would be impracticable for OPM to effectively enumerate all such political positions, especially since new positions may be created over time. OPM also notes that a (necessarily partial) list of positions that do *not* meet the definition may be misunderstood as an attempt at an exhaustive list, generating confusion rather than clarity.

Several commenters requested that OPM clarify how the definition of “confidential, policy-determining, policy-making, or policy-advocating” in this final rule applies, if at all, to the members of the SES.<sup>342</sup> Comments 44, a public service nonprofit organization, and 3687, a science advocacy organization, asked that OPM clarify how this definition affects SES employees. Comment 763, a management association, expressed concern that OPM’s clarification of these types of positions will lead to SES employees getting cut out of their current policy supporting roles. They recommended that OPM define “policy determining, making, and advocating” as covering issues that rise to a level needing decisions by Presidential appointees. They further recommended that OPM address how our proposed amendments to 5 CFR part 210 interact with the statutes and regulations governing the SES and other senior career leaders that make clear that career SES are involved in many policy-related activities, explicitly including support for policy advocacy. Comments 2442 and 3428 (submitted by the same individual) request further clarification in light of the provisions of 5 U.S.C. 3132, which states career members of the SES exercise “important policymaking, policy-determining, or other executive functions.” As described above and further below, no changes to the proposed rule are necessary, as the SES is governed by a separate statutory structure that protects the career SES in different ways from the framework governing the competitive and excepted services.

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<sup>342</sup> The extension of all parts of this rule to the SES was a common request and theme in the comments. *See* Comments 2193, 2222, 2260, 2796, 2816, 2822, 3049, 3095, 3149, 3687, 3973.

As explained in Section III(D), the Federal civil service created by the CSRA consists of three “services”: the competitive service, the excepted service, and the SES.<sup>343</sup> This regulation addresses the competitive and excepted services, which are governed by the statutory and regulatory provisions cited in the proposed rule and this final rule, including, specifically, the adverse action rules set forth at 5 U.S.C. 7501-7515. Congress established the SES as a separate service “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality for executive-level Federal employees.”<sup>344</sup> The SES has a different system for hiring executives, managing them, and compensating them.<sup>345</sup> It provides for both career and noncareer positions and sets its own limitations on the appointment of noncareer positions. Career SES employees are governed by separate adverse action procedures. Because, pursuant to the definitions in 5 U.S.C. 7541, those adverse actions are limited to “career” employees, there was no need, unlike with the rules governing adverse actions for employees in the General Schedule, to call out and exclude positions of “a confidential, policy-determining, policy-making or policy-advocating character,” and thus there is no reference to such positions in the provisions at section 7541-7543.

Instead, chapter 75’s adverse action procedures for the SES, codified at 5 U.S.C. 7543, indisputably apply to any career appointee in the SES who has completed the relevant probationary period in the SES or had accrued adverse action protections while serving in the competitive or excepted services prior to joining the SES.<sup>346</sup> Accordingly, even though SES employees engage in important policy-related work, the phrase “confidential, policy-determining, policy-making or policy-advocating character,” as used to describe positions that are excepted from chapter 75’s adverse action protections, does not apply to the SES.

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<sup>343</sup> There are also a small number of officials, typically those appointed by the President with or without consent of the Senate, who are paid on the Executive Schedule and not considered part of any of these services.

<sup>344</sup> 5 U.S.C. 3131.

<sup>345</sup> See 5 U.S.C. 5131-5136.

<sup>346</sup> 5 U.S.C. 7541.



Further, in addition to providing explicit adverse action protections for career SES, Congress also sought to protect and preserve a career SES free from undue partisan political influence in other ways, including by setting strict limits on the number of SES positions that could be designated as “noncareer” (i.e., political).<sup>347</sup> The rules are clear: the number of noncareer SES in any agency is to be determined annually by OPM, not by the agency; “the total number of noncareer appointees in all agencies may not exceed 10 percent of the total number of Senior Executive Service positions in all agencies”; and the number of noncareer SES in any single agency may not be more than “25 percent of the total number of Senior Executive Service positions in the agency” or “the number of [certain executive and Executive Schedule] positions in the agency which were filled on the date of the enactment of” the CSRA.<sup>348</sup> There are also limits on the number of emergency and limited-term SES appointments. The governmentwide total may not exceed 5 percent of the governmentwide total of all SES.<sup>349</sup>

As discussed above, any suggestion that Congress provided more protections for SES employees who work on policy than it did for competitive and excepted service employees who work on policy would make little sense within the statutory scheme. Members of the SES make up the most senior ranks of the civil service beneath the presidential appointment level. They work most directly with the President’s political appointees. They have managerial authority over employees in the competitive and excepted services. This includes the ability to direct their work and hold them accountable for poor performance or misconduct. A system that provided greater protections to its senior executives than it does to its rank-and-file employees would be ineffective and impractical.

Another commenter expressed concern that the proposed definition would lead to a reduction in the responsibilities of current positions, and a reclassification of those positions into the excepted service. Comment 2445 (an individual), *see also* Comment 763 (management

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<sup>347</sup> *See* 5 U.S.C. 3134.

<sup>348</sup> *See id.*

<sup>349</sup> *See* 5 U.S.C. 3134(e).

association, expressing concern about career staff who support the policy development process through their work but do not have confidential, policy-determining, policy-making, or policy-advocating positions). Comment 2445 suggested that OPM clarify that some confidential, policy-determining, policy-making, or policy-advocating work may be delegated without changing the character of the delegee's position. The comment also suggested that OPM clarify that duties typically performed by those in competitive service positions are not confidential, policy-determining, policy-making, or policy-advocating. OPM will not make revisions based on these comments. OPM will clarify though, as described above, that OPM acknowledges and understands that career employees across government touch, support, and otherwise work on policy. This final rule in no way suggests that only political appointees do or should work on policy. Instead, the purpose of this rule is much more specific—to clarify the meaning of the exception to adverse action rights in section 7511(b)(2)—which, as explained, is a term of art that has long meant political appointees.

Finally, one individual encouraged OPM to define positions of a “confidential, policy-determining, policy-making, or policy-advocating” character as narrowly as possible. Comment 920. OPM will not make revisions based on this comment. OPM notes that the definition adopted accords with Congressional intent, legislative history, and past practices and is the best reading of the statute. The comment also suggested that OPM add additional protections to prevent positions from being moved into Schedule C and to prevent the creation of a new schedule of political appointees. OPM will not make revisions based on this comment. The President has the authority to create excepted service schedules and except positions where necessary and if conditions of good administrations warrant such exceptions. What this rule is addressing is the retention of accrued status and rights following an involuntary move to or within the excepted service and a clarification of when the exception of 5 U.S.C. 7511(b)(2) applies.

## **Part 213—Excepted Service**

Part 213 sets forth provisions for positions and appointments in the excepted service. OPM is amending 5 CFR 213.3301 to conform to the revised 5 CFR 210.102.

OPM received no comments specifically about the regulatory changes to 5 CFR part 213, sees no reason to amend the proposal, and will finalize the language as proposed.

## **Part 432—Performance Based Reduction in Grade And Removal Actions**

### *Section 432.102 Coverage*

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 services, with specific exceptions that include political appointees. The final rule amends 5 CFR 432.102 to make clear 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 part 432, consistent with congressional intent.

### *Comments Regarding Changes to 5 CFR 432.102*

An agency expressed the view that part 752 would provide “coverage to employees who are involuntarily moved into roles in the excepted service that have confidential, policy-determining, policy-making, or policy-advocating character,” as described in Section IV(A) and then requested that part 432 be treated similarly by revising the exclusion at 5 CFR 432.102(f)(10). *See* Comment 2766. OPM will accept the agency’s recommendation for the same reasons it adopted similar suggested revisions to part 752 and will revise section 432.102(f)(10) by adding “unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (e) of this section.”

## **Part 451—Awards**

### *Section 451.302 Ranks for senior career employees*

Part 451 applies to awards and 5 CFR 451.302 addresses ranks for senior career employees. OPM is amending 5 CFR 451.302 to conform to the revised 5 CFR 210.102. This amendment standardizes the phrasing used to describe this type of position.

OPM received no comments specifically about the regulatory changes to 5 CFR 451.302, sees no reason to amend the proposal, and will finalize the language as proposed.

### **C. Agency Procedures for Moving Employees**

OPM revises 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 (hereinafter, “a directive”).<sup>350</sup> This final rule sets the procedures an agency must follow before taking these actions, outlines the notice requirements that apply when the positions are encumbered, and provides a right of appeal to the MSPB to the extent any such move is involuntary and characterized as stripping individuals of any previously accrued civil service status and protections. OPM discusses the public comments related to these provisions in turn.

#### **1. Procedures for Moving Positions**

In enacting the CSRA, Congress made certain findings relevant to the changes discussed here. It noted that the merit system principles, many of which have existed since 1883,<sup>351</sup> “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.”<sup>352</sup> As explained previously, Congress then proceeded to divide functions previously performed by the CSC among OPM, the MSPB, and OSC. It found that the function of filling positions in the

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<sup>350</sup> 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.

<sup>351</sup> *See supra* note 53.

<sup>352</sup> Pub. L. 95-454, sec. 3.2.

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.”<sup>353</sup>

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,”<sup>354</sup> protect against prohibited personnel practices, secure appropriate enforcement of the laws 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 share the same understanding as their agencies and are aware of the potential consequences of those moves.

Some background demonstrates why these changes are important. Positions in the Federal Government are, by default, placed in the competitive service. As noted by the D.C. Circuit, 5 U.S.C. 3301 and 3302 “make it clear . . . that ‘competitive service [is] the norm rather than the exception.’”<sup>355</sup> 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.”<sup>356</sup> 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.<sup>357</sup> It has been a longstanding 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

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<sup>353</sup> *Id.* at sec. 3.5

<sup>354</sup> 5 CFR 6.1.

<sup>355</sup> *Nat'l Treasury Employees Union v. Horner*, 854 F.2d 490, 493 (D.C. Cir. 1988); *accord*, *Dean v. Off. of Pers. Mgmt.*, 115 M.S.P.R. 157, ¶15 (2010); *see also supra* note 149.

<sup>356</sup> 5 U.S.C. 3302.

<sup>357</sup> 5 CFR 6.1(a).

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 for the position. For example, a perennial rider to OPM appropriations prohibits OPM—and before that, its predecessor CSC—from examining for attorney positions.<sup>358</sup> This appropriations bar makes examinations not practicable, and attorney positions have been placed in Schedule A of the excepted service since at least 1947.<sup>359</sup> *See* Comment 2134 (detailing history of federal attorneys in the competitive service and Congress’ bar of attorney examinations resulting in Schedule A). In all these cases, OPM is subject to the standard that any departure must be compelled by conditions of good administration.<sup>360</sup>

Traditionally, the President has exercised his authority to except General Schedule positions from the competitive service through executive orders.<sup>361</sup> OPM has also authorized excepted service hiring to address urgent needs of agencies,<sup>362</sup> such as the need to bring on staff quickly to respond to the COVID-19 pandemic.<sup>363</sup> When OPM exercises such authority, it determines that the characteristics of the position make it impracticable to use the processes associated with conducting a competitive examination.<sup>364</sup> For example, it may be that the

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<sup>358</sup> *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 FR 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.”).

