OFFICE OF PERSONNEL MANAGEMENT

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

[Docket ID: OPM–2025–0004]

RIN 3206–AO80

Improving Performance, Accountability and Responsiveness in the Civil Service

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing a rule to increase career employee accountability. Agency supervisors report great difficulty removing employees for poor performance or misconduct. The proposed rule lets policy-influencing positions be moved into Schedule Policy/Career. These positions will remain career jobs filled on a nonpartisan basis. Yet they will be at-will positions excepted from adverse action procedures or appeals. This will allow agencies to quickly remove employees from critical positions who engage in misconduct, perform poorly, or undermine the democratic process by intentionally subverting Presidential directives.

DATES: Comments must be received on or before May 23, 2025.

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

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

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

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Noah Peters, Senior Advisor to the Director, by email at *employeeaccountability@opm.gov* or by phone at (202) 606–2930.

SUPPLEMENTARY INFORMATION:

OPM proposes this rule to strengthen employee accountability and the democratic responsiveness of American government, while addressing longstanding performance management challenges in the Federal workforce. Chapter 75 of title 5, United States Code (chapter 75) requires most agencies [1] to follow specific procedures to take ''adverse actions'' against employees for misconduct or poor performance—these actions include principally removals, suspensions, or reductions in pay or grade.[2] Most agencies take performance-based adverse actions following procedures set forth in chapter 43 of title 5 (chapter 43).[3] Whether taken under chapter 75 or chapter 43 procedures, employees can appeal such adverse or performance-based actions to the Merit Systems Protection Board (MSPB) and, if unsuccessful, to the Federal Circuit Court of Appeals.[4]

As described below, decades of experience have shown that chapter 43 and 75 procedures make it very difficult for agencies to hold employees accountable for their performance or conduct. The processes are time-consuming and difficult, and removals are not infrequently subject to a protracted appeal process with an uncertain outcome. Surveys show few agency supervisors believe they could dismiss subordinates for serious misconduct or unacceptable performance. This dynamic undermines Federal merit system principles, which call for employees to maintain high standards of conduct and for agencies to separate employees who cannot or will not improve their performance to meet required standards.[5]

The adverse action procedures and appeals that make it difficult for agency leadership to hold employees accountable also empower career employees to insert partisan or personal preferences into their official duties. While most Federal employees nonetheless faithfully perform their jobs, some do not. As discussed in greater detail later in this proposed rulemaking, it is well documented that many career federal employees use their positions to advance their personal political or policy preferences instead of implementing the elected President's agenda. Such behavior undermines democracy, as it enables government power to be wielded without accountability to the voters or their elected representatives.

On October 21, 2020, President Donald J. Trump addressed these challenges with Executive Order 13957, ''Creating Schedule F in the Excepted Service.'' [6] Title 5 generally authorizes the President or OPM to exclude employees in excepted service positions of a ''confidential, policy-determining, policy-making, or policy-advocating character'' (hereafter ''policy-influencing positions'') from chapter 75 procedural requirements and MSPB appeals.[7] Chapter 43 also authorizes OPM to exclude excepted service positions from its procedural requirements and concomitant MSPB appeals.[8] Executive Order 13957 used this authority to create a new Schedule F in the excepted service for policy-influencing career employees. The order required nonpartisan appointments to and removals from Schedule F; these positions remained career appointments filled based on merit and not political affiliation.[9] However, chapter 43 and 75 procedural requirements and appeals would no longer apply. This would enable agencies to expeditiously remove career employees in policy-influencing positions for poor performance or misconduct, such as corruption or for injecting partisanship into the performance of their official duties.

Executive Order 13957 recognized the value of a nonpartisan merit service that develops and maintains institutional knowledge and experience. It strengthened the merit service by giving agencies the tools necessary to hold policy-influencing employees accountable when they fail to uphold high standards of conduct and performance.

On January 22, 2021, President Joseph Biden issued Executive Order 14003, which abolished Schedule F before any positions were transferred into it.[10] In April 2024 OPM issued a final rule (hereinafter the ''April 2024 final rule'') amending the civil service regulations to (1) define policy-influencing positions to encompass only political appointments and have no applicability

[1] Chapter 75 does not apply to all employees or all agencies. See 5 U.S.C. 7511(b).

[2] *See* 5 U.S.C. 7512, 7513.

[3] 5 U.S.C. 4303. Chapter 43 does not apply to all employees or all agencies. See 5 U.S.C. 4301.

[4] *See* 5 U.S.C. 7701, 7703.

[5] 5 U.S.C. 2301(b).

[6] 85 FR 67631 (Oct. 26, 2020).

[7] 5 U.S.C. 7511(b)(2).

[8] 5 U.S.C. 4301(2)(G).

[9] E.O. 13957, sec. 6.

[10] 86 FR 7231 (Jan. 27, 2021).

to career Federal positions; (2) establish comprehensive procedures, including MSPB appeals, governing the transfer of positions to policy-influencing schedules in the excepted service; and (3) provide that any career incumbents moved into such policy-influencing excepted service schedules would remain subject to adverse actions procedural requirements and retain adverse action appeals.[11]

On the first day of his second term President Trump signed Executive Order 14171 on ''Restoring Accountability to Policy-Influencing Positions within the Federal Workforce.'' [12] As described below, until the 1960s the general Federal workforce could not appeal adverse actions. Executive Order 14171 used an express grant of statutory authority to return policy-influencing positions to this historical baseline. To this end, Executive Order 14171 created a new Schedule Policy/Career in the excepted service for policy-influencing positions and made several related modifications to the civil service rules. Under the order Schedule Policy/Career positions remain career positions, filled on a nonpartisan basis using standard career employee hiring procedures. At the same time, employees in such positions will serve at-will and will not be covered by chapter 43 or 75 procedures. This will enable the President and his appointed agency heads to hold Schedule Policy/Career employees meaningfully accountable for their performance and conduct.

The OPM Director is generally charged with executing, administering, and enforcing the civil service rules and regulations of the President and the laws governing the civil service. Accordingly, OPM proposes this rule to strengthen employee accountability and implement Executive Order 14171. OPM proposes amending its regulations in 5 CFR chapter I, subchapter B, as follows:

1. Amending 5 CFR part 213 (Excepted Service) to include Schedule Policy/Career as an excepted service schedule for policy-influencing career positions, while clarifying that Schedule C appointments are exclusively for noncareer (*i.e.,* political) appointments with policy responsibilities. The proposed regulations further clarify that employees filling excepted service positions are in the excepted service, regardless of whether they retain competitive status, and lists increasing accountability to the President as grounds for excepting positions from the competitive service.

2. Amending 5 CFR part 212 (Competitive Service and Competitive Status) to provide that employees with competitive status whose positions are subsequently listed in the excepted service or who are involuntarily transferred into an excepted service position retain competitive status but do not remain in the competitive service while in the excepted position.

3. Amending 5 CFR part 752 (Adverse Actions) to remove the amendments made by the April 2024 final rule and provide that individuals whose positions are reclassified into or who are otherwise transferred into Schedule Policy/Career are not covered by chapter 75 procedural requirements or adverse actions appeals. Additionally, OPM proposes to amend 5 CFR part 752 to remove language pertaining to 10 U.S.C. 1599e, which provided for a 2-year probationary period in the Department of Defense. This language has become obsolete as section 1599e was repealed, effective December 31, 2022, by Public Law 117–81, Sec. 1106(a)(1). The proposed rule further amends 5 CFR part 432 (Performance Based Reduction in Grade and Removal Actions) to remove the amendments made by the April 2024 final rule and to exclude all policy-influencing positions in the excepted service from chapter 43 procedural requirements for performance-based removals.

4. Amending 5 CFR part 210 (Basic Concepts and Definitions (General)) to remove the amendments made by the April 2024 final rule stating that policy-influencing positions are exclusively associated with noncareer political appointments. The proposed rule also amends 5 CFR 213.3301 and 451.302 to conform to the rescission of these definitions.

5. Amending 5 CFR part 302 to remove the amendments made by the April 2024 final rule imposing procedural requirements on movements of positions or employees into policy-influencing excepted service positions (including subsequent MSPB appeals). The proposed regulations also provide that moving or transferring positions into Schedule Policy/Career will not change how appointments to those positions are made. Positions moved from the competitive service will be filled using competitive hiring procedures and employees so appointed may acquire competitive status. Positions moved from the excepted service will continue to be filled using the procedures that applied to their prior excepted service schedule.

As further detailed below, this rulemaking will promote Federal employee accountability and strengthen American democracy while addressing performance management challenges and issues with misconduct within the Federal workforce. It will give agencies the practical ability to separate employees who insert partisanship into their official duties, engage in corruption, or otherwise fail to uphold merit principles. OPM may set forth policies, procedures, standards, and supplementary guidance for the implementation of any final rule.

I. Background

A. History of the Civil Service and Removal Restrictions

Beginning with the Administration of George Washington, the appointment—subject to the advice and consent of the Senate where appropriate—and removal of federal officers occurred at the President's discretion by virtue of Article II of the Constitution. Washington appointed Federalists friendly to the new form of government. Subsequent presidents made appointments and removals to advance their agendas.

However, over the course of the Nineteenth Century, presidents began to lose control of the appointment and removal process due to the rise of the patronage system. By the 1880s appointments to positions in the executive branch were predominantly made based on political connections, typically as a reward for loyal supporters of the party in power. Members of Congress and local party machines would use their influence with the President to get their preferred candidate's Federal appointments. The patronage system began showing strain as the Federal Government expanded rapidly after the Civil War. The Federal civilian workforce nearly doubled in size between 1871 and 1881, from 51,000 to 100,000 employees.[13] The expanded scale made monitoring and managing patronage employees harder for both the President and his Congressional allies. Elected officials spent a significant proportion of their time arranging patronage appointments; future President James Garfield estimated a third of Congress members' waking hours were spent on such tasks. At the same time, the President spent an inordinate amount of time as a ''position broker,'' handing out many jobs under great political pressure.[14]

[11] *See* 89 FR 24982 (Apr. 9, 2024).

[12] 90 FR 8625 (Jan. 31, 2025).

[13] Ronald N. Johnson and Gary D. Libecap, ''The Federal Civil Service and the Problem of Bureaucracy,'' University of Chicago Press, (1994), p. 17. *https://www.nber.org/system/files/chapters/c8633/c8633.pdf.*

[14] *Id.* at 18.

These time demands also meant that patronage appointees became subject to little scrutiny once in office. They often provided poor services that frustrated the President, members of Congress, and the voting public. For example, in the increasingly commercialized U.S. economy of the late 19th Century, businesses needed a well-functioning postal system for shipments and customhouses for imports. They saw how the spoils system often prevented the Government from providing these services reliably; perhaps unsurprisingly a majority of civil service reform association members came from business organizations.[15] Patronage also focused Federal appointees' attention on the local concerns of party machines instead of the national concerns of the President and Congress.[16] By the 1880s, the President and Congress had concluded that the costs of the spoils system outweighed its benefits, and that in many cases patronage appointments made advancing their agendas harder.[17] The final straw was the assassination of President James Garfield by a disappointed office seeker.

This dynamic led Congress to pass, and President Chester A. Arthur to sign, the Pendleton Act of 1883.[18] The Pendleton Act established the classified service—what is today known as the competitive service. Appointments to classified positions were to be made based on merit, assessed through competitive examinations. Executive branch officials could not consider campaign contributions or ''political service'' in appointments to or removals from classified positions.[19] The Pendleton Act also established the Civil Service Commission (CSC) to help implement and enforce its requirements.

When the Pendleton Act became law, President Arthur placed approximately one-tenth of the Federal workforce into the classified service, including half of positions in the postal service and three-quarters of positions in customhouses.[20] The civil service expanded rapidly under subsequent administrations, covering just under half of the Federal workforce by 1896.[21]

Though the Pendleton Act extensively regulated the process of filling classified positions, employees in the new civil service remained at-will. While the law prohibited executive branch officials from dismissing classified employees because they declined to render political services, they otherwise served at the pleasure of the President.[22] Civil service employees also had no right to appeal or otherwise contest removals. Instead, the Pendleton Act was enforced through penalties on officials who violated its requirements.

The reformers who created the Pendleton Act made a conscious decision to keep the civil service at-will. They wanted to create a merit system that would provide high-quality services; they feared that cumbersome removal protections would entrench poor performers. Civil service reformers saw little risk of patronage-based dismissals as long as civil service hiring forbid rewarding campaign supporters with new appointments.[23] George William Curtis, the president of the National Civil Service Reform League who helped draft the Pendleton Act and secure its passage, explained:

> [I]t 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 unfit or incapable clerk can be removed.[24]

In other words, ''if the front door [is] properly tended, the back door [will] take care of itself.'' [25] Reflecting this contemporaneous understanding of the law, President Benjamin Harrison's CSC ''refused to construe the Civil Service Act of 1883 as imposing any limits on the president's removal power and disclaimed any authority to investigate removals aside from those for failure to pay political assessments.'' [26]

The CSC requested an Executive Order requiring officials to formally memorialize the reasons for dismissing civil service employees. The CSC believed this would further discourage covert patronage-based removals. President William McKinley subsequently issued Executive Order 101 on July 27, 1897. This order provided that ''No 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.'' [27] The CSC became concerned that some were construing Executive Order 101's ''just cause'' requirement to mandate the equivalent of a trial to dismiss civil service employees. The Commission believed this ''would give a performance of tenure in the public service quite inconsistent with the efficiency of that service.'' [28] The CSC therefore asked President Theodore Roosevelt to issue an executive order clarifying that ''just cause'' meant any legitimate, non-political reason, and that trials were unnecessary.[29] President Roosevelt did so on May 29, 1902, by issuing Executive Order 173. That order provided that ''just cause'' means any cause, other than political or religious, that promotes the efficiency of the service, and trials or hearings were not required to dismiss an employee.

President William Howard Taft issued Executive Order 1471 in February 1912 reaffirming and restating the prior McKinley and Roosevelt orders. Congress subsequently codified Executive Order 1471 as the Lloyd-La Follette Act of 1912.[30] The Lloyd-La Follette Act mandated that ''no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal.'' [31] The next year the CSC explained the policy governing civil service dismissals:

> The rules are not framed on a theory of life tenure, fixed permanence, nor vested right in office. It is recognized that subordination and discipline are essential, and that therefore dismissal for just cause shall be not unduly hampered. The rules have at all times left the power of removal as free as possible, providing restraints only to ensure its proper exercise . . . Appointing officers, therefore, are entirely free to make removals for any reasons relating to the interests of good administration, and they are made the final judges of the sufficiency of the reasons. No examination of witnesses or any trial or hearing is required . . . The rule is merely intended to prevent removals upon secret charges and to stop political pressure for removals . . . . No tenure of office is created

[15] *Id.* at 19.

[16] *Id.* at 22–24.

[17] *Id.* at 25–41.

[18] Public Law 16; Civil Service Act of 1883, (Jan. 16, 1883) (22 Stat. 403).

[19] *Id.* at sec. 2, fifth.

[20] George F. Howe, ''Chester A. Arthur, A Quarter-Century of Machine Politics,'' F. Ungar Publishing Co. (1966) [1935], pp. 209–210.

[21] *See* Gerald E. Frug, ''Does the Constitution Prevent the Discharge of Civil Service Employees,'' U. Pa. L. Rev., 124, at 955–966. *https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4997&context=penn_law_review.*

[22] Classified employees' status under the Pendleton Act was similar to most private sector workers today. Businesses today cannot fire workers for certain discriminatory reasons, such as race or religion, but employees otherwise serve at the pleasure of their employer.

[23] P.P. Van Riper, ''History of the United States Civil Service,'' Row, Peterson & Co. (1958), p. 102.

[24] *See* Frug, *supra* note 21, at 955.

[25] *See* P.P. Van Riper, *supra* note 25, at 102.

[26] S. Calabresi & C. Yoo, The Unitary Executive: Presidential Power from Washington to Bush (2008), p. 221 (citing 9 U.S. Civ. Serv. Comm'n Ann. Rep. 77 (1892)).

[27] E.O. 101, July 27, 1897.

[28] U.S. Civil Service Commission Annual Report (1902), p. 18.

[29] *Id.* at 19.

[30] 37 Stat. 555 (1912).

[31] *Id.*

except that based upon efficiency and good behavior.[32]

The Lloyd-La Follette Act and its predecessor executive orders did not give classified civil service employees tenure. They instead imposed procedural requirements to prevent merely political or religiously-motivated removals. Agencies remained the sole judge of employee conduct and performance.

For the first six decades of the merit service employees could not appeal removals. That only began to change during the Second World War. The Veterans Preference Act (VPA) of 1944 gave veterans significant hiring preferences for Federal jobs.[33] It also provided that veterans—including those in the excepted service—could be dismissed only to promote the efficiency of the service and allowed veterans to appeal adverse actions to the CSC. The congressional record on this provision is scarce, but commentors have suggested it was motivated by concerns that agencies would honor veteran hiring procedures on the front end, only to pretextually dismiss veterans on the back end.[34] In 1948, Congress amended the law to make CSC appeals binding on agencies.[35] These amendments gave preference-eligible veterans the ability to appeal removals outside their agency.

Until the 1950s, courts would entertain procedural challenges to civil service removals, overturning them where agencies did not follow Lloyd-La Follette procedures. But courts generally avoided examining the substance of removal actions.[36] A significant precedent was established in 1954 when the D.C. Circuit Court of Appeals decided *Roth* v. *Brownell.*[37] The plaintiff, Roth, had been hired into a competitive service position in the Department of Justice (DOJ). President Truman subsequently moved his position into Schedule A of the excepted service. In 1953 President Eisenhower moved Roth's position into the then-newly created Schedule C and shortly thereafter dismissed him. Roth was not a veteran and could not appeal to the CSC. He instead filed suit in federal court, arguing that DOJ had failed to follow Lloyd-La Follette procedures before removing him.

Analyzing the text of the Lloyd-La Follette Act, the D.C. Circuit agreed. The law provided that ''[n]o person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing.'' [38] The court explained that Roth was either removed from the civil service in 1947—when his position was moved into Schedule A—or in 1953, when he was dismissed. Without deciding which action removed him from the civil service, the court ordered his discharge reversed because Lloyd-La Follette procedures had not been followed in either case.[39] *Roth* thus held that Lloyd-La Follette procedures must be followed to take employees out of the competitive service—either through a discharge or through moving the position into the excepted service.

Notably, *Roth* did not allow employees to contest the substance of removals—only whether proper procedures were followed. The D.C. Circuit subsequently clarified that agencies could dismiss employees from confidential or policy-making positions based purely on loss of confidence. In *Leonard* v. *Douglas* (1963) the D.C. Circuit concluded that removing an employee from a policy-making position because his superiors did not find him suitable to advance their policies promoted ''the efficiency of the service'' and was therefore lawful.[40] While the Lloyd-La Follette Act and Veterans Preference Act imposed procedural requirements on removals, agencies generally retained broad authority to dismiss employees for non-discriminatory reasons. Those reasons included removing employees from policy-influencing positions based purely on the belief they would not effectively advance the President's policies.

In the 1950s the courts began to permit limited judicial examination of the substance of removals. In a series of cases, the Supreme Court held that the Due Process clause of the 14th Amendment prohibited the government from dismissing employees for exercising constitutionally protected rights when those activities were unrelated to their job duties.[41]

Consequently, until the 1960s agencies had to follow statutory procedures to dismiss employees, but they could broadly remove employees for any work-related grounds. These grounds included loss of confidence in an employee in a policy-making position. The procedural requirements—notice and an opportunity to respond, followed by a written explanation of the reason for removal—were also modest. For the general Federal workforce, agencies were also the final judge of whether cause existed for dismissal. The Lloyd-La Follette Act was neither interpreted nor applied to give employees a right to their jobs. Courts would rarely evaluate the substance of adverse actions, except if they occurred in response to employees exercising their constitutional rights.

This changed in the 1960s and 1970s. In 1962 President Kennedy's Executive Order 10987 required agencies to create internal procedures for non-veterans to appeal adverse actions.[42] President Richard Nixon's Executive Orders 11491 and 11787 transferred these internal appeals to the CSC, aligning the process for veterans and non-veterans.[43] The Supreme Court also dramatically changed the legal landscape in *Arnett* v. *Kennedy* (1974).[44] In that case the Supreme Court held that a federal employee has a constitutional due process interest in continued federal employment. *Arnett* made constitutional due process challenges generally applicable to civil service removals, not just when employees were fired for exercising constitutional rights.

Congress legislated against this backdrop when it passed the Civil Service Reform Act of 1978 (CSRA).[45] The CSRA replaced the Lloyd-La Follette Act, VPA, executive orders, and private rights of action in Federal court with a new unified framework governing adverse actions and subsequent appeals. President Jimmy Carter explained the law was meant ''to bring efficiency and accountability to the Federal Government.'' [46]

[32] U.S. Civil Service Commission Annual Report (1913), pp. 21–22.

[33] 58 Stat. 387 (1944).

[34] Frug, *supra* note 21, at 959–960.

[35] 62 Stat. 575 (1948).

[36] Frug, *supra* note 21, at 70, n. 134.

[37] 215 F.2d 500 (D.C. Cir. 1954), *cert. denied sub nom, Brownell* v. *Roth,* 348 U.S. 863 (1954).

[38] 37 Stat. 555 (1912).

[39] *Roth* v. *Brownell,* 215 F.2d 500, 502 (D.C. Cir. 1954).

[40] *Leonard* v. *Douglas,* 321 F.2d 749, 751–753 (D.C. Cir. 1963).

[41] *See Wieman* v. *Updegraff,* 344 U.S. 183 (1952) (overturning Oklahoma law forbidding state employees from associating with certain organizations); *Slochower* v. *Board of Education,* 350 U.S. 551 (1956) (overturning New York City law requiring termination of employees who invoke the 5th Amendment right to avoid self-incrimination); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) (School board cannot terminate a teacher for writing a letter to the editor critical of Board policies). OPM notes that none of these cases examined federal employees or considered Article II's vesting of the executive power in the President.

[42] 27 FR 550 (Jan. 17, 1962).

[43] 34 FR 17605 (Oct. 29, 1969), 39 FR 20675 (June 13, 1974).

[44] 416 U.S. 134.

[45] 92 Stat. 1111; Public Law 95–454 (Oct. 13, 1978).

[46] James Carter, ''Statement on Signing S. 2640 Into Law,'' Oct. 13, 1978. *https://www.presidency.ucsb.edu/documents/civil-service-reform-act-1978-statement-signing-s-2640-into-law.*

The CSRA maintained prohibitions on patronage and restricted adverse actions in some respects. For example, the CSRA gave non-preference eligible employees in the competitive service the same right to appeal demotions that preference eligible employees possessed.[47] [48] The CSRA also expanded preference-eligible employees' ability to appeal suspensions. Under the VPA preference-eligible employees could appeal suspensions of greater than 30 days. The CSRA allowed appeals of suspensions of more than 14 days.[49]

In other ways, the CSRA made taking adverse actions easier. It created chapter 43, intended to be a faster process for removing poor performers.[50] It further prevented Federal employees from directly challenging removals in Federal district court. The CSRA instead channeled adverse action appeals to the MSPB, with judicial review of the MSPB rulings. Congress subsequently transferred most appeals of MSPB decisions to the Federal Circuit Court of Appeals when it created that court in 1982.[51] This was intended to create a uniform body of procedures and case law governing the Federal workforce. The CSRA also repealed Lloyd-La Follette provisions governing removal from the competitive service, replacing it with a new unified framework of adverse action appeals for both competitive service employees and excepted service preference-eligibles. The CSRA thus removed from Federal law the language the D.C. Circuit interpreted in *Roth*.

The CSRA originally excluded from chapter 75 adverse action procedures excepted service employees who were not preference eligibles. Chapter 75 also excluded any excepted service employees—preference eligible or not—whose positions the President, OPM, or an agency head, as applicable, determined had a policy-influencing character.[52]

In *United States* v. *Fausto* (1988), the Supreme Court held that employees statutorily excluded from chapter 75 could not contest removals in Federal district court.[53] The Court explained that the CSRA created a comprehensive review system for adverse actions; exclusion from CSRA coverage meant employees could not appeal adverse actions elsewhere. Shortly thereafter, Congress passed the Civil Service Due Process Amendments Act of 1990.[54] This law, which remains in effect, amended the CSRA by extending chapter 75 to generally cover excepted service employees—preference eligible or not—after an initial trial period. At the same time, Congress retained the exclusion for excepted service employees in policy-influencing positions.[55]

To summarize, the Pendleton Act of 1883 did not substantively limit the ability of agencies to remove employees for non-political reasons. Nor did subsequent executive orders or the Lloyd-La Follette Act. They instead required agencies to follow procedural steps and document the basis for their actions, but agencies remained the final judge of the reasons for dismissal. For the first six decades of the merit service employees could not appeal removals outside their agency.

Adverse action appeals began in the 1940s and were initially limited to preference eligible employees. Only in the 1960s did executive orders extend dismissal appeals to the broader Federal workforce. In the 1970s, the Supreme Court construed the Lloyd-La Follette Act to give civil service employees a property interest in their jobs, thus requiring constitutional due process before removals. The Civil Service Reform Act of 1978 reorganized and codified these procedures, creating the civil service framework that remains in effect today. The CSRA and the subsequent Due Process Amendments Act also authorized OPM and the President to exempt employees in policy-influencing positions from chapter 75 adverse action procedures and appeals.

B. Executive Orders 13957, 14003, 14171, and the Prior OPM Rulemaking

President Donald Trump issued Executive Order 13957 creating ''Schedule F'' in October 2020. As previously discussed, chapter 75 adverse action procedures do not cover employees in excepted service positions that the President, OPM, or an agency head have determined are policy-influencing.[56] Prior administrations had only applied this exemption only to political appointments, principally positions in Schedule C of the excepted service.[57] Executive Order 13957 created a new Schedule F (following the pre-existing schedules A through E) for career employees in policy-influencing positions.[58]

Schedule F applied to policy-influencing positions ''not normally subject to changes as a result of a Presidential transition.'' [59] Executive Order 13957 set up a process for agencies to review their workforce, identify such policy-influencing career positions, and ask OPM to move them into Schedule F. The order provided guideposts for that analysis, identifying positions such as regulation writers or officials in agency policy offices as likely belonging in Schedule F.[60] Under 5 U.S.C. 7511(b)(2), any career positions moved into Schedule F would be excluded from chapter 75 adverse action procedures and their associated MSPB appeals.

At the same time, Schedule F positions remained career jobs filled based on merit, not political connections. Any positions filled with the involvement of the White House Office of Presidential Personnel—the White House office responsible for selecting political appointees—could not go in Schedule F.[61] Executive Order 13957 also prohibited hiring or firing Schedule F employees based on their political affiliation or for other discriminatory reasons. It further required agencies to establish internal procedures to ensure compliance with this directive.[62] Executive Order 13957 put policy-influencing career Federal employees in the same position as most private sector workers, generally serving at-will but protected from discriminatory removals.

The order explained that these changes were necessary to enable agencies to more effectively address poor performance. It cited findings from the MSPB's Merit Principles Survey that less than a quarter of Federal employees believe their agency addresses poor performers effectively. Executive Order 13957 explained that poor performance in policy-influencing positions is especially problematic, as it can affect the performance of the entire agency.[63] The order also explained that competitive hiring procedures do not provide enough flexibility to select applicants with the necessary intangible qualities for these important positions,

[47] 5 U.S.C. 7512.

[48] The Veterans Preference Act required agencies to follow adverse action procedures before reducing a preference-eligible veteran's pay or grade, whether the veteran was in the competitive or excepted service. This requirement did not apply to non-preference eligibles.

[49] 5 U.S.C. 7512.

[50] *See* 5 U.S.C. ch. 43.

[51] *See* 5 U.S.C. ch. 77.

[52] 5 U.S.C. 7511(b).

[53] 484 U.S. 439.

[54] Public Law 101–376, 104 Stat. 461, H.R. 3086 (Aug. 17, 1990).

[55] 5 U.S.C. 7511(b)(2).

[56] 5 U.S.C. 7511(b)(2).

[57] 5 CFR 6.2.

[58] Executive Order 13957, 85 FR 67631 (Oct. 26, 2020).

[59] E.O. 13957, sec. 3.

[60] *Id.* sec. 5.

[61] *Id.* sec. 2.

[62] *Id.* sec. 6.

[63] *Id.* sec. 1.

such as sound judgment, acumen, or impartiality.[64]

Schedule F also came in the context of widespread reports of career staff ''resistance'' to Trump Administration policies.[65] While Schedule F employees would not be dismissed based on their personal beliefs, agencies could swiftly dismiss any who did not perform their duties in a nonpartisan manner. However, no agencies moved positions into Schedule F before President Trump left office.[66]

1. Executive Order 14003 and OPM Rulemaking

Shortly after taking office President Biden issued Executive Order 14003 revoking Executive Order 13957 and abolishing Schedule F.[67] Executive Order 14003 described Schedule F as ''undermin[ing] the foundations of the civil service and its merit system principles, which were essential to the Pendleton Civil Service Reform Act of 1883's repudiation of the spoils system'' and that it was necessary to ''rebuild the career Federal workforce.'' [68]

This analysis ignored the fact that Schedule F gave employees stronger removal protections than the Pendleton Act did.[69] It also ignored the fact that the Federal Employee Viewpoint Survey (FEVS) showed career Federal employee job satisfaction rising throughout the first Trump Administration, reaching a record high of 72 percent in 2020.[70] Based on their survey responses, Federal employees did not feel their workforces needed rebuilding.

During the 2024 election cycle President Trump announced plans to reissue Executive Order 13957 if re-elected.[71] Under the Biden Administration, OPM proposed, and in April 2024 finalized, new regulations related to the order.[72] The April 2024 final regulations had three principal components. First, OPM used presidential authority delegated under 5 U.S.C. 3301, 3302, and Executive Order 10577 to regulatorily define the phrases ''confidential, policy-determining, policy-making or policy-advocating'' and ''confidential or policy-determining'' to refer exclusively to political appointments, with no application to career employees.

Second, OPM used those same delegated presidential authorities to add a new subpart F to 5 CFR part 302. Subpart F prescribed mandatory procedures for transferring positions into the excepted service, or into a new excepted service schedule. Subpart F also required agencies notify employees that involuntary movements or transfers into a policy-influencing position would not affect their competitive status or civil service appeals and would allow employees to appeal to MSPB to the extent that an agency committed procedural error or indicated that the transfer would terminate adverse action appeals.

Third, OPM used its own statutory authority under 5 U.S.C. 7514 to provide that, notwithstanding 5 U.S.C. 7511(b)(2), any tenured civil service employees whose positions were moved, or who were otherwise involuntarily transferred into policy-influencing excepted service positions, would remain covered by chapter 75 procedures.

Under the April 2024 final rule, a re-issued Schedule F could not cover career positions, MSPB adjudicators could overturn transfers into Schedule F, and incumbent employees could keep MSPB appeal rights even if their positions were transferred into Schedule F.

The rulemaking responded to a National Treasury Employees Union petition for regulations to prevent the reinstatement of Schedule F.[73] The final rule candidly acknowledged disagreement with Executive Order 13957, but explained that ''OPM does not and cannot prevent a President from creating excepted service schedules or from moving employees.'' [74]

2. Executive Order 14171

Donald Trump won the 2024 Presidential election and promptly fulfilled his commitment, issuing Executive Order 14171 on January 20, 2025. The new order reinstated Executive Order 13957, while amending it in several ways. The order redesignates ''Schedule F'' as ''Schedule Policy/Career.'' This change in nomenclature emphasizes that covered positions remain career positions and are not being converted into political appointments—a common misperception of the original order. The order emphasizes that patronage remains prohibited by defining Schedule Policy/Career to only cover ''career positions.'' [75] It also expressly describes what is and is not required of Schedule Policy/Career employees. They ''are not required to personally or politically support the current President or the policies of the current administration. They are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal.'' [76]

Executive Order 14171 also requires OPM to apply Civil Service Rule 6.3(a) to Schedule Policy/Career positions.[77] This rule authorizes OPM to prescribe by regulation conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status in accordance with the Civil Service Rules and Regulations. This directive requires OPM to generally provide for competitive hiring procedures for Schedule Policy/Career positions.

Executive Order 14171 also overrode significant parts of the April 2024 final rule. That rule used delegated presidential authority to amend parts 210 and 302 of the civil service regulations.[78] President Trump used his executive authority to directly render those amendments inoperative. Executive Order 14171 requires that OPM rescind the amendments made by the April 2024 final rule. It further

[64] *Id.*

[65] *See, e.g.,* Juliet Eilperin, Lisa Rein, and Marc Fisher, ''Resistance from within: Federal workers push back against Trump,'' the Washington Post, January 31, 2017, *https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html.*

[66] 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.*

[67] E.O. 14003, 86 FR 7231, 7231 (Jan. 22, 2021).

[68] *Id.* sections 1 and 2.

[69] The Pendleton Act merely prohibited hiring or dismissing classified employees based on their politics or failure to make political contributions. Section 6 of E.O. 13957 forbid taking any personnel actions prohibited by 5 U.S.C. 2302(b). In addition to political discrimination, this generally forbids any discrimination based on protected characteristics (such as race, sex, or religion) or retaliation against whistleblowers.

[70] U.S. Off. of Pers. Mgmt., 2020 Federal Employee Viewpoint Survey, at 11, *https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2020/2020-governmentwide-management-report.pdf.*

[71] *See, e.g.,* Agenda47, ''President Trump's Plan to Dismantle the Deep State and Return Power to the American People,'' March 21, 2023, *https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-plan-to-dismantle-the-deep-state-and-return-power-to-the-american-people.*

[72] 89 FR 24982 (April 9, 2024).

[73] *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.*

[74] *See* 89 FR 25009.

[75] E.O. 13957, sec. 4(a)(i).

[76] *Id.,* sec. 6(b).

[77] E.O. 14171, sec. 3(d).

[78] OPM relied on delegated Presidential authority under 5 U.S.C. 3301 and 3302 to make these changes.

provides that ''[u]ntil such rescissions are effectuated (including the resolution of any judicial review) 5 CFR part 302, subpart F, 5 CFR 210.102(b)(3), and 5 CFR 210.102(b)(4) shall be held inoperative and without effect.'' [79] Consequently, both the April 2024 final rule's definition of '' ''confidential, policy-determining, policy-making, or policy-advocating'' as a term of art that refers exclusively to political appointees and its procedural requirements for moving employees into such policy-influencing positions are no longer in effect.

In a structural difference with the original Executive Order 13957, the President—not OPM—will now move positions into Schedule Policy/Career. Pursuant to that Executive Order, agencies will review their workforces and petition OPM to recommend that the President move specific positions into Schedule Policy/Career. OPM will review these petitions and make the recommendations it deems appropriate.[80] However, the President will make the final decision about which positions go into Schedule Policy/Career. That decision will be effectuated by a new executive order issued under Presidential—not OPM—authority.

Executive Order 14171 also added new guideposts about positions that may belong in Schedule Policy/Career. Under the order agencies will consider recommending both immediate and higher-level supervisors of Schedule Policy/Career employees for inclusion.[81] If a subordinate employee is in a policy-influencing role, superior officials with authority to tell that employee what to do are also likely policy-influencing. The order further required agencies to consider positions with duties that the OPM Director indicates may be appropriate for inclusion in Schedule Policy/Career.[82]

OPM has issued guidance about positions agencies should consider in their Schedule Policy/Career positions.[83] These additional guideposts consist of:

- Delegated or subdelegated authority to make decisions committed by law to the discretion of the agency head. This identifies a specific subcategory of employees with ''substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law,'' which was one of the categories originally flagged for potential inclusion.[84]
- Authority to bind an agency to a position, policy, or course of action without higher level review or with only limited higher-level review. If an employee has authority to bind their agency without higher-level review they are straightforwardly policy-determining. Such officials are largely—but not exclusively—political appointees out of scope for Schedule Policy/Career.
- Positions statutorily described as exercising important policy-determining or policy-making functions: directing the work of an organizational unit, being held accountable for the success of one or more specific programs or projects, or monitoring progress towards organizational goals and periodically evaluating and making appropriate adjustments to such goals.[85]
- Substantive participation and discretionary authority in agency grantmaking, such as the substantive exercise of discretion in the drafting of funding opportunity announcements, evaluation of grant applications, or recommending or selecting grant recipients. Grantmaking is an important form of policymaking, so employees with a substantive discretionary role in how federal funding gets allocated may occupy policymaking positions.[86]
- Advocacy for administration policy, either in public or before other governmental entities, such as Congress or state governments.
- Positions otherwise described in the applicable position description as entailing policy-making, policy-determining, or policy-advocating duties.

Executive Order 14171 rescinded Executive Order 14003 and directed agencies to reverse any changes to discipline or unacceptable performance policies that followed from it. This requires agencies to restore changes to disciplinary and performance policies from the first Trump Administration that the Biden Administration reversed.

President Trump also explained why he issued this order. Executive Order 14171 cited MSPB research showing only a 41 percent of supervisors are confident they could remove a subordinate for serious misconduct, and just 26 percent are confident they could remove one for poor performance.[87] The order explained that accountability is essential for all Federal employees, but it is especially important for those who are in policy-influencing positions. These personnel are entrusted to shape and implement actions that have a significant impact on all Americans. Under Article II, they must be accountable to the President, who is the only member of the executive branch, other than the Vice President, elected and directly accountable to the American people. Recently, however, there have been numerous and well-documented cases of career Federal employees resisting and undermining the policies and directives of their executive leadership.[88] President Trump concluded that conditions of good administration necessitated issuing the order to restore accountability to the career civil service.[89]

C. Reasons for New Rulemaking

OPM now proposes regulations to rescind the changes made by the April 2024 final rule, implement E.O. 14171, and establish Schedule Policy/Career for policy-influencing career positions. Schedule Policy/Career posts will be filled using standard career hiring procedures, while those who encumber such positions will be excepted from chapter 43 and 75 procedures for adverse actions and performance-based actions. Schedule Policy/Career employees will remain career employees, while being subject to elevated accountability for their performance and conduct. OPM proposes these changes for the reasons set forth below.

1. Change in Administration Policy and Operative Legal Standards

The Constitution gives the President authority to set federal workforce policy, vesting executive power exclusively in the President.[90] Congress

[79] E.O. 14171, sec. 4.

[80] E.O. 13957, sec. 5.

[81] E.O. 13957, sec. 5(c)(vi).

[82] *Id.,* sec. 5(c)(vii).

[83] OPM, Guidance on Implementing President Trump's Executive Order titled, ''Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce'' (January 27, 2025), available at *https://www.chcoc.gov/content/guidance-implementing-president-trump%E2%80%99s-executive-order-titled-restoring-accountability.*

[84] E.O. 13957, sec. 5(c)(iii).

[85] *See* 5 U.S.C. 3132(a)(2)), which defines the Senior Executive Service as positions classified above GS–15 that perform various important policy-making or policy-determining functions. Positions classified at or below grade 15 of the General Schedule that perform those same functions are consequently policy-determining or policy-making and appropriate for consideration for inclusion in Schedule Policy/Career.

[86] OPM notes that employees involved in administering formula or block grant programs will rarely, if ever, have substantive discretionary authority over how those grants are allocated. This guidepost will be primarily applicable to employees with involvement in discretionary grants.

[87] U.S. Merit Sys. Prot. Bd., ''Remedying Unacceptable Employee Performance in the Federal Civil Service,'' p. 15 (June 18, 2019), available at *https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.*

[88] *See* section I(C)(2)(ii).

[89] E.O. 14171, Sec. 1.

[90] U.S. Constitution, Article II, section 1, clause 1. *See also Seila Law* v. *Consumer Finance*

has further tasked OPM with helping the President manage the Federal workforce.[91] President Trump believes Schedule Policy/Career—the successor to Schedule F—is necessary to effectively supervise the executive branch. He was elected on a platform of doing just that and reinstated Executive Order 13957 within hours of taking office. OPM is now proposing to modify its civil service regulations to support the new President's policies. Executive Order 14171 also expressly instructed OPM to rescind the relevant portions of the April 2024 final rule.

Relatedly, Executive Order 14171 has changed the underlying legal authorities under which OPM operates. Sections 3301 and 3302 of 5 U.S.C. recognize the constitutional vesting of Federal workforce management authority in the President. They statutorily authorize the President to prescribe regulations for the admission of individuals into the civil service and to issue rules governing the civil service, respectively. The President can, and has, delegated that authority to OPM. In the April 2024 final rule OPM used this delegated presidential authority, as well as authority delegated under Executive Order 10577, to modify parts 210 and 302 of the civil service regulations.[92] [93] The President has now directly used his authority to render OPM's amendments inoperative. This directive supersedes OPM's prior regulations. Agencies can no longer give effect to 5 CFR 210.102(b)(3), 210.102(b)(4) or subpart F of part 302. OPM is proposing these regulations to align the civil service regulations with the President's policies and operative legal requirements. OPM is also independently basing these regulations on the policy analysis contained herein, and believes that the policy reasons provided herein, standing alone, provide a sufficient basis for this rulemaking.

2. Needed To Address Factors Inadequately Considered in Prior Rulemaking

OPM also now believes that it gave inadequate consideration to several factors when issuing the April 2024 final rule. Upon further consideration, OPM has concluded that these factors call for issuing the proposed regulations.

i. Adverse Action Procedures Make Addressing Poor Performance, Misconduct, and Corruption Challenging

OPM received comments in the prior rulemaking showing that adverse action procedures and appeals make it very challenging for agencies to effectively address poor performance or serious misconduct.[94] These comments, and research which OPM now better appreciates, show that Federal supervisors and employees believe agencies do not effectively address poor performance or serious misconduct—and there is ample basis for this belief.

The MSPB's 2016 Merit Principles Survey shows that less than a quarter of Federal employees believe their ''organization addresses poor performers effectively.'' [95] OPM's FEVS has also long reported similar results. OPM formerly regularly asked Federal employees if they believed that ''in my work unit, steps are taken to deal with a poor performer who cannot or will not improve.'' Agreement with this statement historically ranged from a low of 25 percent to a high of 42 percent. In the history of the FEVS, a majority of Federal employees have never agreed that agencies uphold Merit Principle Six regarding performance standards and employee retention.[96]

OPM removed this question from the FEVS in 2022. The FEVS now asks employees what usually happens to poor performers in their work unit. The modal response—ranging from between 40 to 56 percent of the workforce across survey years—is that the work unit has poor performers, but they remain on the job and continue to underperform.[97]

Third-party researchers report similar findings. Researchers at Princeton and Vanderbilt Universities surveyed Federal executives, asking when underperforming managers and non-managers were reassigned or dismissed. The executives answered ''rarely or never'' in 64 and 70 percent of cases, respectively.[98] Another survey by the Government Business Council found that only 11 percent of federal employees say their agency fires poor performers who do not improve after counseling.[99] The National Commission on Public Service concluded that ''Federal employees themselves are unhappy with the conditions they face . . . [t]hey resent the protections provided to those poor performers among them who impede their own work and drag down the reputation of all government workers.'' [100]

Research further shows that supervisors rarely take action because they do not believe their efforts will succeed. The 2016 Merit Principles Survey finds that only 41 percent of Federal supervisors are confident that they could remove a subordinate for serious misconduct, and just 26 percent are confident they could remove an employee for poor performance.[101] The Government Business Council survey found nearly 80 percent of Federal employees agree that removal procedures and appeals discourage removing poor performers.[102] Federal

Protection Bureau, 140 S. Ct. 2183, 2191 (2020) (''Under our Constitution, the 'executive Power'—all of it—is 'vested in a President' '').

[91] 5 U.S.C. 1103(a).

[92] 19 FR 7521 (November 23, 1953).

[93] The April 2024 final rule did not change the authorities OPM cites for its authority to issue 5 CFR part 210 and Part 302. Those are 5 U.S.C. 1302, 3301, 3302, 8151 and E.O. 10577. These authorities are either grounded in Presidential authority or irrelevant to the instant rulemaking. 5 U.S.C. 3301 and 3302 provide for the President to issue civil service rules and regulations, and in E.O. 10577 the President has delegated certain civil service functions to OPM. 5 U.S.C. 1302(a) authorizes OPM, subject to the President's civil service rules, to prescribe regulations governing civil service examinations, while § 1302(b) and (c) authorize OPM to prescribe regulations implementing veterans' preference. The § 1302(a) authorities are expressly subject to the President's civil service rules, while the § 1302(b) and (c) authorities are not relevant to either the changes made in the April 2024 final rule or this proposed rule; neither alters veterans' preference. 5 U.S.C. 8151 governs civil service retention rights when an employee returns to Federal employment. That authority is likewise inapplicable to the instant rulemaking.

[94] *See, e.g.,* Comments 45, 3156, and 4097. Comments filed in response to the prior rulemaking are available at *https://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.

[95] U.S. Merit Sys. Prot. Bd., ''Issues of Merit,'' (Sept. 2019), p. 3, *https://www.mspb.gov/studies/newsletters/Issues_of_Merit_September_2019_1656130.pdf.*

[96] Merit System Principle 6, Performance Standards states in full: ''Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.'' *https://www.mspb.gov/msp/msp6.htm#:~:text=Merit%20System%20Principle%206%3A%20Performance,performance%20to%20meet%20required%20standards.%22* (last accessed Feb. 14, 2025).

[97] *See* 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;* U.S. Off. of Pers. Mgmt., 2023 Federal Employee Viewpoint Survey, *https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2023/2023-governmentwide-management-report.pdf.*

[98] David E. Lewis & Mark D. Richardson, ''2014 Survey on the Future of Government Service,'' (July 16, 2015), p. 34, *https://www.vanderbilt.edu/csdi/research/SFGSforMayDCv12_weighted_n.pdf.*

[99] Eric Katz, ''Firing Line,'' Government Executive, *https://www.govexec.com/feature/firing-line/.*

[100] Report of the National Commission on Public Service (January 2003), p. 12, *https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf.*

[101] U.S. Merit Sys. Prot. Bd., ''Remedying Unacceptable Employee Performance in the Federal Civil Service,'' *supra,* note 87, at 6, 15.

[102] Katz, ''Firing Line,'' *supra* note 99.

workforce consultants similarly report it is prohibitively difficult to remove employees.[103]

This is a longstanding problem. An MSPB analysis under the Clinton Administration concluded that ''supervisors are usually advised [ ] that it is extremely hard to remove [poorly performing] employees and probably not worth the effort to try.'' That study reported that less than a quarter of Federal supervisors who managed a poor performer proposed demoting or removing them.[104]

Considerable evidence shows that Federal supervisors often find taking warranted adverse actions too difficult and uncertain to be worth the effort. When they do take action, their efforts are not infrequently subject to a protracted administrative process with an uncertain outcome. For example, the MSPB ordered reinstatement of the Chief of the U.S. Park Police, with back pay and interest, despite her repeated, proven misconduct, including serious violations of non-disclosure rules; repeatedly failing to carry out supervisory instructions; circumventing her chain of command; repeatedly violating agency rules; and condoning violations of agency rules by a subordinate.[105] Despite voting to reinstate this employee, an MSPB member called the Chief's behavior ''extraordinary'' and intolerable for someone in an agency leadership position with policy-determining and policy-advocating duties.[106]

In another case, the MSPB ordered reinstatement, with back pay and benefits, of the Executive Director of the National Council of Disability despite the fact that the agency head stated, in a sworn affidavit, that the Executive Director occupied a policy-determining, policy-making, and policy-advocating character and the agency had lost confidence in her.[107]

Failure to address misconduct and poor performance directly undermines Federal Merit Systems Principles.[108] Allowing poor performers to remain, without improvement, directly undermines agency performance—especially in policy-influencing positions that affect the performance of the whole agency. Letting misconduct slide can also create a culture of unaccountability and corruption that hurts Federal employees.