<sup>359</sup> *Fiorentino*, 607 F.2d at 965-66.

<sup>360</sup> *See* 5 U.S.C. 3302; *see also Nat’l Treasury Employees Union v. Horner*, *supra* note 149.

<sup>361</sup> *See, e.g.*, E.O. 13562, 75 FR 82583 (Dec. 30, 2010) (establishing Schedule D for the Pathways programs); E.O. 13843, 83 FR 32755 (July 10, 2018) (establishing Schedule E for administrative law judges).

<sup>362</sup> 5 CFR part 213.

<sup>363</sup> *See* U.S. Off. of Pers. Mgmt. Memo., “Coronavirus (COVID-19) Schedule A Hiring Authority,” (March 20, 2020).

<sup>364</sup> 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).

qualification requirements established for competitive service positions cannot be used because the series has been newly created. In other instances, OPM determines that open competition is not conducive to filling certain positions quickly because the applicant pool is 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—either temporarily or permanently 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,<sup>365</sup> 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 creation of Schedule E, the President remarked that the exigency presented by pending litigation was one of the motivations, and expressly provided that incumbents who were in the competitive service as of the date of enactment would remain in the competitive service as long as they remained in their current positions.<sup>366</sup>

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.

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<sup>365</sup> 83 FR 32755 (July 10, 2018).

<sup>366</sup> 83 FR 32755, 32756.

The Pathways programs, originally established by President Barack Obama in Executive Order 13562, is a good 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. There are rules governing how agencies must use the Pathways programs as part of a larger workforce planning effort, specifying procedures that are conditions of the agency's use of the programs, identifying how Pathways positions are to be announced, and setting parameters for eligibility for the programs.<sup>367</sup> OPM has the authority to cap Pathways hiring<sup>368</sup> and can even shut down an agency's ability to use Pathways altogether.<sup>369</sup>

Based on this history and experience, OPM proposed and is now establishing 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 exercised by the President, Congress, OPM, or their designees. In each instance, the agency would have to adhere to the following procedures:

1. Identify the types, numbers, and locations of the employee(s) or position(s) that the agency proposes to move into or within the excepted service;
2. Document the basis for its determination that movement of the employee(s) or position(s) 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)<sup>370</sup> that the documentation is sufficient and movement of the employee(s) or position(s) is both

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<sup>367</sup> See, e.g., 5 CFR 362.105 (Pathways workforce planning requirements) and 362.303 (Recent Graduate announcements).

<sup>368</sup> See 5 CFR 362.108.

<sup>369</sup> See 5 CFR 362.104(b).

<sup>370</sup> 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. 1401-1402. 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



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 the employee(s) or position(s)) in advance of using the excepted service authority;

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.

#### *Comments Regarding the Implications of this Regulatory Change*

Most of the comments regarding these changes were supportive, but some, including a former political appointee, argued that creating further procedures impedes the President's ability to act with his constitutionally vested authority over the Executive Branch and its functions. *See* Comment 45. Commenter also argued that "Congress has granted the President the authority to move Federal employees. This rule seeks to impede this authority." As noted in Section III(F), 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."<sup>371</sup>

We will not make any changes as a result of this comment. 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

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within an agency." 5 CFR 250.202. OPM has delegated various responsibilities directly to CHCOs. *See, e.g.*, U.S. Off. of Pers. Mgmt., "Personnel Management in Agencies" 81 FR 89357 (Dec. 12, 2016) (tasking CHCOs with developing a Human Capital Operating Plan); U.S. Off. of Pers. Mgmt., "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).

<sup>371</sup> 5 U.S.C. 1103(a)(5).

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,”<sup>372</sup> and to collect information and records regarding matters falling within the civil service laws, rules, and regulations.<sup>373</sup> OPM has acted pursuant to these authorities to create government-wide rules for Federal employees regarding a broad range of topics, such as hiring, promotion, performance assessment, pay, leave, political activity, retirement, and health benefits. Both the President and OPM also establish standards and conditions for agencies to apply in deciding which positions should be moved from the competitive into the excepted service. This rule is squarely within these authorities.

Also, while the President can create excepted service schedules and move positions into the excepted service, that ability is not unqualified. For instance, Congress has mandated that exceptions occur only when “necessary” and warranted by “conditions of good administration.”<sup>374</sup> Although the Administrative Procedure Act (APA) does not apply to the President, it is applicable to OPM and the agencies that implement directions from the President or OPM. The D.C. Circuit has determined, for purposes of challenges under the APA, that “several provisions of title 5 of the U.S. Code, viewed together, provide a meaningful—not a rigorous, but neither a meaningless—standard against which to judge” a decision to except positions from the competitive service, when it is OPM that creates the exception.<sup>375</sup> If determinations by agencies or OPM that certain positions belong in a newly-created excepted service schedule would similarly be reviewable, it is prudent for OPM to establish procedural regularity into this process.

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<sup>372</sup> 5 CFR 5.1, 6.1, 6.2.

<sup>373</sup> 5 CFR 5.4.

<sup>374</sup> 5 U.S.C. 3302; 5 CFR 6.1.

<sup>375</sup> *Horner*, *supra* note 149, 854 F.2d at 495.

Finally, this rule does not restrict the President’s authorities. These procedures, which establish uniform processes when agencies move positions or people, will help OPM determine whether appointments to the competitive service are “not practicable,” 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.

OPM is promulgating the following changes to 5 CFR part 302:

### **Part 302—Employment in the Excepted Service**

Part 302 governs employment in the excepted service, including the procedures an agency must follow when an employee serving under a nontemporary appointment is selected for an excepted appointment. The authority citation provided in the proposed rule did not reflect changes made by the Fair Chance to Compete for Jobs final rule published on September 1, 2023 (88 FR 60317). The updated authority citation is reflected in this final rule.

#### *Section 302.101 Positions covered by regulations*

This section describes positions covered by part 302. OPM is amending 5 CFR 302.101 to conform to the revised 5 CFR 210.102, which adds a definition to the phrases “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining.”<sup>376</sup>

### **Subpart F—Moving Employees and Positions Into and Within the Excepted Service**

OPM adds subpart F titled, “Moving Employees and Positions Into and Within the Excepted Service.” In the event of a directive by the President, Congress, OPM, or their designees, to move employee(s) or position(s) from the competitive service to the excepted service, or from one excepted service schedule to another, this new subpart describes the processes and procedures an agency must follow to carry out such a move.

#### *Section 302.601 “Scope”*

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<sup>376</sup> See Section IV(B).

This subsection describes the scope of the positions that would be subject to the new procedures in subpart F.

*Comments Regarding Amendments to 5 CFR 302.601*

Comment 2134, a joint comment by a nonprofit organization and former federal official, supported the rule but suggested that 5 CFR 302.601 be revised for clarity. Commenter noted that the proposed rule clearly covered the movement of positions into an excepted service schedule but was unclear about the involuntary movement of employees from their current positions to other positions in an excepted service schedule. Commenter suggested a revision to make clear that the movement of employees, not just positions, falls within the scope of Subpart F. OPM agrees with this comment and has revised this provision accordingly.

One intended purpose of Subpart F is to regulate the movement of positions to and within the excepted service. But covering the movement of employees is an important feature of the subpart. For instance, section 302.602(c) requires that agencies that seek to move an encumbered position into or within the excepted service notify affected employees of the movement and relevant rights. Covering both employees and positions in this regulatory scheme is important because, once a position is filled by an incumbent, that incumbent gains certain rights and status over time as detailed in 5 U.S.C. 7511(a) and as explained in Section IV(A). And once those rights and status accrue, the employee retains those rights upon a move to or within the excepted service so long as the moves, however many they may be or into whichever positions they may be, are involuntary. In this way, both positions and employees are covered by this regulatory amendment.

OPM will modify the regulatory language to clarify this point. The revised language at 5 CFR 302.601 will state that the subpart applies to any situation where an agency moves—(1) 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; or (2) an employee who has accrued

status and civil service protections under 5 U.S.C. chapter 75,<sup>377</sup> subchapter II, involuntarily to any position that is not covered by that chapter or subchapter. It will also explain that the subpart applies in situations where a position previously governed by title 5, U.S. Code, will be governed by another title of the U.S. Code going forward, unless the statute governing the exception provides otherwise.

Another commenter, a former federal official, suggested that OPM revise Subpart F to include movement of positions from the career-reserved SES into the excepted service. *See* Comment 2816. For the reasons described in the previous sections, OPM will not adopt these suggestions. The SES, as noted above, is not in the excepted service and is governed by a separate statutory structure that addresses access to adverse action protections by type of appointment. The statute expressly provides for “career” and “noncareer” positions. But an “employee,” for purposes of the SES adverse action provisions, is defined as a “career” employee. Accordingly, the adverse action provisions, which apply only to career employees, contain no explicit exclusions, akin to section 7511(b)(2), based upon the character of the position. Moreover, the provisions governing the SES directly address reassignments and transfers of career senior executives,<sup>378</sup> removal of a career employee from the SES into a civil service position outside of the SES during probation or as a result of less than fully successful executive performance,<sup>379</sup> and the circumstances in which there may be guaranteed placement in other personnel systems for a senior executive who has been removed from the SES.<sup>380</sup>

*Section 302.602(a) “Basic Requirements.”*

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<sup>377</sup> Commenter also suggests that we include regulatory language addressing accrued civil service protections under 5 U.S.C. chapter 23, relating to merit system principles and prohibited personnel practices, in addition to those accrued under chapter 75. As explained above, this final rule deals with adverse action rights under chapter 75 and corresponding regulations, but not prohibited personnel practices. Adverse action protections and the ability to seek corrective action in response to a prohibited personnel practices are two separate types of rights with distinct processes. Also, OPM notes that 5 U.S.C. 2302 addresses certain prohibited personnel actions with respect to “covered” positions, rather than rights “accrued” by individuals over time.

<sup>378</sup> 5 U.S.C. 3395.

<sup>379</sup> 5 U.S.C. 3592.

<sup>380</sup> 5 U.S.C. 3594.

This section requires an agency to take certain steps after a directive from the President, Congress, OPM or their designees to move a position or positions from the competitive service to the excepted service, or from one excepted service schedule to another. This final rule establishes additional procedural requirements that apply when one or more of the positions the agency seeks to move is encumbered by an employee.

Section 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 directive, and their location within the organization and provide the list to OPM.

Section 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 provide OPM with a list of the positions to be moved in accordance with those criteria, those positions' location in the organization, and, upon request from OPM, an explanation of how the positions met those criteria.

Section 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 must, in addition to supplying a list, supply OPM with the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant.

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

Section 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.

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

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

Section 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.

Section 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.

Section 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.