A high-profile example of this phenomenon came to light in a recent FDIC audit. Following public complaints, independent auditors examined the FDIC workplace in depth.[109] They found widespread abusive and corrupt behavior, such as male supervisors pressuring female subordinates for sexual favors in exchange for career assistance.[110] Over 500 current and former FDIC employees reported experiencing misconduct, a disturbingly high proportion of the agency's approximately 6,000 employees.[111]

Even more concerningly, the investigators found the FDIC almost never seriously disciplined employees who engaged in misconduct. The agency's Anti-Harassment program received 92 complaints between 2015 and 2023. Only two resulted in a suspension. Two more resulted in a reprimand. None resulted in a demotion, much less a removal from Federal service.[112] The investigators found that this inaction and a lack of accountability created a culture where employees widely believed reporting misconduct was futile and would only produce retaliation.[113] Investigators further concluded that adverse actions procedures and appeals were a major reason for this lack of accountability. FDIC employees explained that the agency would only take adverse actions in ''air-tight,'' ''highly documented'' cases, for fear of losing subsequent litigation.[114] Adverse action procedures made it difficult for FDIC to hold senior officials accountable for misconduct or corruption, contributing to what many employees described as a ''toxic'' work environment.[115]

The April 2024 final rule provided a cursory and inadequate response to these facts. OPM noted that agencies fire approximately 10,000 employees a year for performance or misconduct.[116] OPM failed to note that most of these dismissals occurred among either temporary or seasonal employees, or during employees' first two years of service—a period when most are still in their probationary or trial periods.[117] Agencies dismiss approximately 4,000 permanent full-time non-seasonal employees with more than two years tenure annually—a rate of separation for performance or misconduct of approximately one-quarter of one-percent. OPM's response also failed to note that, as discussed above, surveys show that agencies rarely separate poor performers and that Federal supervisors believe they are incapable of removing employees for poor performance or misconduct.

The April 2024 final rule argued that FEVS responses are uninformative about Federal performance management because line employees generally do not know what steps their agency takes to address another employee's underperformance.[118] This response demeans the ability of federal workers to directly observe whether agencies separate or discipline colleagues who cannot or will not improve their performance, as demanded under Merit Principle Six.[119] It similarly ignores the related FEVS question asking employees what usually happens to poor performers in their work unit. The modal response is that ''they stay in place and continue to underperform''—an outcome employees witness directly.[120] While employees may not be aware if supervisors are counseling colleagues or giving them an opportunity to demonstrate acceptable performance, they do see the end results of those processes. These surveys consistently show poor performance frequently goes unaddressed. OPM ignored this data in drawing its conclusions for the April 2024 final rule.

The April 2024 final rule also concluded that FEVS data does not show the government has a numerical prevalence of poor performers. For example, it explained that in a work unit of 100 employees and one poor performer, 99 employees might report the continued existence of a poor performer without poor performance

[103] *See* Fred Mills, ''Civil Disservice: Federal Employment Culture and the Challenge of Genuine Reform,'' (2010), pp. 30–31.

[104] U.S. Merit Sys. Prot. Bd, ''Removing Poor Performers in the Federal Service,'' (Sept. 1995), pp. 5, 7, *https://web.archive.org/web/20121007070936/https:/www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACROBAT.*

[105] *Chambers* v. *Dep't of Interior,* 116 M.S.P.R. 17, 62 (2011) (Member Rose concurring).

[106] *Id.* at 63 (Member Rose concurring).

[107] *Briggs* v. *Nat'l Council on Disability,* 68 M.S.P.R. 296 (1995), 60 M.S.P.R. 331 (1994).

[108] *See* 5 U.S.C. 2301(b)(4), 2301(b)(6).

[109] *See* Joon H. Kim, Jennifer K. Park, and Abena Mainoo, ''Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation,'' April 2024, *https://www.fdic.gov/sites/default/files/2024-05/cleary-report-to-fdic-src.pdf.*

[110] *Id.,* Appendix A, pp. A–13 to A–18.

[111] *Id.* at 1.

[112] *Id.* at 2–3.

[113] *Id.* at 3–4.

[114] *Id.* at 154–155.

[115] *Id.* at 58–59, 69, 97, 109.

[116] 89 FR 25040.

[117] Chapter 43 and 75 procedures generally do not apply to employees in their probationary or trial periods. The probationary period is one year for employees in the competitive service. Trial periods—the excepted service equivalent of a probationary period—are one year for preference eligible employees and two-years for nonpreference eligible employees.

[118] 89 FR 25039.

[119] 5 U.S.C. 2301(b)(6).

[120] See U.S. Off. of Pers. Mgmt., 2020 and 2023 Federal Employee Viewpoint Surveys, *supra* note 98.

being widespread in the work unit.[121] OPM further noted that 99 percent of employees receive ''fully successful'' or higher performance ratings.[122]

OPM no longer finds this a convincing rationale for rejecting the evidence from FEVS surveys. The hypothetical OPM provided does not demonstrate that poor performance is rare. Other data suggests otherwise. The National Commission on Public Service, chaired by Paul Volcker, reported that Federal employees believe approximately one-in-four of their colleagues are poor performers.[123] Any employee who fails to achieve a ''fully successful'' rating can by law be denied a salary step increase, creating a major incentive to challenge lower ratings. And employees have many opportunities to contest or appeal their official performance ratings, so it is far from clear that ratings of record can be taken at face value.[124] Supervisors may sadly but rationally rate poor performers as ''fully successful'' to avoid the time and expense involved in litigating an accurate lower rating.

Moreover, Congress has asked the executive branch to remove employees who cannot or will not improve inadequate performance—regardless of their prevalence.[125] Supervisors and line employees alike report adherence to this Merit Principle is the exception, not the norm. Poor performance is particularly problematic in policy-influencing positions because it can affect the performance of the entire enterprise. Consequently, OPM believes the executive branch must have the capacity to effectively address poor performance in policy-influencing positions. OPM now recognizes that the weight of evidence shows that chapter 43 and 75 procedures make effectively addressing poor performance, misconduct, and corruption difficult.

Additionally, the President is the official constitutionally charged with taking care that the law is faithfully executed and statutorily charged with determining when conditions of good administration necessitate new excepted service schedules.[126] It is constitutionally and statutorily up to the President to determine when performance and conduct challenges in the Federal service warrant creating a new excepted service schedule to facilitate greater accountability. The President has made that call pursuant to his direct constitutional and statutory authority, and that judgment should be controlling. Moreover, OPM is independently convinced that Federal employee conduct and performance challenges necessitate Schedule Policy/Career.

OPM accordingly now concludes that chapter 43 and 75 procedures significantly impair agencies' ability to hold Federal employees accountable for poor performance or misconduct, and the proposed regulations implementing Schedule Policy/Career are necessary to ensure high standards of performance and accountability in important policy-influencing positions.

OPM previously argued that even if chapter 43 and 75 procedures made addressing poor performance or misconduct difficult, the appropriate solution would be to try to convince Congress of that proposition and work for corresponding legislative changes to title 5.[127] However, as discussed below, OPM has now concluded that E.O. 14171 is well within the President's constitutional and statutory authority. The President does not need new Congressional authorization to use existing legal authorities.

ii. Proposed Regulations Are Necessary To Strengthen Democracy and Promote a Nonpartisan Civil Service

During the rulemaking process for the April 2024 rule OPM received extensive comments documenting that some career Federal employees engage in ''policy resistance.'' [128] These commenters explained that the adverse actions procedures and appeals that make it challenging to remove employees for poor performance or misconduct create bureaucratic autonomy that enable career employees to advance their own personal or partisan policy preferences instead of those of the elected President and appointed agency heads. OPM broadly dismissed these concerns. Upon further review, OPM has concluded policy resistance is a serious concern—indeed, a serious threat to democratic self-government. OPM now believes these proposed regulations implementing Schedule Policy/Career are necessary to reduce bureaucratic autonomy and strengthen the Government's democratic accountability to the American people.

In the prior rulemaking OPM received many comments from career Federal employees stating that they and their colleagues fulfilled their duties impartially, even when they disagreed with the underlying policies. Executive Order 14171 recognized that many Federal employees do this, and that their performance is a credit to the civil service. OPM also agrees that there are many truly nonpartisan career employees who faithfully carry out their duties irrespective of their personal preferences.[129] Unfortunately, considerable evidence shows that a significant number of career employees instead inject their personal politics into their official duties. Evidence of this comes from many sources.

Academic researchers have long studied the ''principal-agent'' problem in the Federal bureaucracy. The foundational framework for many public administration scholars and political scientists is that career employees (the agents) do not impartially implement the will of Congress or the President (the principals) but have diverging policy preferences and agendas of their own that they actively seek to advance—at times over and against the will of their principals.[130] Many studies draw on this framework.[131]

For example, researchers documented that Environmental Protection Agency (EPA) career staff moved policy in the opposite direction than what principals sought in the Reagan Administration. President Ronald Reagan won a landslide victory on a platform of deregulation, and Anne Gorsuch—his EPA administrator—sought to reduce EPA enforcement stringency. EPA career staff not only rebuffed these directives, but they also actually increased enforcement stringency during this period. The author concluded that ''the influence of elected institutions is limited when an agency has substantial

[121] 89 FR 25039.

[122] *Id.*

[123] Report of the National Commission on the Public Service (January 2003), p. 10, *https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf.*

[124] For example, if they are in a bargaining unit they could file a grievance over their performance rating. *See, e.g., U.S. Department of Vet. Affairs,* 72 FLRA 677 (arbitrator overturning employee's ''unsatisfactory'' performance rating and directing agency to award a rating of ''excellent'' and pay a $1,000 performance bonus).

[125] 5 U.S.C. 2301(b)(6).

[126] *See* 5 U.S.C. 3302(1).

[127] 89 FR 25036.

[128] *See, e.g.,* Comments 3156 and 4097.

[129] OPM leadership has the pleasure of working with many such employees.

[130] Accountability and Principal Agent Models, Oxford Handbook of Public Accountability 2014, available at *https://www.ocf.berkeley.edu/~gailmard/acct-pa.pdf.*

[131] *See, e.g.,* Ronald N. Johnson & Gary D. Libecap, ''The Federal Civil Service System and the Problem of Bureaucracy,'' University of Chicago Press, pp. 156–171 (1994), *https://www.nber.org/system/files/chapters/c8638/c8638.pdf;* Daniel Walters, ''Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control,'' J. of Law & Pol., 28, No. 2, pp. 129–184 (2013); Daniel P. Carpenter, ''The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies,'' Princeton Univ. Press (2002).

bureaucratic resources and a zeal for their use.'' [132]

Other research documents that career Federal employees often do not offer ''neutral competence'' but what the researchers term ''politicized competence''—developing competency in agency operations, but using that competency to advance their personal political preferences.[133] Recent research also documents how ''misaligned'' career employees perform less effectively under appointees they politically disagree with.[134] Still other academics have documented the ''levers of resistance'' like leaking or slow-walking operations that career staff employ to frustrate policies they personally oppose, and that these tactics were used to oppose Trump Administration policies.[135]

From the other perspective, many academics conclude that bureaucratic autonomy is beneficial. Some argue it creates a beneficial ''internal separation of powers'' within the executive branch.[136] Others argue that bureaucratic autonomy moderates policy swings between administrations.[137] But whether academics see it as malignant or benign, they widely conclude that many career Federal employees—especially those with policy responsibilities—inject their personal politics and preferences into the performance of their official duties.

News reports have also documented widespread career employee policy resistance. Within the first month of the first Trump presidency the Washington Post ran an article entitled ''Resistance from within: Federal workers push back against Trump.'' The article documented career employee efforts to undermine the President's agenda. For example, a career Department of Justice employee with grantmaking responsibilities described plans to slow-walk operations if the new administration attempted to shift grantmaking priorities. This employee explained that ''[y]ou're going to see the bureaucrats using time to their advantage.'' [138] The New York Times similarly reported that EPA career scientists were strategizing how to slow-walk President Trump's policies without getting fired.[139] In February 2017 a Washington Post columnist published a long-time federal employee's guide to ''useful tools'' to ''subtly subvert stupid orders'' without outright revolting. The employee advised federal employees to adopt tactics like ''[o]nly provide minimal information requested'', ''[f]ail to find information'', ''[m]iss deadlines while 'doing your best' (after all, we were all overworked). That might get you a poor review next time, maybe, but it won't get you canned'' and ''[k]eep two sets of data (requires some care!)''.[140]

In December 2017 Bloomberg News explained that ''Washington bureaucrats are quietly working to undermine Trump's agenda'' and documented how ''career staff have found ways to obstruct, slow down or simply ignore their new leader, the president.'' [141] Many political appointees who worked in the first Trump Administration have also reported experiencing strong policy resistance.[142]

Reports now indicate that some career employees intend to undermine the policy agenda of the second Trump Administration. Some Federal employees have openly acknowledged these plans. The Washington Post recently covered an EPA career employee explaining that ''she and her co-workers are focused on how to make sure the new administration does not walk back environmental regulations achieved under Biden.'' [143] An undercover journalist documented an employee in the White House Office of Pandemic Preparedness and Response Policy explaining that if he was given an order he opposed he ''would either try to block it or resign'' and explaining that career employees ''slow-walk'' initiatives they dislike or ''pretend to work really hard on something when they're not.'' [144]

An Equal Employment Opportunity Commission (EEOC) employee broadcast her resistance plans to the entire agency. Soon after taking office a second time, President Trump signed executive orders directing the EEOC to prioritize investigations into employers that engage in unlawful DEIA discrimination and to rescind guidance that required employers to give male employees who self-identify as female access to women's bathrooms and other sex-segregated facilities.[145] The President also designated Andrea Lucas as the new EEOC chairwoman. An EEOC administrative judge subsequently addressed an email to Chairwoman Lucas and sent it to all EEOC employees. The administrative judge stated that ''You are not fit to be our chair much less hold a license to practice law. I will not participate in attempts to target private citizens and colleagues through the recent illegal executive orders. I swore an oath to the Constitution of the United States, and the Commission serves the people of the United States. If you want to continue following the illegal and unethical orders of our president and the unelected leader of 'D***' that's on you . . . If upon reflection, you feel like now would be a good time to take a vacation and resign from your position, please 'reply all' to this email and put 'I'd Like to Occupy Mars!' in the subject

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[132] B. Dan Wood, ''Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements,'' Am. Pol. Sci. Rev., 82, No. 1, pp. 213–234 (1988).

[133] Sean Gailmard & John W. Patty, ''Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise,'' Am. J. of Pol. Sci., 51, No. 4 (2007), *https://www.ocf.berkeley.edu/~gailmard/ajps.gail-pat.pdf.*

[134] 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.*

[135] See, *e.g.,* Jennifer Nou, ''Bureaucratic Resistance from Below,'' Yale J. on Reg., (Nov. 16, 2016), *https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/* and ''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.*

[136] *See, e.g.,* Neal Katyal, ''Internal separation of powers: Checking today's most dangerous branch from within,'' Yale L.J., 115, No. 9, pp. 2314–2349 (2006), *https://americafirstpolicy.com/assets/uploads/files/AFPI_Comment_on_OPM_RIN_3206%E2%80%93AO56-Anti-Schedule_F_NPRM-FINAL.pdf.*

[137] *See, e.g.,* Brian Feinstein & Abby Wood, ''Divided Agencies,'' S. Cal. L. Rev., 95, No. 4, pp. 731–784 (2022), *https://southerncalifornialawreview.com/wp-content/uploads/2022/12/WoodFeinstein_Final.pdf.*

[138] Juliet Eilperin, Lisa Rein, & Marc Fisher, ''Resistance from within: Federal workers push back against Trump,'' Wash. Post (Jan. 31, 2017), *https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html.*

[139] Michael Shear & Eric Lichtblau, '' 'A Sense of Dread' for Civil Servants Shaken by Trump Transition,'' New York Times (Feb. 11, 2017), *https://www.nytimes.com/2017/02/11/us/politics/a-sense-of-dread-for-civil-servants-shaken-by-trump-transition.html.*

[140] Joe Davidson, ''Many feds don't like Trump's program, but they're not revolting,'' Wash. Post (Feb. 1., 2017), *https://www.washingtonpost.com/news/powerpost/wp/2017/02/01/many-feds-dont-like-trumps-program-but-theyre-not-revolting.*

[141] Christopher Flavelle & Benjamin Bain, ''Washington Bureaucrats are Quietly Working to Undermine Trump's Agenda,'' Bloomberg News, (Dec. 18, 2017), *https://www.bloomberg.com/politics/features/2017-12-18/washington-bureaucrats-are-chipping-away-at-trump-s-agenda.*

[142] *See, e.g.,* Mark Moyer, ''Masters of Corruption: How the Federal Bureaucracy Sabotaged the Trump Presidency,'' Encounter Books (2024); *see also* James Sherk, ''Tales from the Swamp: How Federal Bureaucrats Resisted President Trump,'' Am. First Pol. Inst., (Jan. 8, 2025), *https://americafirstpolicy.com/assets/uploads/files/Tales_from_the_Swamp-_How_Federal_Bureaucrats_Resisted_President_Trump_-_Revided_1.8.2025.pdf.*

[143] Emily Davies, Lisa Rein, Emma Uber, and Aaron Wiener, ''Federal workers prepare for cuts, forced relocations in Trump's second term,'' Wash. Post (Nov 7, 2024), *https://www.washingtonpost.com/dc-md-va/2024/11/07/trump-dc-federal-workforce-cuts/.*

[144] O'Keefe Media Group, ''the Deep State is Real,'' Jan. 23, 2025, *https://x.com/JamesOKeefeIII/status/1882431381097119797.*

[145] See executive orders 14168 and 14173.

line. We will take this as notification that you are resigning your position as acting chair.'' [146] This employee openly professed her intention to refuse presidential directives based purely on her personal views.

OPM is also aware of recent cases of senior career employees not just professing plans to insert their personal politics into their official duties, but actually doing so. Multiple FLRA decisions chastised a career regional director for ''willful noncompliance'' with an earlier Authority order.[147] The regional director refused for 18 months to decertify a bargaining unit the FLRA determined was statutorily excluded from collective bargaining. Trump Administration officials also reported that career employees in the Education Department would not constructively assist in drafting important regulations, such as the department's Title IX regulations. As a result, those regulations had to be primarily drafted by political appointees.[148]

Trump Administration officials also reported that career attorneys in the Educational Opportunities Section (EOS) of the DOJ Civil Rights Division (CRT) would not assist in litigation charging Yale University with racially discriminating against Asian and Caucasian applicants.[149] EOS is the CRT subcomponent dedicated to combatting educational discrimination and would normally litigate such discrimination cases. However, winning that lawsuit had significant policy implications. A victory would have effectively prohibited racial preferences in higher education, as the Supreme Court's decision in *Students for Fair Admissions* v. *Harvard* subsequently did.[150] The appointees reported that EOS recalcitrance required DOJ leadership to assign attorneys from other CRT and DOJ components to work on the case. It is a publicly verifiable fact—and OPM has so verified—that none of the DOJ attorneys listed on the complaint against Yale or who represented the Government in the subsequent legal proceedings were EOS career attorneys. OPM has received no indication that these examples are incorrect.[151]

Public polling also indicates that a plurality of senior Federal employees would resist directives from President Trump they disliked. A survey asked Federal employees making more than $75,000 in the Washington DC region what they would do if President Trump gave them an order that was legal, but they believed was bad policy. Forty-five percent said they would follow the order. Forty-six percent said they would do what they thought was best. Only 17 percent of senior Federal employees who voted for Kamala Harris said they would follow President Trump's directive.[152] Many career Federal employees say they would insert their politics into their official duties.

These points were raised in the prior rulemaking. Upon further analysis OPM has concluded it gave a cursory and inadequate response to these concerns. The April 2024 final rule ignored the news reports documenting career employee resistance.[153] The rule gave no response to the argument these reports showed putatively impartial career employees acting as political partisans. The rule also largely sidestepped the vast academic literature analyzing the principal-agent problem in the Federal government. For example, the final rule ignored the analysis showing that EPA career employees moved policy in the opposite direction than what principals sought under the Reagan Administration, or the studies concluding that bureaucratic resistance exists and is a positive force.[154]

OPM instead responded to a handful of studies commenters cited, arguing that they presented a nuanced and measured picture that did not support claims of widespread bureaucratic resistance.[155] For example, OPM observed that Nou (2019) did not empirically verify whether policy resistance increased under Trump, and found that some degree of resistance is inevitable. OPM reasoned this study did not show it is universally understood career employees advance their own agendas.[156] OPM now recognizes this analysis was too shallow. It is difficult to empirically document the scope of policy resistance because it primarily occurs behind closed doors. But Nou (2019) broadly catalogued academic literature discussing bureaucratic resistance as a widespread phenomenon, while providing specific examples of what she termed ''civil service disobedience.'' [157] It is one part of the academic literature documenting the principal-agent problem in public service. Moreover, the public polling described above suggests policy resistance is widespread. And while OPM contested the interpretation of a handful of studies, it did not respond to the larger point that the principal-agent model is the basic framework many academics use to examine bureaucratic operations.

OPM also accepted criticism of some of the reports of the bureaucratic partisanship provided by commenters who supported the rule.[158] Some of those individual critiques are debatable and OPM is no longer convinced of their validity.[159] Regardless, these commenters took issue with only a few cases of policy resistance. They did not contest the veracity of many other examples, such as the DOJ CRT employees' unwillingness to participate in litigation challenging racial preferences in higher education.

The April 2024 final rule did not grapple with the broader weight of

[146] This email was reported in multiple sources online. OPM contacted the EEOC and obtained verification both that the email was accurate and that it was sent by an administrative judge.

[147] *See U.S. Department of Justice, Executive Office for Immigration Review and National Association of Immigration Judges,* 72 FLRA 622 (2022); *U.S. Department of Justice, Executive Office for Immigration Review and National Association of Immigration Judges,* 72 FLRA 733 (2022).

[148] Sherk, *supra* note 142.

[149] *Id.*

[150] 600 U.S. 181 (2023).

[151] Two of these examples appear in *Tales from the Swamp, supra* note 142. An earlier version of that report provided examples of career staff resistance to Trump Administration policies and was submitted into the record during the 2024 rulemaking. *See* Comment 4097. Comment 2822 critiqued some of the examples provided in *Tales from the Swamp,* and in the April 2024 final rule OPM accepted those criticisms. *See* 89 FR 24996. Even accepting that critique at face value, however, Comment 2822 did not contest the accuracy of these examples. Moreover, upon further review OPM has concluded that many of Comment 2822's criticisms of *Tales from the Swamp* are misplaced. For example, the report documented that a career General Service Administration employee leaked a draft Trump executive order promoting classical and traditional architectural styles in Federal construction (President Trump recently reissued a similar directive). The report provided this as an example of a career employee leaking a draft policy in order to create controversy and pressure political appointees to drop the initiative. Comment 2822 did not contest that this happened. The comment instead argued that promoting classical architecture is bad policy and appropriately controversial. The wisdom or folly of a particular policy is beside the point—the question is whether career employees serve as nonpartisan and impartial experts, or whether some instead advance their personal political views. Nothing in Comment 2822 suggests that GSA career staff were impartial in how they approached their duties regarding Federal building design.

[152] ''Federal Managers Are Evenly Divided As To Whether They Would Follow A Legal Order From President Trump,'' Napolitan News Service (Jan. 21, 2025), *https://napolitannews.org/posts/federal-managers-are-evenly-divided-as-to-whether-they-would-follow-a-legal-order-from-president-trump.*

[153] *See, e.g.,* Comment 4097.

[154] These studies were cited by commenters. *See* Comment 4097.

[155] *See* 89 FR 25001.

[156] *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.*

[157] *Id.*

[158] *See* 89 FR 24996, 25002, citing Comment 2822.

[159] *See* note 151, *supra.*

evidence showing some career employees insert partisanship into the performance of their official duties. Based on further review, and the evidence discussed above, OPM now concludes that this is a widespread phenomenon, albeit one that many federal employees do not engage in. Researchers widely report such behavior occurs, with well documented case studies. Many Trump Administration officials reported it occurred, career employees told reporters they were doing it, and they advised their colleagues about how to do it openly through the press. As mentioned above, an EEOC administrative judge even broadcast her intention to resist presidential directives to the entire agency. Beyond these case studies, polling shows a plurality of senior Federal employees would subvert directives they personally opposed. There is overwhelming evidence that a significant number of career employees bring their personal politics into their official duties.

OPM now also believes that career employee partisanship and policy resistance is a serious problem because it undermines democracy. If the American people do not like the policies elected officials advance, they can vote for new leadership. This often happens; partisan control of the White House or a chamber of Congress switched in nine of the past ten general elections. But Americans have little recourse when career employees advance their personal agendas or undermine elected officials' policies. They are electorally unaccountable. America was founded on the principle of government by consent of the governed. Career employees who resist elected officials' policy choices attack the foundations of American democracy.

OPM recognizes the value in having many perspectives present in an agency, and in career civil servants who disagree or see problems with a policy presenting their objections. Diverse perspectives frequently improve decision making. But, when a career employee goes from voicing disagreement to resisting policy decisions, they undermine democracy and the Constitution.

OPM also recognizes that a meaningful number of career employees insert their personal politics into their official duties, and that such behavior undermines American democracy. OPM has concluded that these challenges make Schedule Policy/Career necessary to increase policy-influencing officials' accountability to the President and effectively discipline employees who engage in such behavior.

Even if this evidence were not enough to persuade OPM—and it is—the President has determined bureaucratic partisanship undermines his ability to execute the law and Schedule Policy/Career is necessary to combat this behavior. Executive Order 14171 explained Schedule Policy/Career is necessary because ''there have been numerous and well-documented cases of career Federal employees resisting and undermining the policies and directives of their executive leadership.'' [160] The President is the official constitutionally charged with taking care the law is faithfully executed, and statutorily authorized to determine when exceptions to the competitive service default are necessary. Congress tasked OPM with helping the President carry out these responsibilities, not with supplanting his judgment.[161] So even if OPM had not independently concluded career employee partisanship is a pressing concern—and it has—OPM would defer to the presidential determination that it was.

iii. The Policy-Influencing Terms Are Not a Term of Art

The CSRA authorizes the President or OPM to exclude employees in excepted service positions of a ''confidential, policy-determining, policy-making, or policy-advocating character'' from chapter 75 procedural requirements and MSPB appeals. The April 2024 final rule amended 5 CFR 210.102 to define the phrases ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining'' to refer exclusively to noncareer political appointments. OPM cited what it asserted was longstanding usage and legislative history to conclude that these phrases are terms of art with that specific meaning.[162] Under this interpretation, the 5 U.S.C. 7511(b)(2) exceptions can be applied only to political appointees (*e.g.,* Schedule C positions) and have no application to career employees.

Upon further review, OPM has determined that its prior conclusion was erroneous and, while the ''policy-influencing'' terms do encompass political appointments, they are not exclusively limited to them. Rather, these terms have the natural, plain English meaning of describing positions involved in determining, making, or advocating for government policy, or positions of a confidential nature. Such positions include, but are not restricted to, political appointments.

Textual Analysis

The problem with OPM's prior construction is that the CSRA's text refutes it. In 5 U.S.C. 3132(a)(2)—also part of the CSRA—Congress defined Senior Executive Service (SES) positions as those graded above GS–15 that direct the work of an organizational unit, are held accountable for the success of one or more specific programs or projects, monitor progress toward organizational goals and periodically evaluates and makes adjustments to such goals, or ''otherwise exercise[ ] important policy-making, policy-determining, or other executive functions.'' In 5 U.S.C. 3134(b) Congress prohibited more than 10 percent of SES positions from being filled by noncareer (*e.g.,* political) appointees. Consequently, at least nine-tenths of SES positions—which are definitionally policy-making or policy-determining—must be held by career officials.

This usage is incompatible with the terms ''policy-determining'' or ''policy-making'' being terms of art that refer only to political appointments. Congress expressly used these terms to describe and define thousands of career positions in 5 U.S.C. 3132. That usage sheds light on the terms' meaning in 5 U.S.C. 7511(b)(2). As the Supreme Court has often explained, the ''normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.'' [163] Moreover, the presumption of consistent usage most commonly applies to terms appearing in the same enactment, as these did.[164] Congress's use of the terms ''policy-making'' and ''policy-determining'' to describe career positions in one part of the CSRA shows these terms can describe career positions in another section of the law.

Further, the CSRA uses different terms to expressly differentiate political and civil service positions: ''noncareer'' and ''career'' appointments, respectively.[165] OPM is mindful of the Supreme Court's directive that ''when the legislature uses certain language in one part of the statute and different

[160] E.O. 14171, sec. 1.

[161] *See* 5 U.S.C. 1103(a).

[162] *See* 89 FR 25020 *et seq.*

[163] *Gustafson* v. *Alloyd Co.,* 513 U.S. 561, 570 (1995) (citing *Dep't of Revenue of Oregon* v. *ACF Indus.,* Inc., 510 U.S. 332, 342 (1994).

[164] *See United States* v. *Castleman,* 134 S. Ct. 1405, 1417 (2014) (''[T]he presumption of consistent usage [is] the rule of thumb that a term generally means the same thing each time it is used [and] most commonly applie[s] to terms appearing in the same enactment.'') (Scalia, J., concurring).

[165] *See* 5 U.S.C. 3132, 3134.

language in another, the court assumes different meanings were intended.'' [166]

Congress used the terms ''career'' and ''noncareer'' to specifically distinguish career civil service positions from political appointments. The CSRA separately used the terms ''policy-making'' and ''policy-determining'' to describe General Schedule positions that could be exempted from adverse action procedures, and also used these terms to describe all SES positions. It is a ''cardinal doctrine'' that this shift in language implies a shift in meaning; ''policy-determining'' and ''policy-making'' are not synonymous with ''noncareer.''

Congress also knew how to extend adverse action procedures to all career employees. Subchapter V of chapter 75 gives adverse action procedures to any SES ''career appointee'' who passes their probationary period.[167] But Congress worded subchapter II—which covers the competitive and excepted services—differently: ''[t]his subchapter does not apply to an employee . . . whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character . . . .'' [168] It is another basic canon of statutory construction that if ''Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'' [169] Congress knew how to categorically give all career employees adverse action procedures in chapter 75—but used quite different language in subchapter II. This change in structure and language suggests a change in meaning: the policy-influencing exclusion from subchapter II is not limited to political appointees.

Accepting OPM's prior reading of the policy-influencing phrases would mean believing the terms ''policy-determining'' and ''policy-making'' were well known terms of art that referred exclusively to political appointees, and Congress used them in that way in 5 U.S.C. 7511(b)(2), but that Congress used these terms to convey a different meaning when defining SES positions in section 3132. That interpretation would also mean that Congress introduced an entirely different term into title 5—''noncareer''—to describe political appointments instead of using the well-established term of art used elsewhere in the CSRA. And that interpretation would also require one to conclude that the differences in language in subchapters II and V—with the latter explicitly giving all career SES members adverse action procedures and the former using very different terminology to define adverse action coverage—convey no substantive difference in meaning.

OPM concludes that such an interpretation makes little sense and does not reflect proper statutory interpretation. The best reading of 5 U.S.C. 7511(b)(2) is that the terms ''confidential, policy-determining, policy-making, or policy-advocating'' have their ordinary, plain English meaning and describe positions involved in determining, making, or advocating for policy, or confidential positions. Such positions include but are not limited to political appointments. This construction gives the same meaning to the terms ''policy-making'' and ''policy-determining'' throughout the CSRA while recognizing that the terms ''career'' and ''noncareer'' have a different meaning, referring to civil service and political appointments respectively. This interpretation also recognizes that Congress specifically gave adverse action procedures to career SES members and denied them to noncareer SES appointees, while using very different language in the section of chapter 75 governing the competitive and excepted services.

OPM previously gave two reasons for rejecting these textualist arguments. First, OPM argued that this construction would give career SES members greater protection from removal than lower-ranking subordinates. OPM concluded ''it does not follow'' that, if Congress intended to allow at-will removals of employees with policy responsibilities, Congress would give the executive branch greater authority to remove employees with fewer such responsibilities and less ability to remove those with greater responsibilities.[170] However, this reasoning ignored statutory SES management flexibilities. Agency heads can reassign SES members at-will or unilaterally demote them from the SES for poor performance.[171] The President and OPM can also take agencies out of the SES and create alternative senior executive management systems.[172] Section 7511(b)(2) of 5 U.S.C. would then allow the President to exclude employees in those alternative systems from chapter 75. Congress could have easily seen the need for a greater authority to remove employees below the SES precisely because agencies do not have the same degree of management flexibility with them, or drafted section 7511(b)(2) more expansively to ensure the President could make senior executives at-will if he takes their agencies out of the SES.[173]

Second, OPM previously argued that the phrase ''positions of a confidential, policy-determining, policy-making, or policy-advocating character'' in section 7511(b)(2) is a term of art with clear history and consistent usage, while Congress wrote on a clean slate when it created the SES and used different structure and language in section 3132.[174] OPM now recognizes this construction is untenable. OPM's prior argument requires the phrase ''positions of a confidential, policy-determining, policy-making, or policy-advocating character'' to in fact be an established term of art with a meaning independent of its constituent terms. However, this is not the case. This phrase was first introduced in the CSRA; it existed in no legal source prior to 1978. Consequently, there is no history of Congress or the executive branch using the phrase ''positions of a confidential, policy-determining, policy-making, or policy-advocating character'' as a term of art divorced from the meaning of its constituent components.

The history that OPM and commenters pointed to instead used 7511(b)(2)'s constituent terms as separate descriptors. For example, the Brownlow Report spoke of ''policy-determining posts.'' [175] The First and Second Hoover Commissions used the terms ''policy-making'' and ''policy-determining'' respectively.[176] Executive Order 10440, which created Schedule C, used the phrase ''positions of a confidential or policy-determining character.''

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[166] *See Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 711 n. 9 (2004); Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor, 875 F.3d 821, 825 (2017) (concluding statutory context overcomes presumption of ''so-called *Russello* structural canon''—that '' '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' '' (alteration in original) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))).

[167] 5 U.S.C. 7541(1).

[168] 5 U.S.C. 7511(b).

[169] *INS* v. *Cardoza-Fonseca,* 480 U.S. 421, 432 (1987).

[170] 89 FR 25025.

[171] *See* 5 U.S.C. 3395, 4312(d), 4314(b)(3).

[172] 5 U.S.C. 3132(c).

[173] For example, unlike SES members, competitive and excepted service employees can appeal removals based on unacceptable performance to the Merit Systems Protection Board. *See* 5 U.S.C. 4303(e).

[174] 89 FR 25024.

[175] *See* ''Report of the President's Committee, Administrative Management in the Government of the United States,'' p. 3 (Jan. 1937).

[176] 89 FR 25021, 25022.

The CSRA, by contrast, did not use any of these pre-existing terms or phrases. It instead used a broader and more expansive formulation, ''confidential, policy-determining, policy-making, or policy-advocating.''

If OPM's prior reading were correct, and the phrase ''confidential or policy-determining'' used in Executive Order 10440 was a term of art that referred exclusively to political appointees, there would be no reason to add the terms ''policy-making'' or ''policy-advocating'' to it. Under that reading those additions would be mere surplusage. Congress's deliberate decision to add additional new terms to the prior formulation suggests each term is meant to have independent meaning.

If anything was arguably a term of art it was the terms ''policy-determining'' or ''policy-making''—not the CSRA's expansive new phrase ''positions of a confidential, policy-determining, policy-making, policy-advocating character''.[177] But 5 U.S.C. 3132 used those terms to describe thousands of career SES positions. The CSRA did not treat them as terms of art for political appointees. And if Congress did not use the pre-existing terms ''policy-making'' and ''policy-determining'' as terms of art for political appointees, it makes little sense to construe section 7511(b)(2)'s completely new and longer formulation as a term of art either.

The fact that Congress was writing on a clean slate in creating the SES makes little difference. Congress often uses terms of art when writing new statutes, precisely so that courts and the public need not guess at their meaning. If the terms policy-making and policy-advocating were terms of art that exclusively described political appointments, they would carry that meaning into 5 U.S.C. 3132. The fact that Congress instead described career SES positions as exercising policy-making and policy-determining functions shows Congress did not use those terms in that manner.

Policymaking Roles Are Not Limited to Political Appointees

Construing the terms policy-determining and policy-making to refer exclusively to a small number of political appointments is also theoretically and practically unsound. Policy-making authority is not cabined to few political leaders. Early public administration scholars believed otherwise, drawing a theoretical division between policy-determining political positions and line administrative employees. In the 1880s future President Woodrow Wilson argued giving career bureaucrats power over technical details of policy implementation was unproblematic because those details were separate from policy making.[178] However, it soon became apparent to many public administration scholars, including Wilson, that the lines between policy and administration did not have such clear boundaries.[179] By the early 1900s city managers—who were not elected or short-term political appointees—clearly understood that they had important policy discretion.[180]

Many scholars now recognize that it is not feasible to draw a bright line between politics and administration. As one prominent scholar explains: ''Administrators help to shape policy, and they give it specific content and meaning in the process of implementation.'' [181] Administration necessarily entails a degree of policy-making. Contemporary practice recognizes this reality; career officials routinely perform policy functions vested by law in agency heads. Indeed, over the past four decades most Federal officials who exercise delegated agency-head authority have been career employees.[182]

The histories of Schedules A and C bear out the fact that policy-making is not cleanly divisible from administration. As OPM noted in the April 2024 final rule, the Roosevelt Administration's Brownlow Committee originally proposed that policy-determining exceptions from the civil service should be ''relatively few in number,'' consisting mainly of ''the heads of executive departments, undersecretaries 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.'' [183]

However, when President Franklin Roosevelt placed ''policy-determining'' positions in Schedule A, and President Dwight Eisenhower subsequently put them in Schedule C, they swept much more broadly to lower levels of the bureaucracy. Saying that only policy-determining positions went into Schedule C did not provide clear guidelines. The Second Hoover Commission noted ''[t]he term 'policy-determining' has continued to be employed without much refinement . . . This criterion is all right as far as it goes, but it is so great an oversimplification that it does not give adequate guidance.'' [184] The Commission explained that when ''the departments began to apply [the Schedule C criteria] in 1938, some decided that only the secretary and assistant secretaries determined policy. Others avowed that minor officials at the subbureau level were policy determiners. In departmental recommendations in 1953 and 1954 regarding schedule C, there has been an even greater diversity . . . No decision was made as to where the lines between the political high command and the permanent civil service of the Government should be drawn.'' [185]

The history of the executive branch demonstrates that ''policy-determining'' positions are not restricted to senior positions like assistant secretaries but encompass positions far lower in the bureaucracy as well. While the Second Hoover Commission recommended narrowing eligibility for Schedule C, this recommendation was never acted upon. Congress then used the broad and indefinite terms ''policy-determining'' and ''policy-making'' in the CSRA.

Many career Federal employees exercise a degree of policy-determining authority or substantively participate in policy-making. The CSRA and the subsequent Civil Service Due Process Amendments Act gave the President and OPM discretion to determine what positions should be excepted from adverse action appeals on account of their policy responsibilities. It is theoretically and practically untenable to interpret the terms ''policy-making'' and ''policy-determining'' to describe only a small number of purely political positions.

[177] *See* OPM's discussion of the use of these terms by the Brownlow Committee and Hoover Commission, 89 FR 25021–25022.

[178] Woodrow Wilson, ''The Study of Administration,'' *Political Science Quarterly* 2:2 (1887), 197–222, available at *https://www.jstor.org/stable/2139277.*

[179] Calabresi & Yoo, *supra* note 28, at 254–255.

[180] Kimberly L. Nelson and James H. Svara, ''The Role of Local Government Managers in Theory and Practice: A Centennial Perspective,'' *Public Administration Review* 75:1 (2014), 49–61, available at *https://www.jstor.org/stable/24758024.*

[181] James H. Svara, ''The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration,'' *Public Administration Review* 61:2 (2001), 176–183, available at *https://www.jstor.org/stable/977451.*

[182] Brian D. Feinstein and Jennifer Nou, ''Submerged Independent Agencies,'' *University of Pennsylvania Law Review* 171:4 (April 2023), 945–1022. See p. 973.

[183] 89 FR 25021.

[184] Citing Task Force on Pers. and Civil Serv., Report on Personnel and Civil service, p. 6 (1955), *https://www.google.com/books/edition/Report_on_Personnel_and_Civil_Service/ytR9zYFWVtwC.*

[185] *Id.* at 6–7, 35.

Reconsidering OPM's Prior Justifications

Upon further review, OPM has determined that the additional reasons it previously gave for interpreting the phrase ''positions of a confidential, policy-determining, policy-making, or policy-advocating character'' as a term of art do not withstand scrutiny.

OPM cited to legislative history, such as the conference report for the Civil Service Due Process Amendments Act.[186] But legislative history is not the law. Statements of individual members of Congress reflect their views alone. Committee reports are typically written by committee staffers, not voted on by the whole Congress, and may not reflect the sentiments of members of Congress who passed the law or negotiated key provisions. The Supreme Court has accordingly made it clear that legislative history has limited value in interpreting statutory text. Courts ''do not resort to legislative history to cloud a statutory text that is clear.'' [187]

OPM also explained that it was construing the policy-influencing terms to refer exclusively to political appointees to honor Congressional intent.[188] However, Congressional intent is determined by text of the law Congress passes. Post-enactment statements or amicus briefs filed by members of Congress do not determine Congressional intent. They show the desires of individual legislators, not Congress acting in its institutional capacity to enact legislation.

Congressional intent must be gleaned from the text because members of Congress could have different reasons for passing the same language. It is possible that some members of Congress did not anticipate that the policy-influencing terms could be applied to career positions and intended them to apply to only political appointments. The April 2024 final rule embraced that interpretation. But it could also be the case that other members of Congress recognized that the terms could apply to career positions and wanted to retain that flexibility if necessary. Other members of Congress might have preferred to limit the exception to political appointees but recognized, as discussed in section III(C)(4) below, that giving policymaking career employees strong tenure protections would create serious constitutional issues. Those members may have preferred language that encompassed career positions to avoid a potential constitutional conflict. The members of Congress who voted for the CSRA and the subsequent Due Process Amendments Act likely separately held all three positions. OPM previously failed to appreciate that Congressional intent must be discerned from the text of the laws passed. That text shows Congress used the terms ''policy-making'' and ''policy-determining'' to describe both career positions and political appointments.

Further, the legislative history to which OPM previously referred consisted of a general description of Schedule A, Schedule B and Schedule C that was intended to provide an explanation of why Schedule C employees were not being granted MSPB appeal rights: because they ''have little expectation of continuing employment beyond the administration during which they were appointed.'' [189] It did not attempt to define what the term ''confidential or policy-determining character'' meant, nor did it purport to define the term to include only political appointees. Instead, it merely used the term in passing.

OPM and a commenter also noted that a number of statutes enacted after the CSRA expressly describe policy-influencing positions as ''political appointments.'' [190] However, the CSRA expressly described thousands of senior career positions as having ''important policy-making, policy-determining, and other executive functions.'' [191] These other statutes do not purport to define political appointments for all of title 5, or for CSRA purposes. Instead, they universally state that their definitions apply only for purposes of that particular law or section of the U.S. Code. Construing these limited definitions to govern the interpretation of the CSRA would ignore these statutory directives.[192]

These limited statutory definitions likely reflect the fact that until Executive Order 13957 successive administrations had only used the policy-influencing exceptions for political appointments. These new laws were passed against that backdrop. Congress likely assumed only political appointees would fill policy-influencing positions for purposes of those laws because, at the time they were passed, those were the only officials who did. But those laws did not contain any provisions cabining the President's discretion to apply section 7511(b)(2) more broadly in the future, nor did they contain any provisions modifying the definition of ''policy-making'' or ''policy-determining'' for CSRA purposes. OPM accordingly now believes that this post-enactment history should not be interpreted to restrict the President's authority to exempt positions under section 7511(b)(2).

OPM also argued that defining policy-influencing positions as political appointments was necessary for consistency with MSPB interpretations because Congress used the same policy-influencing terms in 5 U.S.C. 2302(a)(2)(B)(i) to define positions covered by Prohibited Personnel Practices (PPP).[193] The MSPB has occasionally applied these terms in that context. However, the CSRA gave primary responsibility for determining which positions are policy-influencing to the President and OPM.[194] The MSPB must apply their determinations. Congress did not give MSPB authority to cabin presidential or OPM discretion over which positions are policy-influencing.

For these reasons OPM has concluded that the policy-influencing terms are not a term of art that refer only to political appointees in Schedule C, and that they can encompass career positions with confidential or policy responsibilities as well. OPM therefore proposes to rescind its prior restrictive definition.

The President Can Treat Political Appointments as Career Positions Regardless

While OPM believes the policy-influencing terms have their plain English meaning and are not a term of art, OPM further notes that, even if those terms were a term of art, that would not make a practical difference. Assuming arguendo that the policy-influencing terms should be construed as a term of art for political appointees, that would simply mean that all positions the President determines are policy-influencing are technically political positions. Even this construction would not, however, prevent the President from exempting any career positions with substantive policy-influencing responsibilities from chapter 75 procedures pursuant to 5 U.S.C. 3302, regardless of the number of

[186] 89 FR 25022–25023.

[187] *Ratzlaf* v. *United States,* 510 U.S. 135, 147–148 (1994).

[188] 89 FR 25012, 25026–25027.

[189] H.R. Rep. 101–328, 5, 1990 U.S.C.C.A.N. 695, 699.

[190] *See* 5 U.S.C. 9803(c), 6 U.S.C. 349(d)(3), 7 U.S.C. 6992(e)(2), 38 U.S.C. 725.

[191] 5 U.S.C. 3132(a)(2).

[192] 89 FR 25021.

[193] Under the CSRA, policy-influencing positions are excluded from the scope of 5 U.S.C. 2302(b), which specifies the PPPs, and from Office of Special Counsel and MSPB enforcement of the same. Section 6(a) of E.O. 13957 requires agencies to establish and enforce internal policies prohibiting PPPs.

[194] The CSRA also gave agency heads responsibility for determining if positions statutorily placed in the excepted service are policy-influencing.

positions so affected.[195] It would simply mean such positions would be formally designated political positions.