*Comments Regarding Amendments to 5 CFR 302.602(a) and (b)*

Comment 2134 proposed several changes to OPM's proposed addition of section 302.602. Commenter correctly noted that in paragraph (a)(1), the second instance of the word "list" (following "in accordance with that") is a mistake. OPM meant to write "directive" instead and will adopt this suggestion. Paragraphs (a)(2) and (a)(3) require that agencies provide a list or lists of the positions to be moved, the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant. Commenter is correct that the list or lists should be provided to OPM. and OPM will make that clear in the final regulatory language. Paragraphs (b)(1) and (b)(2) require agencies to "Identify" and "Document" certain information, respectively. Commenter asserted it is not clear how agencies are to accomplish the identification and documentation and suggested adding "in a report to OPM" after the words "Identify" and "Document" in these paragraphs. OPM will not adopt this suggestion. OPM believes the

reporting is implicit in the certification by the CHCO and the accompanying data and lists. OPM will consider providing further instructions about the forms this information should take in guidance and will also consider providing templates. For the reasons discussed above regarding suggested revisions to section 302.601, commenter also suggested expanding the coverage of section 302.602 to include not only the movement of positions but also the movement of individual employees by adding a new subsection (d) that reads: “In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees who have accrued status or civil service protections under 5 U.S.C. [] chapter 75, subchapter II, to positions that are not covered by such chapter or subchapter.” OPM will adopt this suggestion for the same reasons it adopted the similar suggestion regarding section 302.601.<sup>381</sup> OPM will modify this suggestion so that subsection (d) reads: “In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees with respect to any earned competitive status, any accrued procedural rights, or depending on the action involved, any appeal rights under chapter 75, subchapter II, or section 4303 of title 5, United States Code, even when moved to the new positions.”

Commenter then suggested that OPM consider increasing transparency by ensuring that the public has access to the information discussed in section 302.602. To enforce any such transparency requirement, commenter suggested that OPM provide that personnel actions implementing the movement of positions or employees will be ineffective until 90 days after the release of this information to the public. This period, commenter argued, would also provide Congress an opportunity to conduct meaningful oversight in the event of a major upheaval of civil service processes and protections. OPM believes that the processes in this final rule already strike the appropriate balance among a variety of factors, including transparency, the

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<sup>381</sup> Commenter also suggests that we include regulatory language addressing accrued civil service protections under 5 U.S.C. chapter 23, but for the reasons discussed in note 377, we decline to do so.



preservation of merit, and good governance while also allowing for the efficiency and flexibility to conduct normal government operations governed by statute, which can include reorganizations or moving positions to or within the excepted service if necessary and warranted by conditions of good administration. Further, the presentation of information as described in this subpart may lead to communications between OPM and an agency that would generally be protected by the privilege afforded to the deliberative process. OPM will not adopt these suggestions.

Finally, this commenter suggested that because section 302.602 refers to the movement of “positions” and uses other plural words, this section might be construed to be inapplicable in the case of the movement of only one employee or position. OPM agrees and will add a new subsection (e) that reads: Notwithstanding the use of the plural words “positions,” “employees,” and “personnel actions,” this section also applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

Another commenter supportive of the rule suggested that OPM shift documentation and other duties under section 302.602(b)(3) from agency human resources to Department-level human resources or OPM. Comment 6. OPM will not make revisions based on this comment. A CHCO is well positioned to certify the sufficiency of an agency’s documentation pursuant to section 302.602(b). By law, 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.<sup>382</sup> They are 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.”<sup>383</sup> They are also experienced with these types of duties because OPM has delegated various similar responsibilities directly to CHCOs in the past. Commenter also suggested that the rule require agencies, Departments, and OPM to consult with bargaining units and unions concerning the effects of the movement of a position on bargaining

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<sup>382</sup> See 5 U.S.C. 1401-1402.

<sup>383</sup> 5 CFR 250.202.

unit employees, prior to moving a position. OPM will not make revisions based on this comment. Collective bargaining obligations can arise with any new policies which impact bargaining unit employees. This includes implementation of policies found in any new or revised government-wide regulation, such as the final rule, so no new consultation process is required. The proposed rule did not purport to address new labor relations provisions and such matters are already subject to requirements in the Federal Service Labor-Management Relations Statute of 1978.

Another commenter, an individual, suggested that these regulatory amendments should be broadened to require that agencies disclose the underlying reasons for the movement. Comment 407. Comment 3894, an oversight nonprofit organization, also suggested that section 302.602(b)(6), regarding OPM publishing any such authorizations to move positions in the *Federal Register*, should be revised to require a solicitation for public comment. As stated above, OPM believes these amendments already strike the appropriate balance between being protective of rights and merit system principles and allowing for the efficiency and flexibility of normal government operations, so OPM does not believe that further process is necessary. Regarding Comment 407, there may be many underlying reasons for a move and a precise underlying reason, while potentially probative, does not get to the central inquiry for the retention of rights and status, which is whether the move was voluntary or involuntary. Still, those general reasons are implicit in 5 CFR 302.602(b)(2), which requires that an agency “[d]ocument the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.” OPM does not believe that further requirements on this point are necessary. Regarding Comment 3894, the purpose of publishing this information in the *Federal Register* is to increase transparency. OPM believes that publishing this information is sufficient and that public comment would add little further value. It would also risk the process becoming unduly burdensome. For these reasons, OPM will not adopt these suggestions.

Finally, Comment 2816, by a former federal official, again suggests that OPM clarify that the changes proposed within 5 CFR 302.602 include SES Positions. OPM will not adopt this suggestion for the same reasons it did not adopt a similar suggestion regarding section 302.601. The SES is not in the excepted service and is governed by a separate statutory structure that protects the career SES in different ways from the framework governing the competitive and excepted services.

## 2. Notice Rights for Encumbered Positions

OPM is promulgating additional requirements, under 5 CFR 302.602(c), that would apply when one or more of the positions the agency wishes to move is encumbered by an employee. It describes the information an agency must provide 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.<sup>384</sup> In that case, under section 302.602(c)(1)(i), 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. Under section 302.602(c)(1)(ii), if the move is involuntary, the notice must inform the employee that the employee maintains their civil service status and protections, if any, notwithstanding the movement of the position.

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<sup>384</sup> OPM is omitting Schedules D and E from this 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 the MSPB.

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 that employees be given notice that they are leaving the competitive service and requiring that employees acknowledge they understand that they are voluntarily leaving the competitive service to accept an appointment in the excepted service.<sup>385</sup>

OPM did not receive comments specifically relating to 5 CFR 302.602(c). In this final rule, though, OPM is clarifying that a notice under section 302.602(c)(1)(ii), informing the employee that the employee maintains their civil service status and protections notwithstanding the movement of the position, applies where the move is involuntary.

### 3. Appeal Rights for Encumbered Positions

OPM further amends 5 CFR part 302 to establish that a competitive service employee whose position is moved involuntarily into the excepted service, or an excepted service employee whose position is moved involuntarily into a different schedule of the excepted service, may directly appeal to the MSPB if, contrary to these regulations, the entity perpetuating the move asserts that the move will strip the individual of any status and civil service protections they had already accrued. This rulemaking would not apply to situations where the employee applies for, is selected for, and accepts a new position with fewer or different civil service protections, since acceptance of that new position voluntarily relinquishes the protections the employee had already accrued.

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<sup>385</sup> 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 III(F), under 5 U.S.C. 1103(a)(5), a variety of other provisions governing specific topics under title 5, and delegations from the President, OPM has broad authority to execute, administer, and enforce civil service rules and regulations. Exercising these authorities, OPM has previously conferred rights of appeal to the MSPB with respect to a variety of personnel determinations, including, for example, final suitability determinations.<sup>386</sup> The Federal Circuit has repeatedly sustained this practice and ruled that where an appeal is solely by regulation, the regulation circumscribes the scope of the appeal.<sup>387</sup> Title 5 explicitly provides that an employee may appeal a personnel action made appealable by regulation.<sup>388</sup> The 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.”<sup>389</sup>

*Section 302.603 “Appeals.”*

In these final regulations, OPM is prescribing an MSPB appeal right for an employee whose position in the competitive service is moved to the excepted service involuntarily, or whose position in the excepted service is moved into a different schedule of the excepted service involuntarily, and when an entity effectuating such a move, contrary to these regulations, asserts that the individual loses any status and civil service protections they had already accrued. This 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 an employee’s 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 any civil service protections. OPM notes that an individual may choose to assert in any appeal to the MSPB that the agency committed procedural error, if applicable, by failing to act in accordance

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<sup>386</sup> 88 FR 63862, 63876-77 (citing to 5 CFR part 731, subpart E and identifying twelve instances in which OPM has provided in regulation a basis for an appeal to the MSPB).

<sup>387</sup> 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); see also *Gaxiola v. Dep’t of the Air Force*, 6 M.S.P.R. 515, 519 (1981).

<sup>388</sup> 5 U.S.C. 7701(a).

<sup>389</sup> 5 U.S.C. 1204(a)(1).

with the procedural requirements of section 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 individual asserts procedural error by the agency, OPM expects the MSPB would typically determine whether the procedural error was harmful as a pre-requisite for any reversal of the agency's action. The 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.<sup>390</sup>

*Comments Regarding Amendments to 5 CFR 302.603*

Comment 2134 is supportive of the rule and the conferral of a regulatory appeal right premised specifically on the movement of an employee but suggested that OPM explain that, "in creating this appeal right, OPM is not taking a position as to whether employees would otherwise lack appeal rights in all cases involving an involuntary move." OPM agrees and is not in this rule addressing whether employees would otherwise lack appeal rights in all cases involving an involuntary move.

Commenter also suggested a revision regarding the proposed language in section 302.603, which would allow employees to appeal to have their rights "reinstated." Commenter contended that the proposed text of the rule implied that rights were lost upon the move but could then be "restored" by a successful appeal. Commenter also noted this regulatory language does not specify a time in which an aggrieved employee must file an appeal and expressed concern that this "might not fully achieve OPM's aims." Commenter expressed that, as proposed, the language could suggest that an agency could strip an employee of civil service status and protections in a manner contrary to this final rule and put the onus on the employee to rectify

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<sup>390</sup> 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 Serv.*, 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.").

such an action before the MSPB. Or an agency might use silence or take a chance that an employee will not timely appeal, but that outcome would be unjust. Commenter therefore proposed a 180-day period for the employee to appeal, which commenter offered would allow sufficient time for the employee to gather information necessary for that appeal. OPM does not believe the final rule should specify a time period; the timing procedures should instead follow the normal processes associated with appeals to the MSPB. But OPM agrees that it should add a clause to this section specifying that the appeal rights conferred in part 302 are in addition to, and not in derogation of, any right the employee would otherwise have to appeal a subsequent personnel action undertaken without following appropriate chapter 75 or chapter 43 procedures. The appeal right created by this rule merely provides an additional avenue for immediate correction if the agency asserts that accrued status or rights will no longer apply or fails to provide notice of the impact on accrued status or rights. To better capture OPM's intent, OPM will revise 5 CFR 302.603(a) to read: (a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved involuntarily 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 involuntarily moved to a position in a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b), (c), and (d) of this section. The appeal rights conferred in this section are in addition to, and not in derogation of, any right the individual would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under chapter 75, subchapter II, or section 4303 of title 5, United States Code.