As discussed in greater detail below, OPM now believes that title 5 does not require an adverse action appeals process for career employees in the excepted service whose positions are determined to be policy-influencing. Under E.O. 13957, as amended, and the proposed rule, a presidential determination that a position is policy-influencing terminates chapter 75's applicability to such position regardless of whether it is subsequently designated as political (*e.g.,* Schedule C) or remains career (Schedule Policy/Career). All that removing the April 2024 final rule's restrictive definition of the policy-influencing terms does is allow the relevant positions to remain formally designated as career positions instead of political appointments.

Further, under the Constitution, the President has discretion to use his Article II executive power to require his subordinates to treat technically political positions as though they were career positions. The Constitution vests the executive power in the President alone.[196] If the President believes as a constitutional matter that disregarding political affiliation best helps him carry out his constitutional duties, he can order his subordinates to do so. At most, the CSRA authorizes the President to consider political or policy views in policy-influencing positions, *e.g.,* for existing Schedule C positions—but it does not require it.

Presidents have often treated formally political appointments as career positions. Ambassadors, for example, are one of the few offices expressly provided for in the Appointments Clause. The Constitution requires they be appointed by the President with Senate consent; no law could make them career positions. Nonetheless there is a longstanding practice of appointing career members of the Foreign Service as ambassadors, especially to less prominent postings. Prior to the 2025 Presidential transition most U.S. ambassadors or nominees for vacant posts were career Foreign Service officers. Congress could not and did not require this. Presidents of both parties have instead chosen to fill these posts apolitically because it helps advance their foreign policy agendas. Similarly, nothing in title 5 prevents the President from treating nominally political appointments as career positions.

President Trump has decided to put policy-influencing career positions into Schedule Policy/Career. OPM now believes the best reading of the statute is that the policy-influencing terms encompass both career and political positions. But if that reading of the statute is incorrect the President can still determine that positions with substantive policy responsibilities are policy-influencing, exempting incumbents in those positions from chapter 75, while directing his subordinates to continue to treat those incumbents like career employees.

Additional Considerations

Executive Order 14171 used presidential authority to prohibit agencies from giving effect to the April 2024 final rule's restrictive definition of policy-influencing positions.[197] This directive is binding on OPM and all agencies. Congress tasked OPM with executing, enforcing, and administering the civil service rules and regulations of the President.[198] OPM will not maintain regulations that conflict with presidential directives and cannot be given legal force or effect. Even if OPM did not find the factors discussed above independently persuasive—and it does—OPM would nonetheless propose removing the April 2024 final rule's restrictive definition of the policy-influencing terms to comport with Executive Order 14171's invalidation of 5 CFR 210.102(b)(3) and 210.102(b)(4).[199] In addition, OPM would independently propose changing the April 2024 final rule to advance the policies described in this proposed rule.

3. OPM Has No Authority To Extend Chapter 75 Procedures to Policy-Influencing Positions

Further review has convinced OPM that the April 2024 final rule's amendments to subpart D of 5 CFR part 752, which extended adverse action procedures and appeals to incumbent employees whose positions were declared policy-influencing or who were involuntarily transferred into policy-influencing positions, exceeded OPM's statutory authority. Accordingly, OPM now believes it is necessary to rescind these amendments.

Chapter 75's statutory text determines its scope. Section 7511(b)(2)(A) of 5 U.S.C. provides that subchapter II (covering adverse actions in the competitive and excepted services) does not apply to an employee whose position has been determined to be policy-influencing by the President for a position the President has excepted from the competitive service. Under this statutory directive, employees whose positions the President has excepted from the competitive service based on their policy-influencing character are categorically exempt from chapter 75 procedures and subsequent MSPB appeals. The language is clear and unambiguous.

The April 2024 final rule nonetheless purported to extend chapter 75 procedures and MSPB appeals to employees in policy-influencing excepted service positions if their positions were so designated after they were initially hired or if they were involuntarily transferred into that position. OPM now recognizes that it had no authority to extend subchapter II's coverage like this. Section 7511(b)(2) categorically excludes policy-influencing excepted service positions, irrespective of whether incumbents filling those positions were previously covered by chapter 75. While the final rule repeatedly described Federal employees' as possessing ''accrued rights'' to adverse action procedures and appeals, it did not point to any statutory provisions conveying such personal rights.[200] Such language appears nowhere in the text of subchapter II. Rather, section 7511(b)(2)'s exclusions are tied to the nature of a position, irrespective of who occupies it. Some section 7511 exclusions are tied to an employee's personal history and status, such the 7511(b)(4) exclusion of reemployed annuitants and the 7511(a)(1) exclusion of probationary employees. However, Congress included

[195] Civil Service Rule 1.3(d) provides that if tenured competitive service employees' positions are listed in excepted service schedules A, B, or C, the employees encumbering such positions will remain in the competitive service as long as they remain in those positions. This rule implemented the Lloyd-LaFollette Act provisions that required this result. As discussed in greater detail below, however, the CSRA of 1978 repealed those applicable statutory provisions. Civil Service Rule 1.3(d) now rests on its foundation in the Civil Service Act of January 16, 1883, which includes the President's authority to prescribe rules governing the competitive service and to exempt positions from it. *See* 22 Stat. 403, 406 at ch. 27 (codified as amended in 5 U.S.C. 2102, 3302, *et al.*); 5 CFR 213.101–104. OPM believes that hypothetically, a President who wished to do so could waive the application of Rule 1.3(d) and directly move tenured competitive service employees from such positions into Schedule C excepted service positions. In such event, under 5 U.S.C. 7511(b)(2), such employees would become excluded from adverse action appeals.

[196] *Seila Law* v. *Consumer Finance Protection Bureau,* 140 S. Ct. 2183, 2191 (2020).

[197] *See* 5 U.S.C. 3301, 3302.

[198] *See* 5 U.S.C. 1103(a)(5).

[199] OPM would independently propose changing the final rule to advance the policies described in this proposed rule, even if Executive Order 14171 had not been issued and modified the Civil Service Rules.

[200] *See, e.g.,* 89 FR 24982, 25009, 25018.

no such criteria for the 7511(b)(2) exclusion.

Section 7514 of 5 U.S.C. allows OPM to issue regulations carrying the out purposes of subchapter II. Such authority does not include extending its coverage to positions Congress has specifically excluded.

OPM justified the amendments to subpart D by appealing to the D.C. Circuit's decision in *Roth* v. *Brownell* (1954), a case interpreting the Lloyd-La Follette Act.[201] As discussed above, the Lloyd-La Follette Act provided that ''[n]o person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing.'' The D.C. Circuit concluded that this language meant employees remained covered by Lloyd-La Follette procedures if they were involuntarily moved into the excepted service. OPM subsequently issued regulations in the 1960s codifying this precedent and providing that employees whose positions were involuntarily moved into the excepted service personally remained in the competitive service.[202] The April 2024 final rule discussed this precedent at length.[203]

However, OPM's analysis of *Roth* and its implementing regulations ignored the fact that the Lloyd-La Follette Act is not in effect and has not been for nearly half a century. The CSRA superseded the Lloyd-LaFollette Act, repealing and replacing subchapter I of chapter 75 (where the relevant Lloyd-La Follette requirements had been codified). The legal basis for holding that employees moved into the excepted service remain personally in the competitive service no longer exists.

Modern adverse action procedures for most Federal employees are now found in subchapter II of chapter 75. They are derived from language contained in the Veterans Preference Act, not the Lloyd-La Follette Act. Subchapter II requires adverse action procedures for ''a removal,'' ''a suspension for more than 14 days,'' ''a reduction in grade,'' ''a reduction in pay'', and ''a furlough of 30 days or less.'' [204] While the Lloyd-La Follette Act applied to removals from the classified (*i.e.,* competitive) service, the CSRA only requires adverse action procedures for ''a removal.'' The change in language indicates a change in meaning.

Further inquiry into the history of the CSRA's statutory language demonstrates that ''a removal'' means a ''discharge'' and does not cover reclassifications or transfers into the excepted service. The VPA gave procedural protections and CSC appeals to any preference eligible veteran—including those in the excepted service—who was ''discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment.'' [205] The VPA did not discuss removals from the competitive service as such, likely because its provisions applied to veterans in both the excepted and competitive services. Subsequent 1948 legislation gave backpay to employees returned to duty under either Lloyd-La Follette or VPA procedures.[206] That legislation maintained the distinction between the Lloyd-La Follette Act's scope (being removed or suspended from the classified civil service) and the VPA's.

Congress then recodified title 5 in the 1960s. That legislation codified VPA adverse action procedures in subchapter II of chapter 75 and applied to ''a removal.'' [207] The historical and revision notes explain that this language was supplied on the authority of the VPA and that ''the word 'removal' is coextensive with and substituted for 'discharge.' '' The CSRA used this statutory language as the basis for its adverse action procedures, also codified in subchapter II. While it modified subchapter II's scope in some respects, the CSRA used identical language to cover ''a removal''—previously defined to mean ''a discharge.'' [208] Congress did not carry over the Lloyd-La Follette Act's application to any movement out of the competitive service as such.

Ordinary English and this statutory history indicate that the term ''removal'' in the CSRA means a discharge from the Federal service and does not encompass moves into the excepted service. Transfers into the excepted service are not adverse actions covered by subchapter II. Unlike the Lloyd-La Follette Act, nothing in the CSRA gives employees an accrued personal right to adverse action procedures or appeals before they can be moved into the excepted service.

The April 2024 final rule ignored these facts. The rule instead pointed to a 1988 OPM transition memo advising agencies that civil service employees involuntarily moved into Schedule C positions retained adverse action procedures.[209] That sub-regulatory guidance cited *Roth* for this proposition without further analysis. OPM did not then consider how the CSRA's revisions to chapter 75 may have affected the underlying legal framework. Upon further consideration, OPM now recognizes that the CSRA eliminated the statutory basis for extending chapter 75 procedures to cover employees reclassified or transferred into Schedule C or Policy/Career.

In the notice of proposed rulemaking OPM pointed to 5 U.S.C. 7511(c) as another source of authority for extending chapter 75 procedures to cover employees reclassified into a policy-influencing excepted service schedule.[210] That section allows OPM to ''provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.'' OPM now recognizes this language does not authorize its subpart D regulations. Policy-influencing positions are ''otherwise covered'' by subchapter II—and expressly excluded. Further, section 7511(c) only applies to positions that OPM excepts from the competitive service; it does not apply to exceptions made by the President. Executive Order 14171 provides for the President to place positions in Schedule Policy/Career. Section 7511(c) has no application to such positions.

The April 2024 final rule also cited several cases in which the MSPB held a determination that a position is policy-influencing does not except that position from adverse action procedures unless it occurs before the employee is appointed.[211] These cases either directly

[201] 215 F.2d 500 (D.C. Cir. 1954), cert. denied sub nom, *Brownell* v. *Roth,* 348 U.S. 863 (1954).

[202] These regulations were codified at 5 CFR 212.401 and were not substantively modified until the April 2024 final rule.

[203] 89 FR 25010.

[204] *See* 5 U.S.C. 7512.

[205] 58 Stat. 387 (1944).

[206] 62 Stat. 355 (1948).

[207] Public Law 89–554, 80 Stat. 378 (1966).

[208] *See* 5 U.S.C. 7512(1).

[209] 89 FR 25011.

[210] 88 FR 63876.

[211] *See* 89 FR 25011, citing *Thompson* v. *Dep't of Justice,* 61 M.S.P.R. 364 (Mar. 30, 1994) (No. DE–1221–92–0182–W–1), *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. 751l(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.'').

cited the MSPB's decision in *Briggs* v. *National Council on Disability* [212] for this proposition, or cited cases that in turn cited *Briggs.* Analysis of *Briggs* shows these MSPB decisions do not support this holding. *Briggs* dealt with a case where the National Council on Disability dismissed its executive director, Ethel Briggs, from her position that was excepted from the competitive service by an agency-specific statute. The Council argued in response that MSPB appeals were unavailable because this position was policy-influencing. Upon appeal the MSPB found that there was no evidence the executive director position had ever been declared policy-influencing, and at the bare minimum the employee was never informed of this fact. The Board stated, without further analysis, that ''fairness and due process considerations require that any determination as to the character of the position at issue here have been made in such a manner as to put the appellant on notice of the nature of the position she was considering accepting.'' [213] The MSPB concluded that a jurisdictional hearing was necessary to determine if her position had ever been designated policy-influencing. The MSPB subsequently ordered Briggs reinstated because the Council had not designated her positions as policy-influencing. The Federal Circuit affirmed without considering the question of when a position must be declared policy-influencing.[214]

OPM believes *Briggs'*s analysis of the 7511(b)(2) exception was mistaken. The *Briggs* decision did not analyze the relevant provisions of title 5. The MSPB simply asserted that the timing of the declaration (if it was made) was relevant with no further statutory or legal analysis. This was an unreasoned conclusion, which a handful of subsequent MSPB cases have followed without further analysis. Such a bare record does not establish the existence of accrued personal rights to adverse action procedures for employees moved into policy-influencing positions—especially in the absence of any statutory provision for such rights.

OPM now recognizes that 5 U.S.C. 7511(b)(2) ties exceptions from adverse action procedures to the nature and status of an employees' position alone. Their personal status or history may be relevant for other chapter 75 exceptions, such as those for probationary employees or reemployed annuitants. But it is irrelevant to the policy-influencing exception. OPM has consequently concluded that it lacked authority to issue the subpart D regulations extending chapter 75 to cover employees reclassified or moved into policy-influencing positions. OPM is accordingly now proposing to rescind these changes to subpart D.

4. Reinforce Career Status

OPM is also proposing these rules to make it clear that Schedule Policy/Career positions remain career positions. OPM is aware of widespread concerns that the prior Schedule F would be a means of converting career positions to political positions. The proposed regulations reflect Executive Order 14171's directive that employees in Policy/Career positions remain career employees who are neither expected nor required to personally support the President or his policies. However, they must nonetheless implement the President's agenda faithfully and to the best of their ability. OPM believes formally incorporating this distinction into the civil service regulations would help combat misinformation about the nature and purpose of Executive Order 14171.

D. OPM's Authority To Regulate

The OPM Director has direct statutory authority to execute, administer, and enforce the civil service rules and regulations, as well as most laws governing the civil service.[215] The Director also has authorities Presidents have conferred on OPM pursuant to the President's statutory authority.[216]

Congress also gave OPM broad regulatory authority over Federal employment throughout title 5.[217] Many 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. 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. OPM has other regulatory authority, for example, under 5 CFR parts 5 and 10, to oversee the Federal personnel system and agency compliance with merit system principles and supporting laws, rules, regulations, Executive orders, and OPM standards.

OPM's authorities coexist with the President's direct authority over the civil service. Title 5 provides for the President to prescribe rules governing the competitive service and regulations governing admissions into the civil service.[218] OPM's regulations must comport with these presidential rules and regulations. Further, in cases where OPM issues regulations using delegated presidential authority, the President may use that authority to directly override OPM's regulations.

II. Proposed Amendments

OPM accordingly proposes amending its regulations in 5 CFR chapter I, subchapter B, as summarized below to strengthen employee accountability and improve the management of the Federal workforce.

A. Incorporating Schedule Policy/Career Into the Civil Service Regulations

OPM proposes to amend its 5 CFR part 213 regulations (the Excepted Service) to incorporate Schedule Policy/Career into OPM's civil service regulations. These changes are not legally necessary to implement Executive Order 13957, as amended, or Schedule Policy/Career; the order's provisions are self-executing and supersede OPM regulations issued under delegated presidential authority. However, it promotes clarity and reduces confusion for OPM regulations to reflect the applicable legal framework governing the civil service. Moreover, OPM independently would make these changes for the policy reasons described in this proposed rule. Subpart A of part 213 generally defines and provides for the parameters governing the excepted service, while subpart C sets forth specific excepted service schedules. OPM proposes the following changes to 5 CFR part 213:

Part 213—Excepted Service, Subpart A

Section 213.101 Definitions

Section 213.101 defines terms relating to the excepted service. OPM proposes amending these definitions to add two new definitions of ''career positions'' and ''noncareer position'' for purposes of part 213. These definitions clarify the distinction between noncareer Schedule C positions and career Schedule Policy/Career positions.

OPM proposes to define a noncareer position as a position that carries no expectation of continued employment beyond the presidential administration and whose occupant is, as a matter of

[212] *See Briggs* v. *Nat'l Council on Disability,* No. DC–0432930150–I–1 (M.S.P.B. Jan. 7, 1994), *aff'd King* v. *Briggs,* 83 F.3d 1384, 1389 (Fed. Cir. 1996). *See also Lal* v. *M.S.P.B.,* 821 F.3d 1376 (Fed. Cir. 2016); *Todd* v. *M.S.P.B.,* 55 F.3d 1574 (Fed. Cir. 1995). *Cf., e.g., Bennett* v. *M.S.P.B.,* 635 F.3d 1215 (Fed. Cir. 2011); *Jackson* v. *M.S.P.B.,* 251 F.3d 169 (Fed. Cir. 2000).

[213] *Id.*

[214] *King* v. *Briggs,* 83 F.3d 1384, 1389 (Fed. Cir. 1996).

[215] *See* 5 U.S.C. 1103(a)(5)(A).

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

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

[218] *See* 5 U.S.C. 3301, 3302.

practice, expected to resign upon a presidential transition. This newly defined term would encompass all positions whose appointments involve preclearance by the White House Office of Presidential Personnel. The definition of noncareer position is drawn from section 2 of Executive Order 13957, as amended, with additional gloss to describe the role of the White House Office of Presidential Personnel in political appointments.

OPM further proposes to define a career position as any position that is not noncareer. OPM notes this definition of career position would include temporary positions and term appointments, although these positions do not have tenure or typically lead to an extended career in government. OPM proposes this language to distinguish such positions—which are filled without respect to political loyalty—from noncareer political appointments for purposes of part 213. These definitions would not apply throughout the civil service regulations but would be used only for purposes of clarifying which positions are appropriately classified in Schedule C and which belong in Schedule Policy/Career.

OPM is also proposing to amend the § 213.101(a) definition of excepted service by clarifying that an employee encumbering an excepted service position is in the excepted service, irrespective of whether they possess competitive status under § 212.401(b). This is consistent with the statutory definition of excepted service, which provides that the excepted service consists of those civil service positions that are not in the competitive service or SES without any reference to an incumbent's personal history or status.[219] Title 5 also defines the competitive service by describing the nature of the positions, without respect to the incumbent's personal status.[220] Nothing in the text of title 5 makes a position's location in either the competitive or excepted services contingent on the personal identity or history of the individual encumbering it. The proposed addition to paragraph (a) reflects and clarifies this statutory framework. While the D.C. Circuit held that Lloyd-La Follette procedures were necessary to remove individuals from the competitive service, as previously discussed the CSRA removed that requirement.

As will be further discussed in II(C)(3) below, however, OPM recognizes that individuals moved involuntarily from the competitive service to the excepted service may retain competitive status—eligibility for appointment to competitive service positions—even if they themselves are in the excepted service.

Section 213.102 Identification of Positions in Schedule A, B, C, D, or Policy/Career

OPM proposes to amend § 213.102 to state that the President may place positions in Schedule Policy/Career. While Civil Service Rule 6.2 now authorizes OPM to place positions in Schedule Policy/Career, Executive Order 13957, as amended, directs OPM to make recommendations to the President about what positions should go into that schedule rather than approve agency petitions itself. The proposed amendments reflect the fact that President Trump has reserved to himself the final decision about which positions will go in Schedule Policy/Career.

Section 213.103 Publication of Excepted Appointing Authorities

OPM proposes to amend § 213.103 to include references to Schedule Policy/Career where applicable throughout.

Section 213.104 Special Provisions for Temporary, Time-Limited, or Intermittent or Seasonal Appointments

OPM proposes to amend § 213.104 to include references to Schedule Policy/Career where applicable throughout, as well as references to existing excepted service Schedules A, B, C, and D throughout. As with § 213.102, OPM does not propose to add references to Schedule E administrative law judges, retaining that for a future rulemaking.

Part 213—Excepted Service, Subpart C

Section 213.3301 Positions of a Confidential or Policy-Determining Character

Section 213.3301 sets forth the criteria for Schedule C appointments. OPM proposes to amend the heading to align with the text of Civil Service Rule 6.2, as amended by Executive Order 13957. This would describe Schedule C positions as those of a confidential or policy-determining character normally subject to change as a result of a presidential transition, rather than just positions of a confidential or policy determining character.

OPM also proposes to modify the body of § 213.3301 to expressly define Schedule C positions as noncareer positions. Under these amendments agencies could ''make appointments under this section to *noncareer* positions that are of a confidential or policy-determining character'' (emphasis supplied). The definition of noncareer would follow that which OPM proposes adding to § 213.101. These amendments would make it clear that Schedule C applies only to political appointees and has no application to career positions.

OPM also proposes to eliminate the reference in this section to the § 210.102 definition of ''confidential or policy-determining.'' Executive Order 14171 rendered this definition inoperative and, as discussed below, OPM is proposing to remove it from the civil service regulations.[221] Retaining an obsolete regulatory definition would create confusion about the applicable standards.

Section 213.3501 Career Positions of a Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character

OPM is proposing to add a new § 213.3501 to subpart C for appointments to Schedule Policy/Career of the excepted service. Schedule Policy/Career would cover ''career positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not in the Senior Executive Service.'' Since § 213.101 defines ''career position'' to exclude noncareer appointments, political appointees could not go in Schedule Policy/Career. This language, as well as the schedule's name, makes it clear that Schedule Policy/Career is not to be used for patronage purposes and applies only to career employees hired based on merit.

OPM is proposing to reinforce Schedule Policy/Career's status as covering the career civil service by incorporating into these regulations E.O. 14171's directives that career employees (1) are not required to pledge personal loyalty to the President or his policies, and (2) must diligently implement and advance, to the best of their ability, the policies of the President and the administration, and that failure to do so is grounds for dismissal. This language clarifies what is required of Schedule Policy/Career employees: they do not need to personally support the President's policies, but they must execute them faithfully and to the best of their ability.

OPM is also proposing that individuals appointed to Schedule Policy/Career positions are not subject to trial periods, the excepted service equivalent of probationary periods. Since Schedule Policy/Career positions will be excepted from chapter 43 and 75 procedures throughout their service,

[219] *See* 5 U.S.C. 2103.

[220] *See* 5 U.S.C. 2102.

[221] *See* section I(C)(1).

there is no need to require or administer a separate trial period in which they will serve at-will.

B. Meaning of the Phrase ''Positions of Confidential, Policy-Determining, Policy-Making, or Policy-Advocating Character''

For the reasons set forth in section I(C)(2)(iii), OPM has concluded that the best interpretation of the CSRA is that the phrases ''confidential, policy-determining, policy-making, and policy-advocating'' and ''confidential or policy-determining'' are not terms of art that refer to political appointments in Schedule C. Rather, they have their plain English meaning—confidential positions or those that determine, make, or advocate for policy. 5 U.S.C. 3132(a)(2) further indicates that policy-determining and policy-making responsibilities include functions of SES members such as directing the work of an organizational unit, being held accountable for the success of specific programs or projects, or monitoring progress towards, evaluating, and adjusting organizational goals. The policy-influencing term thus potentially apply to both career and noncareer positions with policy roles. The April 2024 final rule made several regulatory changes intended to clarify that these policy-influencing terms encompass only political appointments in Schedule C. Having reconsidered this conclusion, OPM now proposes to reverse the changes made by the April 2024 final rule.

OPM proposes to amend 5 CFR part 210 (Basic Concepts and Definitions (General)), to remove the definitions for the terms ''confidential, policy-determining, policy-making, or policy-advocating'' and ''confidential or policy-determining'' added by the April 2024 final rule. That rule amended subpart A of part 210 to define these phrases to refer exclusively to political appointments. Under those amendments any career employees moved into policy-influencing positions are definitionally converted into political appointees. Removing these definitions will clarify that both political and career positions can be policy-influencing, and that the President's decision to strengthen accountability in policy-influencing positions does not simultaneously impose a personal loyalty test.

OPM is proposing these amendments for several reasons. As discussed above, OPM now believes the best reading of the CSRA is that the policy-influencing terms encompass career positions. Moreover, even if OPM's prior interpretation was correct, the President has inherent constitutional authority to treat political appointments as career positions. He can always make appointments based on performance instead of political loyalty. President Trump has decided that keeping Schedule Policy/Career appointments career positions improves the administration of the executive branch. Maintaining OPM's regulatory definition would only create confusion about how the President wants these positions treated. They are policy-influencing positions that could be made Schedule C political appointments, but where the President wants hiring and firing to instead occur based on performance. This is within the President's constitutional prerogative, and OPM believes its regulations should facilitate rather than undermine the President's management decisions. OPM accordingly proposes to remove conflicting regulatory definitions that classify Policy/Career positions as political appointments.

Further, Executive Order 14171 overrode these part 210 definitions and rendered them inoperative. OPM's prior part 210 amendments were issued using delegated presidential authority, not OPM's own statutory authority.[222] President Trump used this presidential authority to directly supersede OPM's amendments. OPM cannot enforce regulations issued using delegated presidential authority in defiance of a conflicting presidential directive. Agencies are similarly prohibited from giving the policy-influencing definitions in 5 CFR 210.102(b)(3) and 210.102(b)(4) any force or effect. So even if OPM were not independently convinced as a matter of law and policy that the part 210 amendments should be removed—and it is—OPM would be compelled to do so to bring its regulations into conformity with the President's directive.

The April 2024 final rule made ''conforming changes'' to 5 CFR 213.3301, 432.102, 451.302, 752.201, and 752.401 to ''standardize the phrasing used to describe this type of position.'' [223] OPM is proposing further changes to many of these sections, as discussed in greater detail above and below. In these cases, OPM does not believe it would be appropriate to return to the language that preceded the April 2024 final rule.

However, OPM proposes to rescind the changes made to 5 CFR 451.302 and return to the prior language of ''confidential or policy-making'' rather than ''confidential or policy-determining'' under the April 2024 final rule. This reflects OPM's belief that ''policy-determining'' and ''policy-making'' are not synonyms for political appointees but refer to individuals involved in determining or making agency policy, respectively.

The April 2024 final rule added the term ''policy-determining'' to the list of characteristics which authorize excepted service positions' exclusion from part 302 procedures. With the provisions added to 302.102(d) providing that the positions in Schedule Policy/Career will be filled using the provisions that would have otherwise applied (*e.g.,* part 315 for competitive service positions and part 302 for excepted service positions), OPM is proposing to remove this language, which captured all policy-influencing positions including those in the new Schedule Policy/Career, as a wholesale exemption from part 302 is not appropriate.

C. Adverse Action Procedures and Appeals.

OPM's April 2024 final rule allowed employees whose positions were moved or who were involuntarily transferred into a policy-influencing excepted service position to nonetheless remain covered by chapter 75 adverse action procedures and MSPB appeals. As explained above in section I(C)(3), OPM has concluded it did not have statutory authority to extend chapter 75 to cover employees in such positions. OPM now proposes to rescind the changes made in the prior rulemaking and clarify that chapter 75 does not apply to employees in Schedule C and Schedule Policy/Career positions. OPM is also proposing to amend its part 432 regulations to exclude Schedule Policy/Career positions from chapter 43 performance-based removal procedures.

OPM proposes these changes for several reasons. First, as discussed in section I(C)(3) above, OPM has concluded that the April 2024 final rule's part 752 changes exceed OPM's statutory authority. Section 7511(b)(2) of 5 U.S.C. excludes employees in policy-influencing excepted service positions from chapter 75. Nothing in (b)(2) authorizes such employees to retain an accrued personal right to adverse action procedures. The (b)(2) exclusion is tied solely to the nature of the position, not the personal status of the employee. OPM has no authority to extend chapter 75 to cover employees in positions Congress expressly excluded. OPM therefore proposes these amendments to

[222] *See* 5 U.S.C. 3301, 3302, and E.O. 10577. The April 2024 final rule also left unchanged the part 210 authority citation to 5 U.S.C. 1302, but none of the changes made that rule or proposed by this NPRM adjust veterans preference.

[223] 88 FR 63872.

align the subpart D regulations with its legal authority.

Second, even if the April 2024 amendments were not unlawful, OPM would still propose these changes as a matter of policy. They are necessary to hold employees in sensitive policy-influencing positions accountable and to combat corruption. As discussed in section I(C)(2) above, adverse action procedures make effectively addressing poor performance, misconduct, or corruption very challenging. Federal employees' modal response to what happens to poor performers in their work unit is that they remain and continue to underperform. Surveys show Federal supervisors widely lack confidence in their ability to remove employees for poor performance or even serious misconduct. This has led to situations like that at the FDIC, where agencies have not taken necessary adverse actions against corrupt employees. This undermines the morale of the majority of Federal employees who work diligently.

Decades of experience with the CSRA have shown that chapter 43 and 75 procedures are difficult to use and often deter agencies from taking necessary personnel actions. This directly undermines Merit Principle Four, that employees should maintain high standards of integrity, conduct, and concern for public interest. It also undermines Merit Principle Six, that employees should be separated who cannot or will not improve their performance to meet required standards.[224] These failures are especially problematic in policy-influencing positions, which help shape the whole agency's activities. Enabling the President to except policy-influencing positions from chapter 43 and 75 procedures will enable him to expeditiously remove insubordinate, corrupt or underperforming employees.

Third, and relatedly, OPM is proposing these amendments to strengthen democracy and nonpartisanship in the civil service. Under the CSRA Federal employees ''enjoy a de facto form of life tenure, akin to that of Article III judges'' and some ''take full-throated advantage of it.'' [225] Section I(C)(2)(ii) discusses how adverse action procedures enable career employees to inject partisanship into their official duties, and how some career employees do so.

Partisan career employees undermine the government's democratic accountability to the American people. They can make it very difficult for agencies to implement policies they personally oppose—no matter what the voters chose. Exempting policy-influencing employees from adverse action procedures is necessary to give the President and his appointees the tools to ensure career employees actually perform their duties in a nonpartisan manner. Under OPM's proposed regulations agencies will be able to quickly separate Schedule Policy/Career employees who inject ideology or partisanship into their official duties instead of carrying out the elected President's policies. The proposed changes will help ensure the civil service is nonpartisan in fact as well as name.

The April 2024 final rule stated that concerns with poor performance, misconduct, or partisan career employees could be addressed through existing mechanisms, such as chapter 75 procedures or escalating problems to agency leadership.[226] Upon further review OPM has concluded, for the reasons set forth in sections I(C)(2), that these measures have proven insufficient, and the proposed regulations are therefore necessary.

Fourth, OPM is proposing these regulations to support the new President's management policies. Americans re-elected President Trump, who has determined it is necessary to except policy-influencing career employees from adverse action procedures. Indeed, he considered it so important he signed Executive Order 14171 within hours of being sworn in for his second term. Even if OPM were not independently persuaded that these regulations were necessary (and it is), OPM would defer to the President's judgement and propose these regulations to support the President's management policies. The President is the official constitutionally vested with the executive power and entrusted with the duty to take care the law be faithfully executed. OPM regulations should support the President's civil service policies.

Accordingly, OPM proposes the following changes to 5 CFR parts 432 and 752:

Part 432—Performance Based Reductions in Grade and Removal Actions

The CSRA allows OPM to regulatorily exclude excepted service positions from chapter 43 performance-based removal procedures.[227] OPM's 5 CFR part 432 regulations have long excluded Schedule C positions as such from these requirements. The April 2024 final rule amended 5 CFR 432.102(f)(10) to (1) formally exclude excepted service employees whose positions have been determined to be policy-influencing as defined by § 210.102; (2) state that if OPM put such positions in the excepted service they are Schedule C appointments; and (3) eliminate the exception if the incumbent was involuntarily moved to an excepted service position after accruing tenure.

OPM is proposing to amend § 432.102(f)(10) to remove the reference to the § 210.102 definition, remove the language indicating policy-influencing positions excepted by OPM are necessarily Schedule C positions, and remove the proviso regarding incumbents involuntarily transferred.

These changes will bring the part 432 regulations into conformity with the changes OPM proposes making to parts 210, 213, and 752. As discussed above, OPM is proposing to remove the § 210.102 definition. Retaining regulatory references to a non-existent definition would make little sense. The civil service rules currently provide for Schedule Policy/Career, and OPM is proposing to amend part 213 to reflect this, so it would be misleading to state that Schedule C positions are the only policy-influencing positions in the excepted service. Removing the exception for involuntary transfers also follows OPM's proposed amendments to part 752 and ensures employees in Schedule Policy/Career are treated consistently in chapters 43 and 75. The proposed regulations clarify that agencies do not have to employ chapter 43 procedures to remove employees in Schedule Policy/Career for poor performance.

Part 752—Adverse Actions, Subpart B

OPM proposes to keep the changes the April 2024 final rule made to CFR 752.201—namely to modify language in 5 CFR 752.201(b)(1) to conform with the statutory language in 5 U.S.C. 7501. This proposed change to 5 CFR 752.201(b)(1) conforms the regulatory language to the decisions of the Federal Circuit in *Van Wersch* v. *Department of Health & Human Services,* 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick* v. *Department of the Air Force,* 307 F.3d 1339 (Fed. Cir. 2002). OPM's proposed revision to § 752.201(b)(1) prescribes that, even if an employee in the competitive service who has been suspended for 14 days or less is serving a probationary or trial period, the employee has the procedural rights provided under 5 U.S.C. 7503 if the individual has completed one year of

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

[225] *Feds for Medical Freedom* v. *Biden,* 63 F. 4th 366, 391 (5th Cir. 2023) (Ho, J. concurring).

[226] 89 FR 24991.

[227] 5 U.S.C. 4301(2)(G).

current continuous employment in the same or similar position under other than a temporary appointment limited to one year or less. OPM believes aligning this regulatory language with the underlying statutory authority will reduce confusion and promote adherence to case law. OPM notes that retaining this language would have no impact regarding employees moved into Schedule Policy/Career and, thus, would not impede the purposes of or otherwise affect the implementation of Executive Order 13957, as amended. OPM invites comments as to whether it is appropriate to retain this amendment to part 752.

Part 752—Adverse Actions, Subpart D

Subpart D of part 752 implements subchapter II of chapter 75. Subpart D applies to a removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less. Section 7511(b)(2) of 5 U.S.C. excludes from subchapter II, and thus subpart D, excepted service employees in policy-influencing positions. OPM is proposing to revoke the changes the April 2024 final rule made to subpart D. OPM is also proposing to clarify that employees reclassified or transferred into policy-influencing positions are excluded from subpart D. These changes are expected to increase policy-influencing employees' accountability for their performance and conduct. This will combat insubordination, corruption and underperformance while strengthening nonpartisanship in the civil service.

Section 752.401 Coverage

Section 752.401 governs the scope of subpart D. Paragraph (c) lists the positions subpart D covers and paragraph (d) lists positions it excludes. In paragraph (c), the April 2024 final rule added employees who are moved involuntarily into the excepted service and employees who are moved involuntarily into a different schedule of the excepted service and still occupies either that position or another position to which the employee was moved involuntarily. These changes were intended to extend the subpart to cover employees who were reclassified or involuntarily transferred into a policy-influencing excepted position. OPM is proposing to remove these phrases throughout paragraph (c). This will clarify that employees do not remain covered by subpart D or chapter 75 procedures if they or their positions are moved into Schedules C or Policy/Career.

Paragraph (c)(7) extends subpart D to cover a competitive service employee who had competitive status at the time the employee's position was first listed involuntarily in the excepted service and who still occupies either that position or another position to which the employee was moved involuntarily. OPM proposes to modify this to apply to an employee who was in the competitive service at the time the position was first listed under only Schedule A or Schedule B of the excepted service and who is still in that position. This proposed change reflects the fact that, as explained above in section I(C)(3), employees whose positions are reclassified into a policy-influencing schedule do not retain chapter 75 adverse action procedures or MSPB appeals. However, employees moved into non-policymaking positions (*i.e.,* Schedules A or B) are generally covered by these provisions.

The April 2024 final rule amended the § 752.401(d)(2) exclusion for policy-influencing employees to only cover positions that satisfy the § 210.102 definition of policy-influencing, namely political appointments. The rule also inserted language throughout paragraph (d)(2) providing that it does not cover positions if ''the incumbent was moved involuntarily to such a position after accruing rights as delineated in paragraph (c) of this section.'' OPM proposes to remove both the reference to § 210.102 and this language covering involuntary moves. Paragraph (d)(2) would instead state that employees in Schedules C or Policy/Career are exempted from subpart D's scope.

Additionally, OPM proposes to revise 5 CFR 752.401(c)(2)(ii) pertaining to 10 U.S.C. 1599e, which provided for a 2-year probationary period in the Department of Defense. This language has become obsolete as section 1599e was repealed, effective December 31, 2022, by Public Law 117–81, Section 1106(a)(1).

Section 752.405 Appeal and Grievance Rights.

Section 752.405 covers MSPB appeals of actions taken under subpart D. OPM is proposing to amend § 752.405(a) to add at the end ''Employees listed under § 752.401(d) of this subpart may not appeal to the Merit Systems Protection Board under this section, irrespective of whether they or their positions were previously covered by this subpart.'' This expressly states what is implicit in the amendments OPM is proposing to § 752.401: employees in policy-influencing excepted service positions are categorically exempt from subpart D's coverage and concomitant MSPB appeals. This addition is meant to promote clarity in OPM's regulations.

D. Agency Procedures for Moving Positions Into, or Between Excepted Service Schedules

OPM also proposes modifying 5 CFR part 212, subpart D, and Part 302, subpart F, to modify the procedures for moving positions into or between excepted service schedules. Specifically, OPM proposes to remove subpart F of part 302, which was created by the April 2024 final rule. OPM also proposes to amend part 212, subpart D to remove provisions inconsistent with the policies of Executive Order 14171, as well as to clarify that competitive service employees reclassified or transferred into an excepted service schedule do not remain in the competitive service but retain their competitive status.

Part 212—Competitive Service and Competitive Status, Subpart D

Section 212.401 Effect of Competitive Status on Position

OPM is proposing to revise 5 CFR part 212, subpart D, which governs the effect of an employee's competitive status on the employee's position. The April 2024 final rule modified 5 CFR 212.401(b) to provide that employees who were in the competitive service and had competitive status at the time their position was first listed under Schedule A, B, or C, or any excepted schedule created after May 9, 2024, or who were otherwise moved involuntarily to a position in the excepted service, remain in the competitive service for the purposes of competitive status and any accrued adverse action appeals while the employee occupies that position, or any other position to which the employee is moved involuntarily. This language was meant to extend chapter 75 coverage to positions moved into a policy-influencing excepted service schedule.

OPM is proposing to remove this language. In its place OPM proposes a new paragraph (b) that provides that an employee who has competitive status at the time their position is first listed in an excepted service schedule, or who is involuntarily transferred to a position in the excepted service, is not in the competitive service for any purpose but shall retain competitive status for as long as they continue to occupy such position.

These changes align OPM regulations with the 5 U.S.C. 2102 and 2103 statutory definitions of the competitive and excepted services. Title 5 defines a position's location in the excepted or competitive service solely with regard to the nature and classification of the position, without regard to an

individual's personal status or work history.

The proposed amendments further reflect the fact, discussed in section I(C)(3), that 5 U.S.C. 7511(b)(2) categorically excludes employees in positions the President has placed in the excepted service and determined are policy-influencing. OPM does not have statutory authority to extend chapter 75 to cover such employees. Nothing in title 5 provides for positions to have a hybrid competitive-excepted status. While OPM previously pointed to provisions in the Lloyd-LaFollette Act, as construed by the D.C. Circuit in *Roth* v. *Brownell,* as authorizing such hybrid status, the CSRA repealed and replaced that language. Nothing in the currently enacted title 5 permits employees in the excepted service to remain in the competitive service for purposes of accrued adverse action appeals. OPM has accordingly concluded that the current language in § 212.401(b) exceeds its authority under both title 5 and the civil service rules and must be removed.

Moreover, even if the current § 212.401(b) were permissible under title 5 and the civil service rules, retaining it would undermine the President's policies for increasing accountability in policy-influencing positions. OPM would accordingly propose these changes regardless to support the President's policies.

At the same time, OPM's proposed new § 212.401(b) would provide that employees with competitive status whose positions are listed in or who are involuntarily transferred into the excepted service retain their competitive status. This would allow them to retain their basic eligibility for noncompetitive assignment to a competitive position. This proposal recognizes that employees hired on a competitive basis have met the standards necessary for appointment to competitive positions, and that the President's decision to move them or their position into the excepted service says little about their underlying qualifications.

Allowing employees in excepted service positions to retain their competitive status is consistent with OPM's statutory authorities. Title 5 provides that an individual may be appointed in the competitive service only if he has passed an examination or is specifically exempted from examination by the civil service rules.[228] Employees with competitive status have met this standard. OPM can allow them to keep their competitive status while they encumber an excepted service position, and the Civil Service Rules currently provide for some excepted service employees to accrue competitive status.[229] Unlike purporting to keep a position in the competitive service for purposes of adverse action procedures, this approach does not contradict any statutory mandates.

Part 302—Employment in the Excepted Service, Subpart F

The April 2024 rulemaking added a new subpart F to Part 302 prescribing procedures for moving positions into or between excepted service schedules. OPM is proposing to remove subpart F in its entirety.

5 CFR 302.601 sets forth the scope of subpart F. It applies to any situation where an agency moves a position from the competitive to the excepted service, or between excepted service schedules. It also applies any time that an employee covered by chapter 75 procedures is moved involuntarily to any position not covered by chapter 75.

Section 302.602 prescribes basic requirements for such moves or transfers. It provides that if a directive from the President, Congress, or OPM explicitly delineates the specific positions or employees that will be moved, the agency need only list the positions or employees moved in accordance with that directive and their location within the organization and provide that list to OPM.

If the directive requires the agency to select the positions or employees to be moved pursuant to criteria articulated in the directive, then the agency must provide OPM with a list of the positions or employees to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes they met those criteria. If the directive confers discretion on the agency to establish criteria for identifying the positions or employees to be covered then the agency must also provide OPM with the objective criteria to be used and an explanation of how these criteria are relevant.

Section 302.602 also requires agencies to (1) identify the types, numbers, and locations of employees or positions that the agency proposes to move into the excepted service; (2) document the basis for their determination that movement of the employees or positions is consistent with the standards set forth by the President, Congress, OPM, or their designees, as applicable; (3) obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the employees or positions is both consistent with the prescribed standards and with merit system principles; (4) submit the CHCO certification and supporting documentation to OPM before using the excepted service authority; (5) for exceptions effectuated by the President or OPM, list positions in the excepted service only after receiving written approval from the OPM director; and (6) for exceptions created by the President or OPM, initiate any hiring actions only after OPM publishes such authorization in the **Federal Register**.

Section 302.602(c) also stipulates that, if a position being moved to the excepted service is encumbered, the agency must provide affected employees 30 days advanced written notice. If the movement is involuntary, the agency's notice must state employees will remain covered by chapter 43 and 75 procedures and MSPB appeals. Under 302.603(d) the same requirements apply to the involuntary movement of employees.

Section 302.603 provides MSPB appeals for competitive service employees whose positions are placed in the excepted service or who are otherwise moved involuntarily to the excepted service. It also gives MSPB appeals to excepted service employees whose positions are placed into a different excepted schedule or are otherwise involuntarily transferred into a different excepted service position. Such appeals apply whenever an agency asserts the move or transfer would exclude the employee from chapter 43 or 75 procedures and subsequent appeals. Under the regulations MSPB can order the agency to nonetheless extend chapter 43 or 75 procedures to such employees. Employees can also appeal if they allege any facially voluntary moves were in fact involuntary.

OPM is now proposing to remove subpart F because it no longer remains in effect. OPM issued subpart F using delegated presidential authority.[230] The President has since directly used his authority to hold this subpart inoperative. Executive Order 14171 has rendered subpart F unenforceable and without effect. [231]

This presidential directive is self-executing, taking precedence over

[228] See 5 U.S.C. 3304(b).

[229] 5 CFR 6.3(a).

[230] *See* 5 U.S.C. 3301, 3302, and E.O. 10577. OPM's authority citation for part 302 also cites 5 U.S.C. 1302 and 8151, but these are relevant only to other portions of part 302. Section 1302 deals with retaining records of competitive service examinations and applying veterans preference, while section 8151 deals with retention rights when an employee resumes service with the government. Subpart F is not relevant to these authorities.

[231] Executive Order 14171, sec. 4.

OPM's subpart F regulations. While OPM can modify the civil service regulations using delegated Presidential authority, the President can directly use his constitutionally and statutorily vested authority to override those regulations. OPM and MSPB are now lawfully prohibited from giving effect to subpart F. Consistent with this self-executing Presidential directive, Executive Order 14171 terminated MSPB appeal rights under subpart F. Both OPM and MSPB's regulations providing for appeals under subpart F are now obsolete. OPM therefore proposes to remove these regulations to avoid confusing federal employees about applicable legal requirements. OPM does not believe it is beneficial to keep obsolete and unenforceable regulations on the books. OPM notes that MSPB will need to make conforming amendments to its regulations at 5 CFR 1201.3(a)(12) should OPM's proposed removal of these regulations become final.

Even if OPM had discretion to keep subpart F in effect, OPM would still propose removing it. OPM would do so for several reasons. First, subpart F was expressly adopted as part of the prior administration's policy of preventing the reinstatement of Executive Order 13957. Federal policy has changed with the election of a new President. So OPM would still propose removing subpart F to avoid impeding administration policy.

Second, the Opinion Clause of the U.S. Constitution provides that the President ''may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective offices.'' [232] Executive Order 14171 asks agency heads for their opinion about what policy-influencing career positions belong in Schedule Policy/Career. OPM has no authority to regulatorily limit how agency heads provide this advice. If the President wants agency heads' unvarnished opinion about what positions belong in Schedule Policy/Career, without CHCO certification, the Constitution requires them to provide it. OPM regulations cannot interfere with this constitutional duty.

Third, 5 U.S.C. 3302 gives the President primary responsibility for placing positions in the excepted or competitive services. OPM only excepts positions using delegated Presidential authority. Executive Order 14171 set up a process for the President to place positions in Schedule Policy/Career based upon recommendations from OPM and agency heads. Even if that order had not directly overridden subpart F, it would be inconsistent with this hierarchy of authority for OPM to use delegated Presidential authority to purport to limit the President's direct exercise of section 3302 authority. OPM reports to the President, not vice versa. OPM regulations issued using delegated Presidential authority should not impede Presidential authority.

Fourth, OPM regulations cannot create an entitlement to adverse action procedures that is denied by statute. Subpart F requires agencies to notify employees moved or otherwise involuntarily transferred into Schedule F that they remain covered by chapter 43 and 75 procedures and appeals. It also authorizes MSPB to order agencies to continue to apply such procedures, and to order agencies to correct any deficient notifications.

However, as discussed in section I(C)(3), employees reclassified or transferred into a policy-influencing excepted service position are out of scope for chapter 75 as a matter of law. Section 7511(b)(2) of 5 U.S.C. precludes chapter 75 coverage and subsequent MSPB appeals in Schedule Policy/Career, no matter what notices agencies may have provided. While OPM can give MSPB jurisdiction to hear some appeals, it cannot do so in the face of a conflicting statutory mandate. Nor can MSPB require agencies to apply chapter 75 procedures to employees statutorily excluded from that chapter's coverage.