Commenter also suggested that the right in section 302.603(b) to appeal moves which "purportedly" strip protections is too narrow. Commenter contended that it is possible that agencies will remain silent on an employee's civil service status and protections, and thereby could avoid an appeal because the agency has not "purported" to have any effect on employee status and protections. Commenter also contended that subsection (b) addresses only the

movement of a position. In contrast, subsections (a) and (c) of section 302.603 also cover the movement of an employee to a new position. OPM will revise this language to clarify that agencies cannot circumvent this final rule by moving an individual instead of a position. To better capture OPM's intent in this final rule, OPM will revise 5 CFR 302.602(b) to read: (b) Where the agency, notwithstanding the requirements of section 302.602 of this part, asserts that the move of the original position or any subsequent position to which the individual is involuntarily moved thereafter, will eliminate competitive status or any procedural and appeal rights that had previously accrued, the affected individual may appeal from that determination and request an order directing the agency (A) to correct the notice to provide that any previously accrued status or procedural and appeal rights under those provisions continue to apply, and (B) to comply with the requirements of either chapter 75, subchapter II or section 4303 of title 5, United States Code, in pursuing any action available under those provisions, except to the extent that any such order would be inconsistent with an applicable statute.

To address the concern that an agency could remain silent regarding an employee's status and rights upon a move, OPM will modify section 302.603(c) to read that: Where the agency fails to comply with § 302.602(c)(1) of this part, and fails to provide an individual with the requisite notice, the affected individual may appeal and request an order directing the agency to comply with that provision.

Finally, this commenter suggested that OPM modify section 302.603 to also allow for appeals based on involuntary though not necessarily coercive movements. OPM will adopt this suggestion. Employees retain their civil service status and protections during involuntary movement into or within the excepted service, regardless of whether the movement was coerced or performed by other involuntary means. OPM will add a 5 CFR 302.603(d) to read: (d) An individual may appeal under this part on the basis that (A) a facially voluntary move was coerced or otherwise involuntary for purposes of this section or (B) a facially voluntary move to a new



position would require the individual to relinquish their competitive status or any civil service protections and was coerced or was otherwise involuntary.

Another comment from an employment lawyers association supportive of the rule suggested that OPM revise the rule to bring section 302.603 appeals under 5 U.S.C. 7701, so that successful appellants are not burdened with attorney's fees or the costs of litigation. Comment 40. OPM appreciates this suggestion but will not add regulatory language to this effect as it goes beyond the scope contemplated in the proposed rule. If experience with such appeals indicates further changes might be warranted, OPM can pursue regulatory options then.

Comment 920, an individual, was supportive of the rule but expressed concern that it would not be sufficiently protective in cases of "wholesale reclassification." The comment questioned whether individual appeals would be effective if an agency attempted to involuntarily move a majority of its workforce all at once while purportedly stripping them of civil service status and protections. The President and OPM have the authority to reschedule positions but, as explained in this rule, there are ways to do so without infringing on this authority that are protective of the civil service and merit system principles as envisioned by Congress. Further, to the extent "wholesale reclassification" is unlawful, there exist other avenues to challenge such a move besides the processes in this final rule.<sup>391</sup>

A few commenters supportive of the rule queried what happens when, by deliberative or inadvertent act, the MSPB is without a quorum. *See* Comments 44, 2442, 3687. As explained above, the appeals described in 5 CFR 302.603 should be treated like all other appeals to the MSPB. Therefore, OPM does not believe that it should revise this final rule to account for the possibility of a lack of a MSPB quorum. Even without a quorum, OPM notes, administrative

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<sup>391</sup> For example, in *Blalock v. Dep't of Agric.*, 28 M.S.P.R. 17, 20 (1985), *aff'd sub nom., Huber v. MSPB*, 793 F.2d 284 (Fed. Cir. 1986) the MSPB rejected an agency's claim that it had removed employees from their Schedule A positions by RIF procedures and appointed them to new Schedule C positions. It found that this RIF was improper, there was no reclassification warranting a RIF, and the redesignation was not a "reorganization." Therefore, the agency could not have conducted a RIF and the agency's abolishment of their Schedule A positions constituted individual adverse actions against the incumbents. The MSPB directed the agency to reinstate the employees whom it had separated without adhering to applicable adverse action procedures.

judges (AJs) can issue initial decisions. If neither party to a case files a petition for review, the AJ's initial decision becomes the final decision of the Board. Appellants could then choose to exercise their judicial review rights.<sup>392</sup> If either party files a petition for review to the MSPB, a Board decision could not be issued until a quorum of at least two Board members is restored but the Clerk of the Board can still exercise delegated authority to “grant a withdrawal of a petition for review when requested by a petitioner.”<sup>393</sup>

Finally, Comment 2816, from a former federal official, again suggests that OPM clarify that the changes proposed within 5 CFR 302.603 include SES Positions. OPM will not adopt it for the same reasons it did not adopt a similar suggestion regarding sections 302.601 and 302.602.

## **V. Regulatory Analysis and Related Comments**

### **A. Statement of Need**

On December 12, 2022, OPM received a petition from the National Treasury Employees Union (NTEU), which represents Federal workers in 34 agencies and departments,<sup>394</sup> 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.<sup>395</sup> 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 argued 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

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<sup>392</sup> See 5 U.S.C. 7703.

<sup>393</sup> See U.S. Merit Sys. Prot. Bd., “Frequently Asked Questions about the Lack of a Quorum Period and Restoration of the Full Board, Updated: February 27, 2023,”

[https://www.mspb.gov/New\\_FAQ\\_Lack\\_of\\_Quorum\\_Period\\_and\\_Restoration\\_of\\_the\\_full\\_board.pdf](https://www.mspb.gov/New_FAQ_Lack_of_Quorum_Period_and_Restoration_of_the_full_board.pdf).

<sup>394</sup> See Nat'l Treasury Employees Union, “Our Agencies,” <https://www.nteu.org/who-we-are/our-agencies>.

<sup>395</sup> See Nat'l Treasury Employees Union, 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>.

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. For the reasons described in the proposed rule and this final rule, OPM determined it was prudent to consider the points raised.

By operation of law, certain 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 notes that this section precludes noncareer political appointees and other statutorily specified categories of employees from accruing these procedural rights, but OPM does not interpret chapter 75 as allowing the President, OPM, or an agency to waive the statutory rights that covered employees have accrued. These final rules are to clarify and reinforce that point.

The now-revoked Executive Order 13957 introduced a new conception of the phrase “confidential, policy-determining, policy-making or policy-advocating character,” as used in the adverse action exception in 5 U.S.C. 7511(b)(2), and sought to employ that conception to expand the category of employees excluded from adverse action procedural rights.<sup>396</sup> This phrase is a term of art with a long history. It has been broadly understood, based upon context, history, and practice, to mean political appointees. Using that language as the former President used it in Executive Order 13957—to remove rights from career civil servants—departed from this established understanding. OPM has determined that a regulation interpreting and clarifying this provision, pursuant to OPM’s statutory authority to prescribe regulations to carry out the purpose of subchapter II of chapter 75, is warranted.<sup>397</sup>

The CSRA and merit system principles have informed OPM’s regulations regarding the competitive and excepted services, and employee movement between them. One of those

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<sup>396</sup> 85 FR 67361-62.

<sup>397</sup> 5 U.S.C. 7514.

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 competitive service positions 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,<sup>398</sup> such as where positions are placed temporarily in the excepted service for the purpose of a trial period leading to a permanent appointment in the competitive service;<sup>399</sup> OPM authorization to create certain new positions in—or move certain existing positions into—the excepted service;<sup>400</sup> publication in the *Federal Register*;<sup>401</sup> and an acknowledgment of the consent of affected employees when an existing employee obtains a different position in another service or schedule.<sup>402</sup> The now-revoked directions to agencies contained in Executive Order 13957, for implementing the now-defunct Schedule F, called into question the continued vitality of these longstanding principles with respect to employees who had accrued adverse action rights. We seek to confirm these principles through this final rule.

OPM received numerous comments relating to the need for this rule. Most of the comments were supportive.

#### *Comments Regarding the Need for This Final Rule*

Several comments agreed with OPM that this rule would protect the nonpartisan career civil service and merit system principles. Comment 684, an individual, contended that “[t]he rule will help preserve the autonomy of the civil service, allowing its professionals to complete their

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<sup>398</sup> 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.”); 5 CFR 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 the civil service laws, rules, and regulations, and records pertinent to these matters”); 5 CFR 10.2 (OPM authority to set up accountability systems); 5 CFR 10.3 (OPM authority to review agency personnel management programs and practices).

<sup>399</sup> See, e.g., 5 CFR part 362.

<sup>400</sup> 5 CFR 6.1.

<sup>401</sup> *Id.*

<sup>402</sup> 5 CFR 302.102(b).

work without arbitrary fear or favor of current elected office holders and making it possible for the government of the United States to serve its people consistently and evenhandedly across administrations.” *See also* Comments 9 (arguing that the government “cannot properly function if civil servants are forced to curry political favor rather than carry out the work laid out for them by law,”), 1310 (explaining that the rule will help preserve the many benefits of the civil service), 3687 (same). Comment 1691, an individual, contended that “[b]y ensuring that federal employees retain their civil service protections and status during transitions between the competitive and excepted services, the rule enhances job security and employee rights.” Also, the rule “clarifies the definitions of roles exempt from these protections, bringing greater transparency and adherence to legislative intent. Importantly, the introduction of procedural safeguards and the right to appeal to the Merit Systems Protection Board empowers employees, fostering a fairer and more accountable federal workforce.” Commenter concluded that “[t]his rule change is not just a regulatory update; it’s a reaffirmation of our commitment to a merit-based, transparent, and equitable civil service.” *See also* Comment 949 (an individual, expressing concern that ambiguities in the civil service statutes, addressed by this rule, could allow for mass firings based on political favor).

Regarding the rule’s protection of merit system principles, an individual wrote, “[i]n a time when preserving the merit-based and non-partisan principles of the federal workforce is of paramount importance, this proposed rule stands as a beacon of clarity and fairness.” Comment 3800. It is “essential to safeguard the rights and protections of federal employees while also maintaining flexibility for necessary personnel movements. It is my firm belief that implementing this rule will promote good administration, uphold merit system principles, and provide federal employees with the confidence that their careers and rights are protected.” *Id.* Commenter concluded that the rule “ensures that decisions related to the movement of positions are made judiciously, with adherence to the rule of law and congressional intent.”

Some commenters opposed to this rule argued that civil service procedures cause hiring, performance management, and misconduct challenges and this rule would only exacerbate those challenges and hurt accountability. Comment 4097 stated, “Chapters 43 and 75 have proven to be longstanding and entrenched barriers to effectively addressing performance and conduct issues. ... The reality is that they give federal employees ‘a de facto form of life tenure, akin to that of Article III judges ... What’s more, federal employees know it—and they take full-throated advantage of it.’”<sup>403</sup>

As noted in prior sections, OPM does not agree with commenter’s characterizations of the futility of chapters 43 and 75 or that career civil servants are broadly “taking advantage” of those protections to some inappropriate end. Under commenter’s theory, Federal employment should be at-will. As discussed above and in the following Section V.(B), the civil service has sufficient and longstanding tools to deal with actual misconduct or unacceptable performance. 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 and other authorities. More importantly, if commenter believes that the current performance management system, as reflected in chapters 43 and 75, is inadequate, then the appropriate solution is to try to convince Congress of that proposition and suggest corresponding changes to the statutory scheme. In contrast, distorting existing provisions to have a meaning untethered to long-settled understandings and removing adverse action rights from thousands of employees whom Congress intended to protect is not an appropriate means of addressing the putative problem with the statutory scheme.

Commenter 4097 also argued that this rule, and its removal restrictions, are unnecessary to protect merit. Commenter wrote “the merit system operated for eight decades with federal employees generally unable to appeal dismissals; the Lloyd-La Follette Act expressly provided that no trial or hearing would be required to effectuate removals. Many state governments

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<sup>403</sup> Citing *Feds for Med. Freedom v. Biden*, 63 F. 4th 366 (5th Cir. 2023) (J. Ho concurrence).

currently operate at will. Nonpartisan, merit-based civil services can, do, and did operate effectively at will. Schedule F’s elimination of those restrictions is fully consistent with an effective merit service.” Commenter then added “[n]onetheless, OPM’s confusion on these points is understandable” because “federal unions prompted this rulemaking” and “have long used the specter of the spoils system to oppose civil service reforms.”

While a labor union petitioned OPM to promulgate regulations regarding civil service protections, OPM is fully capable of analyzing these issues on its own, and is promulgating measured amendments, using its own expertise, and based squarely within statutory and regulatory authority, legal precedent, and history, to reinforce and clarify these longstanding civil service protections and merit system principles.

Also, as noted above, other commenters (*see* Comment 2822) take issue with Comment 4097’s interpretation of history and law in support of Schedule F. Since the Pendleton Act, Congress has barred terminations based on political grounds to preserve merit-system principles. A few years later President McKinley required just cause and written charges prior to removal—requirements which were codified in the Lloyd La Follette Act to establish that covered Federal employees were to be both hired and removed based on merit. Comment 2816, a former federal official, cited studies showing the negative impacts of at-will employment on states and several other state employees commented how these reforms have been harmful. OPM therefore does not agree that the elimination of civil service protections is “fully consistent with an effective merit service.”

Several individuals supportive of the rule argued that it would effectively protect civil servants from politicization. Comment 11 wrote that the “proposed rule is a necessary and timely response” to efforts that could “undermine the civil service system and politicize it for partisan purposes.” Comment 371 stated that the rulemaking would protect the civil service from “employment decisions based on anything but job performance and qualifications.” *See also* Comments 704 (arguing that the rule “acts as a necessary buffer against the potential upheaval

and erosion of our institutions, and would help to ensure stability of essential government agencies.”), 711, 3751. A professor contended the rule “provides appropriate protection against these negative effects” of politicization. Comment 1971.

A coalition of national and local unions, including the union that submitted the petition for rulemaking referenced above, expressed their support for this rule. They stated, “OPM would make important clarifications regarding the rights of federal employees whose positions might be shifted from the competitive service to the excepted service or from one excepted service schedule to another. We urge OPM to finalize the rule promptly.” Comment 41.

Commenters opposed to this rule argued that the civil service needs performance management, and this rule will have a negative effect on the stated intent, resulting in government inefficiency and waste. Comment 2866, a legal organization, argued that “American taxpayers should not be forced to fund lazy, incompetent, or insubordinate federal employees who fail to complete their work, seek to undermine the democratic process by failing to carry out the President’s agenda, or both.” Comment 4097 argued “OPM’s proposed rule would instead make dismissing employees in senior policy-influencing positions for poor performance or intransigence considerably more difficult. This would ‘seal up’ poor performers in the bureaucracy. ... [C]hapter 43 and 75 procedures are insufficient to combat these ‘levers of resistance.’”

For the reasons stated above, OPM disagrees with commenters’ views as to the sufficiency of performance management tools. These tools are also addressed further in Section V.(B). Moreover, this rule tracks the status quo, so it would not make performance management more difficult. The amendments to parts 210, 212, 432, and 752 clarify longstanding civil service law and agency procedures. Nor do commenters explain how the changes to part 302 and resulting procedures would impact performance management. They are instead directed at potential movements of positions or employees from the competitive to the excepted service or between schedules in the excepted service, and added for the purposes of good administration, to



enhance transparency, and to provide employees with a right of appeal to the MSPB to protect against potential abuses. In essence, they provide an avenue of relief to an employee in the event the employing agency fails to inform the employee of the impact of the move on the employee's rights or the employee is concerned that the move is an attempt to strip the employee of civil service status and protections.

Further, actual resistance to supervisory direction would generally be expected to produce unacceptable performance that could be demonstrated on the record under either chapters 43 or 75.

Comment 4097, from an advocacy nonprofit organization, also argued that this rule would increase politicization. *See also* Comment 3156 (the same commenter, arguing that “political appointees rationally respond to intransigent career staff by cutting them out of the policy process.”). Comment 4097 argued that this rule would “discourage vetting prospective policies with career staff” because “the practical consequence of insulating career staff from accountability is political appointees cut them out of the loop to avoid leaks.” Commenter added “[i]f career officials feared leaking draft policies could end their careers, political appointees would have more freedom to seek their input.” As an example, commenter states, “OPM career staff were entirely cut out of the development of Schedule F. The White House realized sharing policy proposals with OPM career staff was tantamount to sending them to federal unions and other reform opponents.”

Generations of civil servants have worked with administrations and political appointees of both parties to advance their policies. For instance, as explained above, Comments 2822, a legal nonprofit organization, and 3038, a former civil servant, observe that the Reagan, Bush, and Trump Administrations succeeded in advancing many of their policy efforts even if, as Commenter 4097 contends, federal employees lean liberal.

Commenter adds “[i]f there were no restrictions on removing policy-influencing career staff political appointees could simply dismiss employees they knew *or strongly suspected*

leaked deliberative policy documents.” (emphasis added). This comment suggests that, under its preferred scheme, suspicion of leaking, without proof, would be a basis for removal. OPM believes such an environment would chill employees broadly and interfere with their willingness to present objective analyses and frank views in carrying out their duties, thus diminishing the reasoned consideration of policy options. Moreover, by instilling fear of reprisal and loss of employment, it would damage retention and recruitment efforts, as explored in the following section, thus further fracturing the successful functioning of government and our democracy.

Individuals opposed to this rule also added that it is a means for the “bureaucracy” to “protect itself from any disruption or risk to its continued employment.” Comment 20, *see also* Comment 3130. Comment 45, a former political appointee, stated this rule “is a truly clear demonstration of bureaucrats in full self-protection mode, operating as an independent, unaccountable, deep state fourth branch of government, outside the United States Constitution” and its “goal is simply to expand more protections to as many of the current administrative state’s lackeys as possible.” Comment 31 adds “[t]here is probably no private business that allows its ‘employees’ to first make up & approve their own policy, salary, benefits, performance etc. and then to ‘manage’ and ‘interpret’ their duties to the general public.”

OPM is headed by a presidentially appointed and Senate-confirmed Director, who is accountable to the current President. It has both career staff and political appointees. Accordingly, this rule is not the work product of unaccountable bureaucrats. OPM also does not, through this rule or any rule, “make up” the “bureaucracy’s” adverse action rights—those rights have been granted to incumbents of various positions in the civil service by Congress after vigorous and careful debate. In that way, and many other ways, the civil service is also unlike employees in private businesses in the same way that government agencies, though mindful of sound business practices where they appropriately apply, are not and cannot be identical to a business. Congress decided, long ago, to create a civil service based upon merit system principles (and has added, over time, various protections for career employees) to protect against

politicization, build competencies, enhance the ability to transmit knowledge during transitions, and generally advance the public interest. OPM is tasked by statute with the authority to execute, administer, and enforce all civil service rules and regulations as well as the laws governing the civil service.<sup>404</sup> All of its rules give effect to Congress' intentions under title 5, including civil service protections and merit system principles. This rule is a standard exercise of the delegated authority Congress provided to OPM.

Several commenters expressed support for the rule, in part, because it is being promulgated through notice and comment in accordance with the APA. This is contrasted with Executive Order 13957 establishing Schedule F, which a professor argued “was developed in secret, with no consultation of public management researchers or experts who could provide evidence to inform its adoption.” Comment 50. It “sought no consultation of researchers or experts in public management, so the Executive Order is free of any peer-reviewed evidence to support its adoption.” Comment 2594 (an individual), *see also* Comment 3213 (an individual). The rule, commenters argued, “is thoroughly researched, and invites public comment,” demonstrating a high degree of public engagement. Comments 50, *see also* Comments 1677 (an individual), 1780 (same). OPM takes no position as to the executive processes leading to Executive Order 13957 but does acknowledge this rulemaking process resulted from OPM's own research, informed by 60 days of public comment, and now reflects the review and consideration of the thousands of comments received. This final rule, moreover, furthers 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 Act's repudiation of the spoils system.<sup>405</sup> The President further noted that revoking Schedule F was necessary “to enhance the efficiency of the civil service and to promote good

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<sup>404</sup> *See* 5 U.S.C. 1103(a)(5)(A).

<sup>405</sup> E.O 14003, sec. 2.

administration and systematic application of merit system principles.”<sup>406</sup> The amendments in this final rule support the civil service and merit system principles for career Federal 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 final rulemaking are many and include both fiscal as well as non-fiscal consequences. As noted in the preamble, this rulemaking is important for preserving the integrity of the Federal career workforce as an independent entity selected in a manner that is free of political influence, and free of personal loyalties to political leaders, consistent with merit system principles. Promulgating measures that help ensure that career employees maintain any status and procedural rights they have accrued under law is a means of preserving the integrity of the Federal career workforce. It preserves and promotes employee morale and settled expectations, 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, and importantly, these changes will promote compliance with statutory enactments.

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.

Many commenters discussing regulatory alternatives focused on the potential impact of this final rule on performance management and the ability to recruit, hire, and retain talent.

#### *Comments Regarding Performance Management*

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<sup>406</sup> *Id.*

Commenters opposed to the rule commented that career civil servants have too many poor performance issues and therefore fewer, not more, protections are needed to allow for their removal. *See, e.g.*, Comment 1802 (an advocacy organization). Comment 90, a form comment, points to a 2020 Federal Employee Viewpoint Survey (FEVS) to say, generally, that “the existing system ... already faces challenges in addressing poor performance.” Comment 45, a former political appointee in favor in Schedule F, similarly cited the 2020 FEVS results<sup>407</sup> showing that 42% of employees agreed with the question: “In my work unit, steps are taken to deal with a poor performer who cannot or will not improve.” Commenter then cited a different question in that FEVS which asked, “In my organization, *senior leaders* generate high levels of motivation and commitment in the workforce.” (emphasis added). Commenter argued that “[a]cross five years from 2016 to 2020, we see worryingly low rates of workers responding in the affirmative, with only 51% of workers doing so in 2020 and it being lower in all previous years surveyed.” Commenter concluded that this “not only signals a demoralizing effect on those workers who do strive for efficiency and satisfactory performance but is also a cause of poor performance itself.”

OPM disagrees with commenter’s analysis and conclusions. “Senior leaders” in the FEVS are defined as the heads of departments/agencies and their immediate leadership team responsible for directing the policies and priorities of the department/agency.<sup>408</sup> These can be career employees but are most often political appointees. It is unclear how the motivation and commitment question relating to *senior leaders* ties to performance management, as commenter concluded, especially since immediate supervisors—the personnel most likely to handle performance management—scored higher than senior leaders in relevant metrics in that same

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<sup>407</sup> U.S. Off. of Pers. Mgmt., 2020 Federal Employee Viewpoint Survey, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf>.