Fifth, subpart F partially transfers decisional authority over which positions can go into Schedule Policy/Career from the President to subordinate officers. Section 302.602(b)(2) would require agency CHCOs to certify movement of positions into Schedule Policy/Career. Many CHCOs are career employees. Executive orders 13957 and 14171 have proven controversial in the civil service. Some CHCOs may be unwilling to issue certifications necessary to transfer positions into Schedule Policy/Career, even if the President directs the move. This could have the effect of functionally transferring to career CHCOs the authority to except positions that 5 U.S.C. 3302 vests in the President.

Similarly, § 302.603 authorizes MSPB appeals over movements or transfers into Schedule Policy/Career. OPM previously noted ''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 with the procedural requirements of § 302.602 while effecting any placement from the competitive service into the excepted service or from the excepted service to a different schedule of the excepted service.'' [233] These procedures would allow the MSPB to overturn a Presidential decision to place positions in Schedule Policy/Career based on asserted failure to comply with OPM regulations. Further, Congress designed the MSPB to be independent of Presidential control. MSPB members serve seven-year terms, and the President can only dismiss them for inefficiency, neglect of duty, or malfeasance.[234] Subpart F could thus potentially transfer final control over which positions go into Schedule Policy/Career from the President to the MSPB.

Subpart F was added as part of the prior administration's effort to stymie the reintroduction of anything like Schedule F. OPM now believes that, with the change in administration and administration policy, control over the federal workforce should remain with the official constitutionally and statutorily vested with that authority—the President. OPM does not believe its regulations should give subordinate agency officials the functional ability to countermand a Presidential directive to place positions in Schedule Policy/Career. Even if the President had not directly rendered subpart F inoperative, OPM would propose these changes to restore authority to the official constitutionally vested with it and democratically accountable to the American people.

Sixth, requiring adherence to externally enforceable procedural steps with subsequent MSPB appeals seems likely to produce protracted litigation. Such litigation would create confusion about whether positions have been moved into Schedule Policy/Career and whether incumbents in those positions retain adverse action appeals. The government benefits from certainty and dispatch about position classifications and the scope of removal restrictions. Additional bureaucracy and extended litigation do not promote the efficiency of the federal service. That is particularly true when the appeals in question were overtly adopted to frustrate a Presidential priority.

OPM notes that agencies will nonetheless be required to provide justification to OPM for Schedule Policy/Career recommendations. Executive Order 13957 requires each agency to give OPM a written explanation documenting the basis for the agency heads' determination that positions should be placed in Schedule

[232] U.S. Constitution, article II, section 2.

[233] 89 FR 25033.

[234] *See* 5 U.S.C. 1202.

Policy/Career.[235] OPM will only recommend the President place positions in Schedule Policy/Career if OPM is persuaded the classification is warranted. But OPM no longer believes that regulatorily mandating adherence to externally enforceable procedures for transferring positions into, or moving them within, the excepted service is appropriate or beneficial, especially when those procedures were adopted to undermine a presidential priority.

Authority Citations

OPM proposes to revise the authority citations for parts 210, 212, 213, 302, and 752 to comply with 1 CFR part 21, subpart B. OPM also proposes to update the citations by adding current authorities and removing obsolete citations.

E. Retaining Career Hiring Procedures

Executive Order 13957, as amended, now directs OPM to provide for the application of Civil Service Rule 6.3(a) to Schedule Policy/Career positions.[236] Rule 6.3(a) allows OPM to by regulation prescribe conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status in accordance with the Civil Service Rules and Regulations.[237] OPM is accordingly proposing to modify 5 CFR part 302, subpart A (Employment in the Excepted Service) to clarify that appointments to Schedule Policy/Career positions will be made using the hiring procedures that would have otherwise been used had the position not been moved into Policy/Career. Positions moved into Schedule Policy/Career from the competitive service will continue to be filled using procedures applicable to the competitive service, and positions moved from the excepted service will continue to be filled using excepted service procedures. Under this proposal a position's movement into Schedule Policy/Career will not affect how it is filled.

§ 302.101 Positions Covered by Regulations

Part 302 prescribes procedures governing excepted service hiring, and 5 CFR 302.101(c) lists exemptions from these procedures. For example, these exemptions include attorneys and positions included in Schedule A for which OPM agrees with the agency that the positions should be excluded.[238] In the 2024 final rule, OPM added positions excepted by statute which are of a policy-determining character to these exemptions. Based on the inclusion of noncareer positions which are of a confidential, policy-making, or policy-advocating nature in Schedule Policy/Career, which will be subject to new provisions in 302.102(d), OPM is proposing to remove this language so that the exemption in 302.101(c)(7) includes only positions in Schedule C.

§ 302.102 Method of Filling Positions and Status of Incumbent

With limited exceptions, individuals employed in the excepted service do not acquire competitive status based on that employment. By definition, competitive status means an individual's basic eligibility for noncompetitive assignment to a competitive position. An individual with competitive status may be, without open competitive examination, reinstated, transferred, promoted, reassigned, or demoted, subject to conditions prescribed by the Civil Service rules and regulations. One of those exceptions is found in 5 CFR 6.3, which allows OPM to ''prescribe conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status . . . .'' Moreover, competitive service employees whose positions are first listed under Schedules A, B, and C retain their competitive status. To create consistency in the treatment of individuals who will be transferred from the competitive service into Schedule Policy/Career positions and individuals who will be appointed to Schedule Policy/Career positions, OPM is exercising its discretion to grant competitive status to individuals appointed to Schedule Policy/Career positions after 1 year of service.

Specifically, OPM is proposing to revise paragraph (c), which currently allows OPM to specify that individuals in certain positions in the excepted service may acquire competitive status as provided in part 315. Part 315 only allows for competitive status when employed in a permanent appointment in the competitive service; however, Civil Service Rule 6.3(a) provides broader authority to OPM to provide for competitive status. Because OPM is proposing to allow individuals in Schedule Policy/Career to acquire competitive status even though Schedule Policy/Career positions are in the excepted service, OPM is proposing conforming changes to paragraph (c) to remove the part 315 limitation.

OPM is also proposing to add a paragraph (d) to 5 CFR 302.102 that would provide that a position's movement into Schedule Policy/Career will not affect how it is filled. (Alternatively, OPM may place this provision at 213.3501.) More specifically, the regulations would provide that agencies make appointments to positions in Schedule Policy/Career in the same manner as to positions in the competitive service, unless such positions would, but for their placement in Schedule Policy/Career, be listed in another excepted service schedule. Conversely, appointments to positions in Schedule Policy/Career that would be listed in another excepted service schedule, but for their placement in Schedule Policy/Career, would be filled using the provisions that would otherwise apply to that schedule.

For example, under this proposal agencies can still use excepted service procedures to hire applicants with severe disabilities into Policy/Career positions. Such positions would otherwise be placed in Schedule A, so agencies may continue to use excepted service procedures, including the exemption from appointment procedures in 302.101(c)(11). Similarly, attorney positions would continue to be exempted from part 302 appointment procedures in accordance with 302.101(c)(8). OPM-granted governmentwide or agency-specific Schedule A authorities for which part 302 appointment procedures apply also would continue to be subject to the part 302 appointment procedures. Agencies would continue to apply competitive service hiring procedures to positions moved into Schedule Policy/Career from the competitive service.

Commentators had expressed concerns that Executive Order 13957 was an attempt to replace merit hiring with patronage appointments. Executive Order 14171 and the regulations OPM is proposing make clear those concerns are meritless.

III. Addressing Further Objections

OPM expressed serious concerns with Executive Order 13957 during the prior rulemaking. Upon further consideration OPM now concludes those concerns were unwarranted. This section provides an explanation of why OPM has changed its views and now believes Schedule Policy/Career—the successor to Schedule F—would improve the civil service.

[235] E.O. 13957, sec. 5(a)(i).

[236] E.O. 13957, sec. 4(b)(i).

[237] 5 CFR 6.3(a).

[238] 5 CFR 302.101(c)(8), (c)(6).

A. Schedule Policy/Career Rejects Patronage

Both OPM and commenters expressed significant concern that Executive Order 13957 was an attempt to resurrect the patronage or ''spoils'' system. In this view, the order was a vehicle to convert tens of thousands of policy-influencing career positions into political appointments. The President would then replace ''qualified'' career employees en masse with ''unqualified'' political loyalists. OPM and commentators feared that this would reduce ''expertise'' within the federal workforce, reduce agencies' administrative capacity, and degrade effective government operations.[239]

OPM and commentators also expressed concerns such a shift would hurt agency recruitment and retention, as experienced professionals would be less likely to seek or remain in jobs where political affiliation was perceived to be a condition of employment.[240] OPM explained that it believed ''qualified individuals should discharge important functions, and [the 2024] 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.'' [241]

Upon further review, and in consideration of the policies set out in Executive Order 14171, OPM has concluded that these fears were misplaced. This order rejects the spoils system and seeks to return to the efficient, merit-based system enacted by the Pendleton Act. Nothing in the order disturbs merit hiring of career employees. It also contains safeguards to prevent patronage, such as forbidding the White House office in charge of vetting political positions from being involved with selecting Schedule Policy/Career appointees.

Section 6 of Executive Order 13957, as amended, further prohibits considering political affiliation when making Policy/Career appointments. It also expressly provides that Policy/Career employees do not have to personally support President Trump or his policies. Contrary to fears of a return to the spoils system, the President expressly forbid political loyalty tests for Policy/Career employees. At the same time the President made clear that career employees who fail to faithfully implement administration policies to the best of their ability have failed to perform their basic work responsibilities and will be removed.

Executive Order 14171's purpose is to increase policy-influencing employees' accountability within the Executive Branch, thereby facilitating effective Presidential management of and reducing insubordination and corruption in the civil service. That purpose is not served by, and in fact would be undermined by, a return to patronage practices that undermine agency capacity.

OPM's prior analysis and comments were predicated on the assumption that Executive Order 13957 was an effort to impose a political loyalty test on employees in policy-influencing positions. Executive Order 14171 rejected that approach, and those concerns are inapposite. The order instead provides that Schedule Policy/Career jobs are open to employees of any political persuasion so long as they perform well and faithfully implement the President's agenda to the best of their abilities. This is the opposite of the patronage system, which subjected employees to dismissal upon a Presidential transition based on political affiliation alone, irrespective of their performance.

In the 2024 final rule OPM recognized that Executive Order 13957 contained similar prohibitions on prohibited personnel practices but explained it would be difficult for employees to personally enforce those protections.[242] This analysis ignored the fact that the President has set the parameters for Schedule Policy/Career and has ample constitutional and statutory authority to enforce his directives. These include the ability to dismiss political appointees who defy or ignore section 6's requirements. The President has required that agencies appoint and retain employees in Policy/Career positions based on merit, not their personal political affiliation. It is OPM's experience that compliance with executive orders governing the civil service is the norm, not the exception. OPM accordingly expects that agencies will not treat Schedule Policy/Career positions as patronage appointments in defiance of a presidential directive.

OPM notes that President Trump has strong motivation to enforce section 6's prohibition on patronage. As OPM and commentators previously noted, hiring less qualified personnel reduces Federal administrative capacity and efficiency. Replacing experienced career employees who are faithfully implementing Presidential directives with inexperienced political appointees would make it significantly more difficult for him to carry out his agenda.

For example, Executive Order 13957, as amended, contemplates that Schedule Policy/Career would apply to agency employees with responsibility for drafting regulations and guidance. These are complex tasks that require considerable experience with the subject matter and technical procedures. Few newly hired employees—career or noncareer—can do these jobs effectively. Generally dismissing career regulation drafters who do not share the President's political affiliation, even if they would otherwise faithfully and expeditiously draft rules advancing his policies, would cripple agencies' ability to engage in notice and comment rulemaking. The President accordingly has strong motivation to prevent agencies from treating regulation-drafting positions as patronage plums instead of merit positions. It may be necessary to dismiss some regulation drafters who slow-walk the production of rules they personally oppose or otherwise insert partisanship into the performance of their duties. But a President who wants agencies to implement his policies has strong incentives not to dismiss experienced regulation writers who are performing timely and quality work, no matter their personal political affiliation.

OPM also notes that the President and his appointees have additional incentives to maintain a career workforce that contains a diversity of views and opinions. Having intellectually diverse career staff analyze and critique proposed policies can help identify blind spots and problems during the policy-making process that might not be apparent to a team that shared the same political perspective. Career staff critiques, especially those coming from a political perspective that differs from political appointees, ultimately strengthens policymaking and produces better agency decisions. Even some of the strongest advocates for Executive Order 13957 have reported that Trump Administration policymakers found career staff policy criticism or ''red teaming'' highly valuable.[243] OPM accordingly believes that agency heads would have little desire to dismiss career employees who provide candid advice that differs from their own preferences, provided those employees faithfully execute the ultimate policy decisions. Career employees, in

[239] *See, e.g.,* 89 FR 24997–25002.

[240] 89 FR 25040–25041.

[241] 89 FR 24995.

[242] 89 FR 24994.

[243] Sherk, *supra* note 142, at 21.

Schedule Policy/Career or otherwise, are expected to provide their frank and fearless advice to agency leadership. Doing so helps agencies make better decisions, which the President and agency leaders value. Executive Order 14171 accordingly protects disagreement and dissent.

If some officials nonetheless treat Schedule Policy/Career positions as noncareer positions OPM can help the President fix that problem when it arises. OPM will be heavily involved in the implementation of Schedule Policy/Career. If necessary, OPM can recommend additional measures to prevent abuses. But currently hypothetical concerns that agency personnel will ignore a Presidential directive are not grounds for failing to implement an executive order.

B. Bureaucratic Autonomy Undermines Democracy

In the prior rulemaking some commentators expressed, and OPM broadly agreed with, a related but distinct, concern—that the prior Schedule F would strengthen the Federal workforce's accountability and responsiveness to the President, and this is a negative. For example, one commenter argued 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.'' [244] This commenter argued that Congress has ''consistently rejected a civil service that is merely an extension of a President's will.'' [245] Another commenter argued that the ''Founders were deeply concerned with the amassing of centralized power, and Schedule F frustrates the institutional design of checks and balances.'' [246] Another commenter argued that OPM's prior rule would ''help preserve the autonomy of the civil service, allowing its professionals to complete their 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.'' [247] These and other commentators essentially argued that bureaucratic autonomy is beneficial, and that career employees should be substantively insulated from Presidential supervision.

Upon further review, OPM now disagrees with these views. America was founded on the principle of government by consent of the governed. The Government's power flows from the American people, and the Constitution in turn holds those who exercise that power accountable to the people. Article II of the U.S. Constitution vests the Federal Government's executive power in the President. To discharge his responsibilities under Article II the President necessarily delegates his executive power to subordinate officers and employees. Those officials must be accountable to the President, who in turn must account for their performance to the American people.

The Constitution contains multiple checks and balances to prevent the amassing of centralized power. It divides executive, legislative, and judicial power among three co-equal branches of government. Congress appropriates funds, creates agencies, and defines their powers. ''An agency literally has no power to act . . . unless and until Congress confers power upon it.'' [248] The courts—whose judges are appointed by the elected President with the consent of the elected Senate—interpret the law and determine whether the executive branch has exceeded its authority. The Supreme Court has recently emphasized that the executive branch may not aggrandize its power by leaning into statutory ambiguities; courts will interpret Congressional enactments fairly.[249] The President also requires Senate consent to appoint the principal officers who lead the executive departments. The constitutional design places many constraints on Presidential power.

However, nothing in the Constitution contemplates insulating policy-influencing officials from Presidential supervision. Instead, as the Supreme Court has often emphasized, ''lesser officers must remain accountable to the President, whose authority they wield.'' [250] In this way ''the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.' '' [251]

Bureaucratic autonomy undercuts the federal government's accountability to the American people. If voters do not like how the President is executing the law, they can elect a new one at the next election. Partisan control of the White House has changed in four of the past five presidential elections. The threat of the opposing party winning the next election also shapes how Presidents exercise their authority.

However, career employees are by design unaccountable to the American people; they do not lose their jobs if a new President takes office. Insulating policy-influencing employees from accountability to the elected President accordingly insulates them from accountability to the American people. This enables career officials to exercise Federal power without a democratic mandate. This runs contrary to the founding principles of American government. OPM does not believe the civil service should function as an extra-constitutional and undemocratic constraint on presidential management of the executive branch. Checks and balances are instead provided through the constitutionally mandated separation of powers.

C. Schedule Policy/Career Is Lawful

Several commentators in the prior rulemaking argued that Schedule F was unlawful. OPM explained it ''took no position on whether Executive Order 13957 was based on legal error'' and that the rulemaking was not premised on that conclusion.[252] However, OPM set forth its views on those legal concerns. Many of those views suggested Executive Order 13957 was based on legal error.

OPM has reconsidered those views and now believes that Executive Orders 13957 and 14171 are squarely within the President's constitutional and statutory authority. Even some of those orders' strongest critics have come to the same conclusion. For example, a professor emeritus and former Dean of the School of Public Policy at the University of Maryland founded a working group to oppose Schedule F.[253] He has nonetheless acknowledged that ''Schedule F is constitutional'' and that

[244] 89 FR 24985.

[245] *Id.*

[246] 89 FR 24997.

[247] 89 FR 25036.

[248] *La. Pub. Svc. Comm'n* v. *FCC,* 476 U.S. 355, 374 (1986).

[249] *Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. 2244 (2024).

[250] *Seila Law* v. *CFPB,* 140 S. Ct. 2183, 2197 (2020).

[251] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 498 (2010) (quoting James Madison).

[252] 89 FR 24991.

[253] Erich Wagner, ''Governance experts launch a group to oppose Schedule F,'' Gov. Exec., (May 21, 2024), *https://www.govexec.com/workforce/2024/05/governance-experts-launch-group-oppose-schedule-f/396754/.*

opponents ''need to look to tools elsewhere'' than legal challenges.[254]

As discussed above, OPM believes that the policy-influencing terms encompass career positions and that employees moved into policy-influencing excepted service positions are no longer covered by chapter 75. OPM also believes that the President has authority to except positions from the competitive service for the purpose of excluding them from chapter 75 procedures and that doing so does not raise due process concerns. OPM also now recognizes that construing the CSRA to prohibit Schedule Policy/Career would raise serious constitutional concerns.

1. Positions May Be Excepted From the Competitive Service To Promote Accountability

5 U.S.C. 3302 authorizes the President to prescribe rules governing the competitive service and to provide, as nearly as conditions of good administration warrant, for necessary exceptions from the competitive service.[255] In the 2024 rule OPM explained that it ''disagree[d] that the authority to make exceptions in section 3302 also allows for the removal of incumbents' accrued adverse action rights under chapter 75.'' [256] OPM further noted that section 3302 is placed in subchapter I of chapter 33, a subchapter addressing examination, certification, and appointment. OPM argued that section 3302 authority is consequently limited to excepting positions for reasons relating to those topics, not altering chapter 75's coverage. Further review has led OPM to conclude that this analysis was mistaken; section 3302's text, history, and precedents demonstrates that it allows the President to except positions from the competitive service for any reason he finds necessary, including excluding them from chapter 75.

Section 3302's text places no restrictions on the grounds for excepting positions from the competitive service. Those decisions are left to Presidential discretion, so long as he finds it necessary and warranted by conditions of good administration. If the President believes chapter 75 procedures are impeding his supervision of a particular position, then he may except it to bring it within the 7511(b)(2)(A) exception.

An examination of the section's history confirms that reading. Section 3302 of 5 U.S.C. is the modern codification of the provisions of section 2, Eighth of the Pendleton Act of 1883.[257] Section 2, First of the Pendleton Act called for the President to issue civil service rules implementing the law's requirements, including competitive examinations. Section 2, Eighth further provided that ''any necessary exceptions'' from the civil service rules ''shall be set forth in connection with such rules, and the reasons therefore shall be stated in the annual reports of the Civil Service Commission.'' [258] The Pendleton Act did not restrict the basis for making exceptions to the civil service rules; it merely required the President to publicly explain them. Section 2, Eighth was subsequently codified as 5 U.S.C. 633(2)(8).

Congress reorganized and recodified title 5 in 1966.[259] That recodification created section 3302 from the former section 633(2)(8). It also placed section 3302 in subchapter I of chapter 33 as a housekeeping measure; many of the reasons for excepting positions pertain to the examinations process. But that recodification did not limit the grounds for excepting positions from the competitive service. Instead, the law explained that the ''legislative purpose in enacting [ ] this Act is to restate, without substantive change, the laws replaced by those sections.'' [260] Under the Pendleton Act the President could except positions for any reason he deemed necessary, provided he publicly explained it. Section 3302 maintained that authority without substantive change.

OPM also now recognizes that section 3302's location within subchapter I of chapter 33 should not be construed as implicitly limiting the grounds for excepting positions from the competitive service. The title 5 recodification act provided that an ''inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.'' [261] Contrary to OPM's prior view, section 3302's location in subchapter I provides no indication that authority to make exceptions is limited to matters relating examination, certification, and appointment. Congress expressly provided otherwise.

The Supreme Court has also interpreted section 3302 to allow the President to except positions from the competitive service for the purpose of excluding them from chapter 75 procedures. The Court has found that ''senior or 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, 7511(b)(2)''.[262] While on the D.C. Circuit, then-Judge Kavanaugh similarly concluded that ''civil service laws recognize the authority of the President or agency head to exempt certain employees from tenure protection as necessary and appropriate. *See, e.g.,* 5 U.S.C. 2302(a)(2)(B), 3301–02, 7511(b)(2).'' [263]

The text, history, and precedents governing section 3302 confirm the President can except positions from the competitive service to bring them within the scope of the 7511(b)(2)(A) exception.

2. Schedule Policy/Career Does Not Raise Due Process Concerns

In the prior rulemaking, OPM stated that tenured Federal employees are constitutionally entitled to due process before any dismissals and any new policies affecting them must still provide constitutional due process.[264] Under this view, Executive Order 13957 was unlawful because it permitted agencies to remove currently tenured employees without due process.

Commentators contended that this analysis was incomplete.[265] They argued that while for-cause removal restrictions may create a property interest in continued employment, the government can abolish those removal restrictions. Doing so extinguishes the underlying property interest they create. Commenters observed that Federal courts have consistently rejected challenges to laws excluding positions from state civil service systems. The courts have held that due process is satisfied by the applicable governmental body going through the necessary procedures to modify the scope of the civil service. Employees are not entitled to an individual adjudication before the

[254] Don Kettl, ''Schedule F Can't Be Beaten in the Courts,'' Persuasion (Aug. 16, 2024), *https://www.persuasion.community/p/schedule-f-cant-be-beaten-in-the.*

[255] Section 3302 can also be viewed as a Congressional recognition of the President's inherent constitutional authority over the executive branch. OPM takes no position in this rulemaking as to whether section 3302 should be construed as a legislative grant of power to the President or a legislative recognition of power constitutionally vested in the President.

[256] 89 FR 24992.

[257] Public Law 16; Civil Service Act of 1883, (Jan. 16, 1883) (22 Stat. 403).

[258] *Id.*

[259] Public Law 89–554, 80 Stat. 378 (Sep. 6, 1966).

[260] *Id.,* section 7(a).

[261] *Id.,* section 7(e).

[262] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 506 (2010).

[263] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 537 F. 3d 677, 699, n. 8 (D.C. Cir. 2008).

[264] 88 FR 63866–63867.