<sup>408</sup> U.S. Off. of Pers. Mgmt., “Federal Employee Viewpoint Survey,” <https://www.opm.gov/fevs/>, *see also* U.S. Off. of Pers. Mgmt., “2022 Federal Employee Viewpoint Survey Results: Technical Report,” (defining “Senior Leader”), <https://www.opm.gov/fevs/reports/technical-reports/technical-report/technical-report/2022/2022-technical-report.pdf>.

2020 FEVS. For instance, 78% of respondents said their immediate supervisor was doing a “good job” overall and 87% said their supervisor treated them with respect. Regarding their close colleagues, 82% of respondents said their work unit had the “job-relevant knowledge and skills necessary to accomplish organizational goals” and 84% said the people they worked with “cooperate to get the job done.”

Comment 4097 and others also argued that FEVS data shows “[a]gencies fail to address poor performers effectively,” citing 2021-2023 FEVS data and the same question as above, this time showing approximately 40% of respondents agreeing that “their agency had taken steps to deal with a poor performer who cannot or will not improve.” *See also* Comments 1811, 3190, 3892. A few also argued (or cited surveys that they allege show) that public trust in government is low. *See* Comments 1811, 1958. Comment 4097 adds that “[m]isconduct—including policy resistance—occurs at unacceptably high levels. The federal hiring process is also widely recognized as broken. The federal workforce needs reform.”

As explained above, under the law, a mere difference of opinion with leadership 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. The FEVS data that commenters argued shows there are too many poor performers in government does not, in fact, show a numerical prevalence of poor performers. There is an important difference between (a) data showing a belief by respondents that poor performers exist and the agency has not adequately addressed their performance and (b) the existence of too many poor performers. For example, if a work unit contains one employee with performance issues out of a 100, then 99 might have one example of a poor performer who has not yet been removed or demoted, but that does not necessarily mean the work unit has a prevalence of poor performers. Also, unless the respondents are in the supervisory chain of an employee with performance issues, they would have little way of knowing what “steps are being taken to deal with a poor performer who cannot or will not improve,” which is the FEVS question repeatedly cited in these comments. For privacy reasons,

supervisors would not normally share information about a particular employee's performance or behavior with other employees, nor would the supervisor be likely to disclose what actions had been taken in response. Commenters have not shown that there are significant numbers of poor performers in government. OPM notes that a 2016 GAO report showed "99 percent of all permanent, non-SES employees received a rating at or above 'fully successful' in calendar year 2013. Of these, approximately 61 percent were rated as either 'outstanding' or 'exceeds fully successful.'" In any event, even if it could be demonstrated that there was a high proportion of unacceptable performance or misconduct among employees, OPM is not free to remove adverse action rights from large swathes of career civil servants. That is an action that may be taken only by congressional enactment.

A few individuals opposed to the rule argued that career civil servants are inefficient and/or provide poor service to the American public. *See* Comments 18, 29. A nonprofit organization claimed the civil service was ineffective and blamed it on the lack of competition "that makes the private sector efficient." Comment 1811. Commenter argued that once an employee accrues worker protections, "they have little incentive to improve their work." And should an agency allege poor performance, "the federal worker has ample time to improve their performance and challenge the claims of the agency." Comment 4097 concurred with this notion, arguing that "[i]n addition to sheltering poor performers, removal restrictions directly make federal employees less productive. Economists consistently find that giving employees removal protections reduces their productivity." OPM notes that commenter cited Ichino and Riphahn (2005); Martins (2009); Riphahn (2004); Scoppa (2010); Scoppa and Vuri (2014) for this proposition. These studies all concern European workers with European-style labor protections. Four exclusively consider private industry and three are further restricted to the impact of a single statute on Italian labor markets. None are about the American civil service. Also, these papers do not purport to and could not show that removing American civil service protections

would make career civil servants more efficient. A loss of protections, instead, would likely lead to a loss of motivation to invest in and hone their skills.

With respect to the claim that, should an agency allege poor performance, “the federal worker has ample time to improve their performance and challenge the claims of the agency,” we note that many supervisors can and do use chapter 75, rather than chapter 43, to suspend, demote, or remove an employee with a history of unacceptable performance. Although it is true that the statutory scheme provides for a notice period and an opportunity to respond, in a chapter 75 adverse action proceeding, the supervisor need only disclose the grounds for proposing the action (which can be unacceptable performance), provide evidence to support the charge, and demonstrate that the action proposed will promote the efficiency of the service. There is no requirement to let the employee try to improve their performance.

One form comment argued, without evidence, that career civil servants do not deserve protections because they are captured by industry. *See* Comment 14, 26. The comment contended that, once a career federal employee has lost independence of decision making to “the patronage of a corporation,” the employee is no longer applying their merit to their employment function, thus their “merit score would be rendered ‘zero.’” The comment argued the employee would then be subject to employment termination. Commenter provided no evidence for this assertion. Whether some civil servants are influenced improperly by outside corporations in the way they conduct their official duties is outside the scope of this rule. But OPM notes that such demonstrable influence, to the extent it exists, could be a violation of federal ethics laws and, in any event, could readily be addressed by existing performance management mechanisms. We reiterate, as well, that whether or not civil servants “deserve” adverse action protections, Congress has provided for them by law, and OPM is not free to eliminate the protections merely because it would allow agencies to more easily remove employees.

Conversely, several commenters in support of the rule agreed with OPM and argued that the civil service already has sufficient tools to deal with performance issues. A public service



nonprofit organization commented that “[c]ritics often claim that it is impossible to fire poor performing federal employees, but data shows that over 10,000 federal employees are terminated or removed due to discipline or performance issues each year (a trend that goes back to at least 2005).”<sup>409</sup> Comment 44. It continued, “[d]espite many misconceptions about the prevalence of poor performers in government, there are reasonable approaches to ensuring managers are trained in using disciplinary and removal procedures and have the necessary tools to manage their workforce, including a streamlined adjudicatory and appeals process.” Comment 1228, an individual, argued that “[t]hrough some may argue that the current system is incapable of removing bad employees, a.) there is little evidence that such incapacity exists, it seems like there are not only good agencies doing good work but also the need to fully staff those same offices, and b.) the benefits of removing low performing employees more easily is drastically outweighed by the risk of an administration creating massively unpredictable alterations to government functioning based on the whims of an incoming administration.” Comment 4016, an individual who worked for the Federal Government for 30 years, added that “[p]oliticization only leads to incompetence in the federal workforce. It’s not easy but a manager can remove poor performers. It can be done as I’ve witnessed and have done many times.” OPM agrees that the civil service contains tools to address misconduct or performance issues.

*Comments Regarding the Effect of the Rule on the Recruitment, Hiring, and Retention of Talent*

In addition to comments about performance management, OPM received many comments about the rule’s impact on recruitment, hiring, and retention efforts. This rulemaking is expected to create an incentive for such efforts. It will enhance agencies’ ability to fulfill important merit system principles, that recruitment should be from qualified individuals in an endeavor to achieve a workforce from all segments of society, and that selection and

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<sup>409</sup> Citing statistics on federal employees drawn from Office of Personnel Management FedScope data on the federal workforce.

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.<sup>410</sup> It also promotes compliance with the congressional policy to confer a preference on eligible veterans or family members 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 that require a response by the Executive branch. These challenges include threats to our nation’s economy writ large, as well as problems impacting small businesses and emerging markets and technologies. There are challenges associated with public health, climate (including impacts on both private property and businesses impacted by droughts, floods, wildfires, etc.), data security, and pressing international and geopolitical matters, among others.

Many commenters were concerned that not issuing this rule would allow politicization (or even the threat of politicization) to increase in the career civil service, which would hurt government recruitment, hiring, and retention efforts.

OPM received several comments concerning politicization that noted, as a baseline concept, that the civil service, unlike much employment in the private sector, is spurred by mission-driven work. Comment 3022 contended “[o]pponents of the Civil Service often voice two objections: ‘Government should be run like a business’ and ‘The boss has the right to hire and fire at will.’” Commenter argued that government is not a business because the purpose of a business is to turn a profit whereas the purpose of government, as “stated in the first paragraph of

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<sup>410</sup> See 5 U.S.C. 2301(b)(1).

the Constitution” is to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”

This desire for mission-driven work helps explain why politicization in the civil service impacts job satisfaction and morale, argued commenters. Comment 2660, a science advocacy nonprofit organization, cited evidence suggesting that when federal scientists perceive that their workplaces are free from political interference, there are positive knock-on effects, such as making that federal agency more attractive when recruiting other federal scientists and increasing retention. Comment 2816, a former federal official, showed that “[e]mployees in highly politicized agencies evince ‘less general satisfaction in the workplace and federal workers in more politicized agencies are less likely to believe their agency compares favorably with other organizations and to recommend their job as a good place to work.’”<sup>411</sup>

Other commenters in support of this rule argued that it would help recruitment. Comment 2059, an individual, expressed that “[a]s someone considering joining the civil service, this is the type of clarification and improvement I would need to see before moving forward.” *See also* Comments 84 (an individual, commenting about the difficulty to recruit and retain competent and dedicated employees to the civil service if they knew that they might lose their jobs at any moment for political reasons), 3038 (a former civil servant arguing that increased politicization diminishes the attraction of government jobs “to excellent workers with the temperament to be truly dedicated public officials”). Comment 2193, a women’s health nonprofit organization, argued that “[m]erit system protections are important for attracting highly qualified individuals to fill open positions and retaining employees who have developed valuable expertise in their topic areas.” Comment 2004, an individual, added that “[e]roding [civil service] protections would also damage the federal government’s ability to attract good people, as job security and a

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<sup>411</sup> Citing David E. Lewis, “Politicization and Performance: The Larger Pattern, in *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance*,” pp. 172, 191 (2008).

sense of purpose are two attractive features of many federal jobs which attract talent that could easily make more money working somewhere else.” Commenter continues, “[i]f these employees have to worry that every election could mean the end of their federal careers, we’ll have a tough time attracting and retaining good people, meaning we’ll have severely damaged the government’s ability to effectively serve the country and implement the policies and programs of any President or Congress.” As examples of politicization’s potential impact on government recruitment, Comment 1904, a national parks advocacy organization, pointed to the National Park Service, saying “[t]he NPS is already struggling with recruiting and retaining employees and the risk of political retribution or misguided politically-driven decisions would only create further challenges.” Comment 857, an individual, gives, as an example, the Environmental Protection Agency, saying “[t]he EPA and other agencies will not be able to attract and retain the best professional staff if they are subject to at will firing. US citizens will not be as safe as a result.”

Comment 407, an individual, detailed how this rule directly impacts OPM’s recruitment and human capital management goals. The rule would “help to maintain the progress of the past two decades on strategic human capital management.” Since 2001, commenter noted, GAO has placed strategic human capital on its biennial high-risk list. In the past two decades, “OPM has reported addressing government-wide skill gaps for certain positions, such as auditors and economists, while gaps persist for other specialties like acquisition or cybersecurity.” Commenter continued “[t]o ensure continued progress, it is imperative that the civil service remain an employer that is professional, apolitical, merit-based, and stable.” Conversely, “inaction or weakened protections for career civil servants may reverse the progress of the last two decades with strategic human capital management and resolving skills gaps.” As an example, commenter stated “auditors and economists may not apply for or remain in federal positions in the face of political interference or retaliation that slants their analysis and work to meet political ends.” The prospect of instability with each change in administration would

“undermine the government’s ability to recruit and retain such key positions.” Commenter concluded, “it would be difficult to keep highly sought and potentially high paid experts in federal employment if they do not think that they will have a job in another 4 or 8 years when the administration changes.”

OPM notes that agencies have specifically raised concerns around attrition rates for scientific and technical positions as well as an inability to hire quickly enough to meet demands. Regarding these types of positions, Comments 3687, a science advocacy organization, and 3973, an anti-poverty nonprofit organization, added that “[i]ncreased politicization of roles also makes public service less attractive and can result in higher turnover and fewer incentives to develop expertise. Managing federal science and technology programs requires a steady cadre of subject area experts, including working with program partners and grantees and balancing competing operational, legal, and political needs. Federal agencies already face challenges hiring and retaining employees in positions that require highly-specialized technical expertise, and failure to insulate the civil service from politicization introduces additional instability and exacerbates this issue.” Similarly, Comment 2660, another science advocacy organization, argued that “[f]ailing to ensure that federal scientists’ jobs are based on merit and other civil service protections is more likely to push federal scientists to consider leaving federal agencies for workplaces that better fit the demands and norms of their scientific profession.” Comment 3409, a former civil servant, contended that “researchers and evaluators who wish to conduct unbiased analyses and present an honest representation of results may avoid civil service positions under such conditions. The quality of the federal workforce would decline as a result.” Comment 2001 added “[a]s a trained engineer with extensive software, data analysis, and data science experience, I have long considered working for the federal government a dream of mine that I would love to pursue should the opportunity arise. The reason for that is that the United States’ strong tradition of an apolitical, well-protected civil service that is hired and rewarded based on

merit, rather than political connections, makes it something that I couldn't help but aspire to.

This tradition must be protected.”

One commenter opposed to the rule argued it will hurt the ability to hire, but that seems to be based largely on their concerns about the time and resources necessary to hire into the competitive service. Comment 4097 stated “the competitive hiring process is broken. There is widespread consensus that the federal hiring process needs reform. It takes agencies an average of about 100 days—more than three months—to fill vacant positions in the competitive service.” Commenter argued that private employers do not have to use these procedures and can hire qualified applicants much more expeditiously. The Comment fails to acknowledge, however, that the rules governing the competitive hiring process were established, largely, by Congress. Congress’ objective was to filter a merit system principle—that selection and advancement of candidates be determined on the basis of relative levels of knowledge, skills, and abilities—through rules enacted to confer a defined advantage, in the process of rating and selection, on individuals eligible for veterans’ preference.<sup>412</sup>

Comment 4097 concluded that OPM’s recruitment concerns regarding efforts to strip career employees of civil service protections are misplaced. Commenter argued that, “[Executive Order 13957] prohibited patronage and stipulated that Schedule F positions would last beyond a presidential term. ... Contrary to OPM’s concerns, Schedule F employees would keep their jobs so long as they performed well and faithfully advanced the President’s agenda.” As explained previously, however, if career civil servants become at-will employees, thereby subjecting them to removal without any cause, we do not understand the basis for commenter’s view that such employees “would keep their jobs.” They may keep their jobs—but they also would be removable at will for any number of reasons.

Comment 4097 stated that “OPM’s recruitment concerns have not materialized in states with at-will workforces.” Commenter again cited snippets of a report concluding that at-will

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<sup>412</sup> See 5 U.S.C. 2301(b)(1), 3301, 3304; see also 5 U.S.C. 3319, 3320.

employment “makes the HR function more efficient.” Whether states can more efficiently fill these positions proves nothing about the applicant pool or the quality of the candidates ultimately selected. *See* Comment 2816 (regarding the effect on state civil servants of at-will laws). At any rate, as Commenter 4097 concedes, these state systems operate under statutory provisions that differ meaningfully from those of title 5.

*Comments Outside the Scope of this Rulemaking and/or OPM’s Regulatory Authority*

Commenters also suggested a variety of other changes. These included requests to curb burrowing in, limit large scale movements of employees (including capping the number of Schedule C appointments), scrutinize the appointments and functions of the SES, review hiring preferences and agencies’ uses of preferences, add whistleblower protections, modify assignment rights applicable to RIF, clarify how agencies should better use probationary periods, reform chapters 43 and 75, streamline performance and accountability processes, and consider whether policies promoted by the rule could be included in collective bargaining agreements. *See* Comments 6, 33, 38, 44, 2442, 2849, 3049, 3227, 3428, 3687, 3894. OPM appreciates these suggestions but found they were either outside the scope of this rulemaking, outside of OPM’s regulatory authority, or both.

As described above, commenters proposed revisions to some of OPM’s regulatory changes to 5 CFR parts 210, 212, 213, 302, 432, 451, and 752. For the reasons described above and summarized below, they were adopted or rejected in whole or in part.

Regarding 5 CFR part 752, OPM’s changes to the regulations for adverse actions are consistent with statute and cannot be further simplified. OPM conforms part 752 with Federal Circuit precedent<sup>413</sup> and statutory language.<sup>414</sup> In addition, OPM makes plain that an employee who is moved involuntarily from the competitive service to a position in the excepted service, or

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<sup>413</sup> *See Van Wersch*, 197 F.3d at 1151-52; *McCormick*, 307 F.3d at 1341-43.

<sup>414</sup> *See* 5 U.S.C. 7501.

from one excepted service schedule to another excepted service schedule, retains the status and civil service protections the employee had already accrued.

One regulatory alternative to conforming part 752 was to forgo changes to the regulation and allow Federal agencies to continue relying upon 5 U.S.C. 7501 and 7511 for a more complete understanding of eligibility for procedural and appeal rights. However, as the 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.<sup>415</sup>

OPM agrees that current regulations need updating and does so through this rulemaking.

OPM is amending the coverage-related provisions in part 752 to close the gap between current regulations and relevant precedent interpreting the underlying statute, thus adding clarity. In addition, OPM provides guidance on implementing the statute. Having regulations that are congruent to the underlying statute, as interpreted in binding precedent, should mitigate potential errors in cases where an agency might mistakenly believe it is free to terminate employment without following adverse action procedures. Failure to align the regulations with applicable precedents could produce improper terminations. These terminations might then be overturned at the MSPB, resulting in wasted resources and frustration for agency supervisors. It could also mean the continued employment of a poorly performing employee, until a proceeding under chapter 75 or chapter 43 could be undertaken and sustained. Revising this regulation thus promotes efficiency in removing or disciplining employees and addresses complaints that the Federal removal process is too cumbersome. Through this rulemaking, OPM is conforming the regulation to essential statutory requirements that have not been previously reflected in OPM's regulations.

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<sup>415</sup> U.S. Merit Sys. Prot. Bd., "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](https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf).



OPM is issuing these regulations in the least burdensome way possible. Fundamentally, the amendments to part 752 do not impose new requirements on agencies that are not already in place through existing statutes, regulations, and case law. This includes the provisions that an employee retains accrued rights when the employee is moved involuntarily 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, or policy-advocating” and “confidential or policy-determining” positions but, as stated in the proposed rule and here, doing so adds important clarity. This final rule more explicitly defines the employees and positions that are excluded from civil service protections to align with relevant statutory text, congressional intent, legislative history, legal precedent, and OPM’s longstanding practice. Accordingly, OPM adds a definition for these terms of art to clarify that they mean 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.

Finally, OPM’s addition of 5 CFR 302.602 establishes minimum requirements for moving employees and positions into and within the excepted service and creates new guardrails to protect existing rights and reinforce merit system principles. OPM also confers in 5 CFR 302.603 a narrow MSPB appeal right to an employee whose position is placed involuntarily into the excepted service, or an excepted service employee whose position is placed involuntarily into a different schedule of the excepted service, and when, in any such move, in violation of these regulations, an agency asserts that the employee loses status or any civil service protections they had already accrued.

OPM weighed the alternative of not conferring a right of appeal to the MSPB. As stated in 5 CFR 1201.3, the 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, an OSC complaint, an administrative grievance, or if applicable, a grievance under a negotiated grievance procedure. However, with regard to an allegation that an agency has asserted that the employee loses status or any civil service protections the employee has already accrued, or that an agency coerced the employee to move in a manner that was facially voluntary to a new position that would require the employee to relinquish their status or any civil service protections, OPM concluded that the current scheme of avenues for redress is less complete than 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.

Currently, if an employee alleges that an agency has committed 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 personnel action and claim as an affirmative defense that the agency committed a prohibited personnel practice. OPM’s selected option—the addition of 5 CFR 302.603—provides an earlier recourse to employees, following an involuntary movement, or at a later point, if a personnel action is undertaken without following appropriate procedures, as detailed in section 302.603. This enables employees to protect their status and rights and 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**

These revisions clarify and reinforce existing employee protections and 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.<sup>416</sup> 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 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.”<sup>417</sup>

Where Congress has created a property interest in a position for tenured employees, due process considerations protect employees from an unlawful deprivation of that interest.<sup>418</sup> Procedural protections 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.<sup>419</sup>

For the reasons stated in the proposed rule and in Section IV(A-C) of this final rule—including OPM’s responses to comments therein—these rules will reinforce protections and 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

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<sup>416</sup> U.S. Merit Sys. Prot. Bd., “What is Due Process in Federal Civil Service,” pp. ii, 4 (May 2015), [https://www.mspb.gov/studies/studies/What\\_is\\_Due\\_Process\\_in\\_Federal\\_Civil\\_Service\\_Employment\\_1166935.pdf](https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf).

<sup>417</sup> *Id.*, at cover letter.

<sup>418</sup> See *Loudermill*, 470 U.S. at 541.

<sup>419</sup> U.S. Merit Sys. Prot. Bd., *supra* note 32 at pp. ii–iii.

above). The reporting requirements relating to excepted service positions align with those with which OPM already must comply.

#### **D. Costs**

This final rule requires agencies to update internal policies and procedures to ensure compliance with the final regulations at 5 CFR 210.102(b), 212.401, 213.3301, 302.101, 302.602, 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 will affect the operations of approximately 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. OPM cannot 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 2024 rate for a GS-14, step 5, from the Washington, DC, locality pay table (\$157,982 annual locality rate and \$75.70 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 \$151.40 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 \$151.40 per hour. Upon publication of the final rule, this would result in first-year estimated costs of about \$6,056 per agency, and about \$484,480 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 final rule, affected agencies would need to resolve any appeals that may arise pursuant to section 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 \$151.40 per hour. This would result in estimated costs in that first year of implementation of about \$18,168 per agency, and about \$1.45 million governmentwide. In subsequent years, we assume a decreased need for appeal resolution as agencies further refine their processes under section 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 \$151.40 per hour. This would result in estimated costs of about \$12,112 per agency annually, and about \$968,960 governmentwide annually in the years after the first year of implementation.

OPM did not receive comments related to the financial costs of this rulemaking, which were presented in the proposed rule.<sup>420</sup> OPM adheres to its view in the proposed rule and will adopt the estimates as set forth here. In sum, OPM estimates the first-year cost to be approximately \$24,224 per agency, and about \$1.94 million governmentwide. For subsequent years, we estimate annual costs to be \$12,112 for agencies, and about \$968,960 governmentwide.

#### **E. Benefits**

These final regulations 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 longstanding civil service protections, but also by 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

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<sup>420</sup> 88 FR 63862, 63880.

of leadership’s greatest priorities.”<sup>421</sup> 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 final rule has several important benefits. It supports the retention of Federal career professionals who provide the continuity of institutional knowledge and subject-matter expertise necessary for the critical functioning of the Federal Government.<sup>422</sup> “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.”<sup>423</sup> The rights and protections afforded to career Federal employees offer a more stable alternative to comparable private and non-government sector positions.<sup>424</sup> 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 or a new schedule in the excepted service. “Instability and politicization makes public service less attractive, leading to higher turnover of experienced civil servants and giving public officials less reason to develop expertise.”<sup>425</sup> OPM cannot estimate the exact value of this benefit to taxpayers because it would depend on the

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<sup>421</sup> U.S. Off. of Pers. Mgmt., “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>.

<sup>422</sup> Donald P. Moynihan, “Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service,” *Pub. Admin. Rev.*, p. 174, 177 (Jan.-Feb. 2022).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

number of positions moved by an agency. Nevertheless, the final 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 funds) in a timely and efficient manner.

*Comments Regarding the Benefits of this Final Rule*

The benefits of civil service protections, which this rule would uphold, have been widely recognized by Congress, civil servants, and the American public for 140 years. Comment 2816, a former federal official, argued that “[t]he notion of a competitively selected civil service is far from a modern creation; the justification for competitive selection stretches more than a century and a half. Throughout that period, Congress has grappled with the same concerns—whether and how to insulate civil servants from political forces, how to ensure the civil service is staffed by experienced professionals, how to promote trust that the government acts in the public interest—that are at stake in contemporary debates about civil service protections.”

For these reasons, OPM believes that civil service protections and merit system principles provide significant benefits both to civil servants and the American people. This final rule will reduce the risks associated with misapplying the CSRA, depriving civil service protections to those who have rightfully earned them, and needlessly politicizing our nation's nonpartisan career civil service.

As several commenters noted, there is little evidence that supports the notion that a more politicized civil service would increase governmental performance.<sup>426</sup> A professor noted that

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<sup>426</sup> See *id.*; see also Donald P. Moynihan, “Populism and the Deep State: the Attack on Public Service under Trump,” *Liberal-Democratic Backsliding and Pub. Admin.*, (May 21, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3607309](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 Pol.*, 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.”).

opponents of this rule have cited a paper by Spenkuch, Teso and Xu, which argues that political misalignment between political appointees and career agency officials can lead to cost overruns and delays in procurement contracts.<sup>427</sup> Comment 50. The paper reaches this conclusion by looking at voter registration data for civil servants, but especially for procurement officers, and then examines the performance of contracts the procurement officers oversaw, including any cost overruns, ex post modifications, or delays. But Comment 50 argued that the paper actually shows the risks of politicization. The professor argued that, “[w]hile there are certainly key decisions where political appointees should shape policy, specific procurement outcomes is not one. There is no Democratic or Republican ideological approach to procurement that should alter how existing legal processes are implemented.” Commenter continued that politicizing procurement through political alignment would risk “temporary partisan employees redirecting procurement processes to satisfy politically favored contractors” and that “peer-reviewed research in the top-ranked *American Journal of Political Science*” demonstrates this point.<sup>428</sup> A review of federal procurement processes between 2003-2015 shows that greater politicization is associated with more non-competitive contracts and greater cost overruns. The authors of the study that Comment 50 cites conclude that “agency designs that limit appointee representation in procurement decisions reduce political favoritism.”<sup>429</sup> Another professor argued that there is “no equivalent body of peer reviewed evidence” supporting the idea that removing career civil servants from office improves government performance or responsiveness. Studies show that the opposite is true. Comment 1927.

Finally, agency counsel and employee relations practitioners will benefit from the clarifications in this final rule that address current inconsistencies between OPM regulations and

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<sup>427</sup> Citing Jörg L. Spenkuch, Edoardo Teso, and Guo Xu. “Ideology and Performance in Public Organizations.” *Econometrica*, 91, no. 4, pp. 1171-1203 (2023), <https://doi.org/10.3982/ecta20355>.

<sup>428</sup> Citing Carl Dahlström, Mihály Fazekas, and David E. Lewis, “Partisan procurement: Contracting with the United States Federal Government, 2003–2015,” *Am. Journal of Pol. Sci.*, 65, no. 3 (2021), <https://doi.org/10.1111/ajps.12574>.

<sup>429</sup> OPM is also not persuaded to change its analysis based on this paper because it does not address the likely resource costs of politicization on the civil service described in this rule, such as increased attrition and the need to hire new employees with likely less experience and expertise.



statute. After the MSPB recommended that OPM update its regulations to reflect the Federal Circuit’s decisions in *Van Wersch* and *McCormick*,<sup>430</sup> 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 clarifies 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 appropriately.

## **VI. Procedural Issues and Regulatory Review**

### **A. Severability**

If any of the provisions of this final rule 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 final rule 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 if moved involuntarily—would independently remain workable and valuable. Similarly, the portions of this final rule defining “confidential, policy-determining, policy-making, or policy-advocating” and “confidential and policy-determining” can and would function independently of any of the other portions of this final rule. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

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<sup>430</sup> U.S. Merit Sys. Prot. Bd., *supra* note 30.

## **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 certain 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 final 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. Congressional Review Act**

OMB's Office of Information and Regulatory Affairs has determined this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

#### **H. 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.

### **VII. Regulatory Amendments**

#### **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.

**Stephen Hickman,**

*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM amends 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.

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**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 who was in the competitive service and had competitive status as defined in § 212.301 of this chapter at the time:

(1) The employee’s position was first listed under Schedule A, B, or C, or whose position was otherwise moved from the competitive service and listed under a schedule created subsequent to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]; or

(2) The employee was moved involuntarily to a position in the excepted service; remains in the competitive service for the purposes of status and any accrued adverse action protections, while the employee occupies that position or any another position to which the employee is moved involuntarily.

#### **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.*, [§ 302.107](#) also issued under [5 U.S.C. 9201-9206](#) and [Pub. L. 116-92](#), sec. 1122(b)(1).

## **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 character;

\* \* \* \* \*

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.

302.602 Basic requirements.

302.603 Appeals.

**§ 302.601 Scope.**

(a) This subpart applies to any situation where an agency moves:

(1) 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; or

(2) An employee who has accrued status and civil service protections under 5 U.S.C. chapter 75, subchapter II, involuntarily to any position that is not covered by that chapter or subchapter.

(b) This subpart also applies in situations where a position previously governed by title 5, United States Code will be governed by another title of the United States 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 into the excepted service under Schedule A, B, or C, or any schedule in the excepted service created after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], 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 directive, and their location within the organization and provide the list to OPM.

(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 OPM with 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 of the identified positions or specific slots of particular types of position, supply OPM with the locations in the organization, 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 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 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—

(i) Provide written notification to the incumbent employee of the intent to move the position 30 days prior to the effective date of the position being moved.

(ii) In the written notification required by paragraph (c)(1)(i) of this section, if the movement was involuntary, inform the employee that the employee retains any competitive status or procedural and appeal rights previously accrued under chapter 75, subchapter II, or section 4303 of title 5, United States Code, notwithstanding the movement of the position, and inform the employee of appeal rights conferred under § 302.603 and the timing for exercising such appeal rights.

(d) In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees with respect to any earned competitive status, any accrued procedural rights, or depending on the action involved, any appeal rights under chapter 75, subchapter II, or section 4303 of title 5, United States Code, even when moved to the new positions.

(e) Notwithstanding the use of the plural words “positions,” “employees,” “individuals,” and “personnel actions,” this section also applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

### **§ 302.603 Appeals.**

(a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved involuntarily 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 involuntarily moved to a position in a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b), (c), and (d) of this section. The appeal rights conferred in this section are in addition to, and not in derogation of, any right the individual would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under chapter 75, subchapter II, or section 4303 of title 5, United States Code.

(b) Where the agency, notwithstanding the requirements of section 302.602 of this part, asserts that the move of the original position or any subsequent position to which the individual is involuntarily moved thereafter will eliminate competitive status or any procedural and appeal rights that had previously accrued, the affected individual may appeal from that determination and request an order directing the agency:

(1) To correct the notice to provide that any previously accrued status or procedural and appeal rights under those provisions continue to apply; and

(2) To comply with the requirements of either chapter 75, subchapter II or section 4303, title 5, United States Code, in pursuing any action available under those provisions, except to the extent that any such order would be inconsistent with an applicable statute.

(c) Where the agency fails to comply with § 302.602(c)(1) of this part and fails to provide the individual with the requisite notice, the affected individual may appeal the failure to provide the requisite notice and request an order directing the agency to comply with that provision.

(d) An individual may appeal under this part on the basis that:

(1) A facially voluntary move was coerced or otherwise involuntary; or

(2) A facially voluntary move to a new position would require the individual to relinquish their competitive status or any civil service protections and the move was coerced or otherwise involuntary.

**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, unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (e) of this section.

\* \* \* \* \*

**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 Coverage.**

\* \* \* \* \*

(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), (c)(5) and (6), and adding paragraph (c)(7) to read as follows:

**§ 752.201 Coverage.**

\* \* \* \* \*

(b) *Employees covered.* This subpart covers:

(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 occupies any other position to which the employee is moved involuntarily;

(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 occupies any other position to which the employee is moved involuntarily;

(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 or occupies any other position to which the employee is moved involuntarily;

(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 involuntarily under any schedule of the excepted service and still occupies that position or occupies any other position to which the employee is moved involuntarily;

(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 or occupies any other position to which the employee is moved involuntarily; 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 occupies any other position to which the employee is moved involuntarily.

(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 unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (b) of this section.

\* \* \* \* \*

**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) and (d)(2) to read as follows:

**§ 752.401 Coverage.**

\* \* \* \* \*

(c) *Employees covered.* This subpart covers:

(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) An employee in the competitive service—

(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 in the former section 1599e of title 10, for individuals hired prior to December 31, 2022 (the date that section was otherwise repealed by Pub. L. 117-81, section 1106), 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 of title 5, 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 occupies any other position to which the employee is moved involuntarily;

(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 occupies any other position to which the employee is moved involuntarily;

(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 occupies any other position to which the employee is moved involuntarily;

(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 or occupies any other position to which the employee is moved involuntarily;

(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

involuntarily under any schedule of the excepted service and who still occupies that position or occupies any other position to which the employee is moved involuntarily;

(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 occupies any other position to which the employee is moved involuntarily; 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 unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

(ii) The Office of Personnel Management for a position that the Office has excepted from the competitive service unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section; or

(iii) The President or the head of an agency for a position excepted from the competitive service by statute unless the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section;

\* \* \* \* \*