[265] *See, e.g.,* Comment 4097.

government makes a policy decision to exclude them from adverse action procedures, and any subsequent dismissals are not governed by constitutional due process.[266]

OPM rejected these comments and concluded that these cases did not eliminate constitutional concerns with Executive Order 13957. OPM reasoned that the cases commentators raised involved state legislation, not administrative procedures. OPM explained that ''Federal appellate courts have held that rights conferred on state employees by legislative action can be revoked, but that revocation also requires legislative action.'' [267] OPM argued that administrative action could not constitutionally modify chapter 75's applicability to tenured employees; that would take an act of Congress.[268]

Upon further review OPM now concludes that it took too narrow a view of the term ''legislative'' as it is used in due process case law. It is settled precedent that individualized due process is not required when the government makes general policy (''legislative actions'') rather than makes individualized adjudications. The distinction between ''legislative'' and ''adjudicative'' actions depends on the character of the action—not which branch of government formally undertakes it.[269]

Courts follow a three-part test for determining whether a governmental action is ''legislative'' or ''adjudicative'' for due process purposes: (1) does it apply to specific individuals or to unnamed and unspecified persons; (2) does the promulgating agency consider general facts or adjudicate a particular set of disputed facts; and (3) does the action determine policy issues or resolve specific disputes between particular parties? [270] Whether the action is formally designated legislative, adjudicatory, or administrative is irrelevant.

For example, court orders setting minimum experience levels for trial attorneys who appear in court are ''legislative'' acts, notwithstanding the fact they were issued by the judicial branch. They applied to unnamed and unspecified persons, considered general facts, and determined policy issues. Thus, even though they prevented specific attorneys from practicing law before the courts, they were ''legislative in nature'' and did ''not give rise to constitutional procedural due process requirements.'' [271]

This is why agency terminations through Reductions in Force (RIFs) raise no constitutional concerns. Although RIFs discharge tenured employees without providing individualized due process, they are ''legislative'' acts that apply to unspecified persons and flow from general policy decisions.

Executive branch reclassification of tenured employees into Schedule Policy/Career, and the concomitant exception from adverse action procedures and appeals, are straightforwardly legislative under this framework. Like RIFs, the reclassifications would apply to groups of positions as a class rather than to specific named individuals.[272] OPM's recommendations will focus on general facts relating to position duties rather than adjudicate individual conduct.[273] Moving positions into Schedule Policy/Career also resolves a policy question about the appropriate scope of removal restrictions in the civil service. This is legislative action for due process purposes. Moreover, even if legislative action were required, Congress unambiguously vested authority in the President to effectuate these reclassifications.

The Constitution does not require individualized due process before the President can promulgate general policies to move positions into Schedule Policy/Career.[274] Due process is no more required for such actions than it is for RIFs. OPM's prior statements to the contrary relied on flawed analysis.[275]

3. Construing CSRA To Forbid Schedule Policy/Career Would Create Serious Constitutional Concerns

Upon further reflection, OPM has also concluded that interpreting the CSRA to prevent the President from excepting incumbent policy-influencing employees from chapter 75 and MSPB appeals would raise significant constitutional concerns. The canon of constitutional avoidance calls for interpreting statutes to avoid serious constitutional issues. So even if the language of title 5 did not clearly authorize Executive Order 14171—and OPM believes it does—the canon of constitutional avoidance would require interpreting it to do so.

Article II of the Constitution vests the Federal Government's executive power in the President, who necessarily relies on his subordinates to aid in the exercise of his executive power. Presidential subordinates who exercise significant authority pursuant to law in continuing positions established by law are ''Officers of the United States.'' [276] Principal officers must be appointed by the President with Senate consent, while the President alone, agency heads, or courts of law can be authorized by law to appoint inferior officers. Officers typically supervise subordinate employees with lesser authority and fewer responsibilities.

The Supreme Court has repeatedly held that Article II's vesting of executive power in the President generally authorizes him to supervise—and, if necessary, dismiss—constitutional officers. The Supreme Court has authorized only two limited exceptions to this general rule. Congress may restrict removals of principal officers who head ''multimember expert agencies that do not wield substantial

[266] *See, e.g., Gattis* v. *Gravett,* 806 F. 2d 778 (8th Cir. 1986); *Pittman* v. *Chicago Board of Education,* 64 F. 3d 1098 (7th Cir. 1985); *Rea* v. *Matteucci,* 121 F. 3d 483 (9th Cir. 1997); *McMurtray* v. *Holladay,* 11 F. 3d 499 (5th Cir. 1993).

[267] 89 FR 25012.

[268] OPM now notes that Congress did take such an action when it authorized the President to exclude positions from chapter 75 procedures under 5 U.S.C. 7511(b)(2)—precisely the authority the President is now utilizing.

[269] *Halverson* v. *Skagit County,* 42 F. 3d 1257, 1260–1261 (9th Cir. 1994). (''In seeking to define when a particular governmental action is 'legislative in nature' [courts] have eschewed the formalistic distinctions between 'legislative' and 'adjudicatory' or 'administrative' government actions and instead focused on the character of the action, rather than its label.'')

[270] *Gallo* v. *U.S. Dist. Court For Dist. of Arizona,* 349 F. 3d 1169, 1181–1183 (9th Cir. 2003).

[271] *Id.,* at 1182–1183. *See also Brown* v. *McGarr,* 774 F. 2d 777, 781 (7th Cir. 1985).

[272] OPM notes that neither OPM nor the President will be informed of or review the names of any particular employees encumbering positions that will be moved into Schedule Policy/Career.

[273] OPM has instructed agencies that the individualized characteristics and attributes of the particular employee encumbering a position are irrelevant to whether the underlying position or office itself is appropriately categorized into Schedule Policy/Career. *See* Guidance on Implementing President Trump's Executive Order titled, ''Restoring Accountability To Policy-Influencing Positions Within the Federal Workforce'' | CHCOC (January 27, 2025), available at *https://www.chcoc.gov/content/guidance-implementing-president-trump%E2%80%99s-executive-order-titled-restoring-accountability.*

[274] OPM further notes that the cases evaluating due process requirements for employee reclassifications out of civil service protections involve state and local government employees, which do not raise the same separation of powers concerns inherent in limiting the President's Article II removal authorities.

[275] OPM also previously stated that ''it is unclear which, if any, cited cases removed protections from incumbents as opposed to unencumbered positions.'' *See* 89 FR 25012. Further review by OPM reveals that several of these cases dealt with incumbents who were dismissed after they were moved outside the scope of applicable civil service systems. See *Gattis* v. *Gravett,* 806 F. 2d 778 (8th Cir. 1986), *Rea* v. *Matteucci,* 121 F. 3d 483 (9th Cir. 1997); and *McMurtray* v. *Holladay,* 11 F. 3d 499 (5th Cir. 1993).

[276] *Lucia* v. *SEC,* 585 U.S. 237 (2018).

executive power.'' Congress can also restrict the President's ability to remove inferior officers ''with limited duties and no policymaking or administrative authority.'' [277] Further, these removal restrictions cannot be combined. In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board* (2010), the Court held that if Congress protects the heads of a multimember independent agency from removal, subordinate inferior officers cannot also possess binding removal restrictions.[278] The Court held such multilevel removal restrictions would too thoroughly insulate inferior officers from accountability to the President.

The *Free Enterprise Fund* court explained that the prohibition on multilevel removal restrictions did not cast doubt on the constitutionality of the civil service for two reasons: first, most civil servants are employees, not constitutional officers covered by the rule. Second, the President has broad authority to waive adverse action procedures and appeals. Pointing to the exact statutory authority that President Trump used to issue executive orders 13957 and 14171, the court explained that ''[s]enior or 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, 7511(b)(2)''.[279] The Supreme Court considered removal restrictions that the President voluntarily embraced constitutionally unproblematic because the President retained responsibility—and accountability—for that management choice. As Chief Justice Roberts explained, the ''President can always choose to restrain himself in his dealings with subordinates. He cannot, however . . . escape responsibility for his choices by pretending that they are not his own.'' [280]

However, the April 2024 final rule interpreted the CSRA to prevent the President from excluding tenured employees from chapter 75. This construction negates the court's second reason for finding civil service procedures constitutional. This interpretation creates at least one—and possibly two—significant constitutional conflicts when CSRA procedures apply to constitutional officers.

First, OPM's prior construction would constitutionally forbid applying chapter 75 to any constitutional officers with any substantive policymaking or administrative authority. In *Seila Law* v. *Consumer Finance Protection Bureau* (2020), the Supreme Court held that tenure protections for officers with ''limited duties and no policymaking or administrative authority'' represent ''the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'' [281] Constitutionally, chapter 75 can only cover inferior officers with substantive policymaking or administrative authority if the President has the option of excepting them. Under the 2024 rule's construction of the CSRA the President cannot except these officers from adverse action procedures. Accepting that interpretation means chapter 75 cannot be constitutionally applied to any inferior officer with any degree of substantive policymaking or administrative authority.

Because the Supreme Court has not provided a definitive test for officer status, it is not clear how many officials this restriction covers. However, OPM follows the advice of the Department of Justice's Office of Legal Counsel (OLC). Drawing from Supreme Court decisions assessing officer status, OLC instructs agencies that constitutional offices are continuing positions within the Federal Government that exercise ''significant authority'' such as conducting enforcement activities to vindicate public rights.[282] Subordinate officials who act as the agents of superior officers directly vested with statutory or regulatory responsibilities generally are not officers. But officials directly vested with significant authority are officers. OPM has found multiple continuing Federal positions covered by chapter 75 that satisfy this test for a constitutional office.

For example, EEOC field offices are led by GS–15 Field Directors covered by chapter 75. EEOC field offices are agency satellite offices within the jurisdiction of larger EEOC district offices. Led by Field Directors, Field Offices perform a portion of the work assigned to the larger district office.[283] Field Director's responsibilities include planning, managing, supervising, implementing, coordinating, and monitoring the enforcement activities of the field office, including supervising their office's activities to obtain and approve settlements that resolve allegations of discrimination and obtain appropriate relief.[284] EEOC regulations directly vest Field Directors with authority to serve notices of charges, make a final determination of reasonable cause, negotiate and sign conciliation agreements, dismiss charges, authorize withdrawals of charges, issue no cause determinations, negotiate settlements, and issue notices of right to sue.[285] These significant and regulatorily vested responsibilities in a continuing position within the Federal government straightforwardly satisfy the test for a constitutional office. EEOC regulations recognize this, describing Field Directors as the ''person designated as the Commission's chief officer in each field office.'' [286] These duties also embody the broad responsibilities and substantive administrative power that *Seila Law* explains makes Presidentially binding removal restrictions impermissible.

Other agency satellite offices are similarly led by General Schedule employees who appear to satisfy the constitutional test for inferior officers. Occupational Safety and Health Administration (OSHA) Regional Area Directors occupy GS–14 positions covered by chapter 75.[287] OSHA regulations task Area Directors with determining when and where to conduct workplace safety inspections, deciding whether to seek compulsory processes to require those inspections, determining whether to issue citations, and determining and issuing proposed penalties.[288] They also negotiate measures to resolve serious occupational safety and health violations that involve controversial or unprecedented issues.[289] Area Directors also have significant administrative responsibilities, being tasked with generally supervising their area office and evaluating subordinates' performance. OSHA Directors exercise significant authority in continuing positions within the Federal government, and thus appear to meet the constitutional test for an officer of the United States. At the same time, they possess the wide-ranging duties

[277] *Seila Law* v. *Consumer Finance Protection Bureau,* 140 S. Ct. 2183, 2200 (2020).

[278] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477 (2010).

[279] *Id.,* at 506.

[280] *Id.,* at 497.

[281] *Seila Law* v. *Consumer Finance Protection Bureau,* 140 S. Ct. 2183, 2200 (2020).

[282] U.S. Department of Justice, ''the Test for Determining 'Officer' Status Under the Appointments Clause,'' Slip. Op. (Jan. 16, 2025), at 13–14, available at *https://www.justice.gov/olc/media/1385406/dl.*

[283] Field Directors operate under the supervision of District Directors, who are SES members.

[284] *USAJobs.gov,* Job Announcement number DE–11679734–23–SM. *https://www.usajobs.gov/job/681993400.*

[285] *See* 5 CFR 1601.10, 1601.14, 1601.18, 1601.19, 1601.20, 1601.21, 1601.24.

[286] 29 CFR 1601.5.

[287] *USAJobs.gov,* Job Announcement number MS–24–BOS–OSHA–12534830–DDH. *https://www.usajobs.gov/job/807826300.*

[288] 29 CFR 1903.4(b), 1903.7(a), 1903.14(a), 1903.15.

[289] *USAJobs.gov,* Job Announcement number MS–24–BOS–OSHA–12534830–DDH. *https://www.usajobs.gov/job/807826300.*

and substantive administrative and policymaking responsibilities that *Selia Law* holds requires full accountability to the President.

Cataloguing every position covered by chapter 75 that is likely an inferior office with substantive administrative or policymaking responsibilities is beyond the scope of this rulemaking. However, applying the ''significant authority'' test set out in the Supreme Court's decisions as well as OLC's advice, OPM recognizes that there are a significant number of such positions in absolute terms, even though they represent a small proportion of the total Federal workforce.

Second, if Congress can constitutionally insulate the heads of multi-member independent agencies from Presidential dismissal, OPM's prior construction means chapter 75 cannot be constitutionally applied to any inferior officers in those agencies. Congress has sought to restrict the President's authority to dismiss the heads of many independent agencies by limiting the grounds for removal, *e.g.,* for cause. The Department of Justice has taken the position that these tenure protections are unconstitutional under *Seila Law,* as these agencies exercise significant executive authority. This issue is currently being litigated. Assuming arguendo that the courts reject that analysis, *Free Enterprise Fund* would not permit Congress to create double layers of for-cause removal protection for inferior officers within those agencies. Yet that would be the effect of construing the CSRA to forbid the President from excepting inferior officers in policy-influencing positions from chapter 75.

It is difficult to determine precisely how many inferior officers work in independent agencies and are covered by chapter 75. At a minimum, however, this construction would constitutionally invalidate adverse action procedures for non-Administrative Law Judge (ALJ) administrative adjudicators.[290] The Supreme Court has held that adjudicatory duties generally make positions offices.[291] Non-ALJ adjudicators are also generally employed in general schedule, senior level, or scientific and professional positions covered by chapter 75.

The Administrative Conference of the United States has identified over two-dozen multimember independent agencies whose heads have explicit statutory for-cause removal restrictions.[292] Scholars have also identified over 700 non-ALJ administrative adjudicators at these agencies. These include 40 hearing officers at the Federal Labor Relations Authority, 70 administrative judges at the Merit Systems Protection Board, 600 hearing officers at the National Labor Relations Board, and 30 administrative judges at the Nuclear Regulatory Commission.[293]

Assuming that courts find tenure protections for independent agencies are enforceable, construing the CSRA to prevent the President from excepting incumbent employees from chapter 75 would constitutionally invalidate tenure protections for these non-ALJ adjudicators (as well as all other inferior officers in these agencies). Under *Free Enterprise Fund,* Congress cannot give such inferior officers presidentially binding multilevel removal restrictions. Conversely, the construction of the CSRA that OPM now finds correct—that the President has statutory authority to except policy-influencing employees from chapter 75—makes maintaining chapter 75 coverage for these positions a constitutional non-issue no matter how the courts rule on tenure protections for independent agency heads.[294]

The interpretation of the CSRA the 2024 final rule advanced thus creates significant conflicts between chapter 75 and constitutional requirements for presidential supervision of inferior officers. If the President cannot except inferior officers with substantive policymaking or administrative authority from chapter 75, then *Seila Law* requires that these officers serve at-will. Assuming arguendo the courts hold tenure protections for multimember independent agency heads constitutional, *Free Enterprise Fund* would forbid all inferior officers in those agencies from possessing Presidentially binding tenure protections. OPM's prior construction of the CSRA makes applying chapter 75 procedures to a significant number of important offices categorically unconstitutional.

The ''canon of constitutional avoidance'' is one of the fundamental canons of statutory interpretation. As the Supreme Court has often explained, ''[w]hen a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'' [295] If a permissible alternative reading of the statute avoids the constitutional conflict courts will adopt that interpretation rather than conclude Congress passed an unconstitutional law. The Supreme Court regularly applies this doctrine.[296]

Of relevance to this rulemaking, the Supreme Court has applied the canon of constitutional avoidance to separation of powers cases where an act of Congress threatens to interfere with the President's constitutional responsibilities. For example, in *Public Citizen* v. *Department of Justice* (1989), the Supreme Court construed the Federal Advisory Committee Act (FACA) to not apply to an American Bar Association committee that advised the President about judicial nominations.[297] Although FACA could naturally be read to encompass the committee, this interpretation would require it to meet publicly. That would infringe on the President's ability to obtain advice in the performance of his constitutional duty to nominate federal judges. So, the Court avoided ''formidable constitutional difficulties'' by adopting an alternative reading of FACA that did not encompass the ABA committee.[298]

[290] The 5 U.S.C. 7511(b)(2) exception does not apply to ALJs, whose removal procedures are governed by subchapter III of chapter 75. ALJ removal protections do provide multiple layers of removal protections, as ALJs can only be dismissed for cause and that cause is assessed by tenure-protected MSPB members. As discussed below, these multilevel ALJ removal restrictions have been subject to considerable litigation.

[291] *See Freytag* v. *Commissioner,* 501 U.S. 868 (1991); *Lucia* v. *SEC,* 585 U.S. 237 (2018).

[292] Jennifer Selin and David Lewis, ''Sourcebook of United States Exec. Agencies,'' (Oct. 2018), at 97, *https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf.*

[293] Kent Barnett and Russell Wheeler, ''Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal,'' Georgia Law Review, Vol. 53, Issue 1 (2019), at 33–34, *https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2294&context=fac_artchop.*

[294] Scholars have noted that administrative adjudication inherently involves a degree of policymaking. There are consequently strong arguments that administrative adjudicators fall within the scope of the 5 U.S.C. 7511(b)(2)(A) exception for policymaking employees. It is thus accordingly constitutionally unproblematic for chapter 75 to cover such positions as long as the President retains the latent authority to except them. *See e.g.,* Charles H. Koch Jr., ''Policymaking by the Administrative Judiciary,'' Journal of the Nat'l Ass'n of Admin. Law Judges (2005), *https://digitalcommons.pepperdine.edu/naalj/vol25/iss1/2.*

[295] *Jennings* v. *Rodriguez,* 583 U.S. 281 (2018) (cleaned up).

[296] *See, e.g., DeBartolo Corp.* v. *Gulf Coast Trades Council,* 485 U.S. 568, 577–78 (1988); *Bond* v. *United States,* 572 U.S. 844 (2014); *NFIB* v. *Sebelius,* 567 U.S. 519 (2012); *Northwest Austin Municipal Utility District Number One* v. *Holder,* 557 U.S. 193, 210–11 (2009).

[297] *Public Citizen* v. *United States Department of Justice,* 491 U.S. 440 (1989). See also *Franklin* v. *Massachusetts,* 505 U.S. 788 (1992).

[298] *Public Citizen* v. *United States Department of Justice,* 491 U.S. 440, 466 (1989).

For the reasons discussed above OPM believes the best reading of title 5 and the CSRA is that the President can exclude policy-influencing career positions and the employees encumbering them from chapter 75 procedures. Moreover, adopting this interpretation avoids the formidable constitutional difficulties that would be raised by construing the CSRA to restrict the President's ability to remove many inferior officers with important policymaking or administrative responsibilities. The canon of constitutional avoidance consequently requires construing the CSRA to allow the President to exclude incumbent policy-influencing employees from chapter 75. Courts resolve statutory ambiguities against creating unnecessary constitutional conflicts.

4. Inadequate Prior Response to Constitutional Concerns

Commenters raised these constitutional concerns during the prior rulemaking. In the final rule OPM gave several reasons for rejecting these concerns. Upon further consideration, OPM has concluded that the justifications it gave for rejecting these constitutional objections were poorly reasoned.

OPM explained that the commenters were mistaken to assert that many senior career officials are inferior officers covered by the *Free Enterprise Fund* and *Seila Law* rules. OPM stated that ''it is not aware of any judicial decision holding so and the comments cite none.'' [299] As discussed above, further review has uncovered numerous positions that are likely inferior offices covered by chapter 75.

OPM stressed that the *Free Enterprise Fund* court explained that nothing in its decision ''should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies.'' OPM concluded that if nothing in *Free Enterprise Fund* cast doubt on the civil service in independent agencies, it did not cast doubt on the civil service system across the executive branch more generally.[300] This response ignored the reasons the Court gave for this conclusion: the *Free Enterprise Fund* rule applies only to constitutional officers, and the President can except policymaking civil service positions from chapter 75 to facilitate accountability.[301] OPM has since identified numerous positions covered by chapter 75 where the incumbents are likely inferior officers. If the President cannot except those officers from chapter 75, then much of his ability to hold them accountable is negated. *Free Enterprise Fund* did not suggest that adverse action appeals are constitutionally unproblematic where they prevent the President from removing policymaking inferior officers.

OPM similarly argued that *Free Enterprise Fund* expressly declined to hold SES adverse action procedures raised constitutional concerns, even though SES have more responsibility and authority than lower-ranking officials. If restrictions on removing SES members are constitutionally unproblematic, OPM concluded, then restrictions on removing lower-level strata of career civil servants present even less of a constitutional concern.[302] OPM now believes this objection fails for the same reason the preceding objection did. The *Free Enterprise Fund* court reasoned that SES members' adverse action procedures are permissible precisely because the CSRA gives the President broad flexibility to waive them. As the Court explained, ''entire agencies may be excluded from [the Senior Executive] Service by the President [ ], see, *e.g.,* [5 U.S.C.] §§ 3132(c)''.[303]

The President, acting in coordination with OPM, can exclude any agency or agency subunit from SES adverse action procedures. Former SES members in those agencies would then fall under chapter 75. The President could then invoke section 7511(b)(2) to exclude the former SES positions from chapter 75, as positions that qualify for SES status are definitionally policy-making or policy-determining. Consequently, although removing them would take several procedural steps, SES members' adverse action appeals effectively exist at the President's sufferance. The Court recognized this flexibility and held this framework constitutionally unproblematic. The Supreme Court did not suggest that SES adverse action procedures the President could not bypass would be constitutionally acceptable.

OPM previously pointed to the Supreme Court's decision in *United States* v. *Arthrex* (2021), a case challenging the unreviewable authority given to Administrative Patent Judges (APJs) to cancel some patents.[304] Arthrex, Inc. argued that this gave the APJs—inferior officers appointed by the Secretary of Commerce—significant authority that only a Presidentially appointed, Senate confirmed principal officer could constitutionally wield. The Federal Circuit Court of Appeals agreed and solved the constitutional problem by holding chapter 75 could not be constitutionally applied to APJs. This converted them into at-will employees, which the Federal Circuit concluded was sufficient to make APJs inferior officers. On appeal the Supreme Court agreed with the broad conclusion that APJs wielded more than an inferior officer's authority but crafted a different remedy. The Court instead severed restrictions on the Patent and Trademark Office's Director's authority to review patent cancelations. This prevented APJs from possessing final decisional authority for the executive branch—something only principal officers could exercise. OPM concluded that this was a limited and narrow remedy ''far removed from a proposal to remove previously accrued adverse action [procedures] from thousands of traditional civil servants.'' [305]

Upon further review, OPM now recognizes that the narrow remedy the Supreme Court crafted in *Arthrex* does not imply chapter 75 can be construed to restrict the President's ability to remove inferior officers with substantive policymaking or administrative authority, or to give inferior officers in independent agencies presidentially binding multilevel removal restrictions. The Supreme Court tailored the remedy in *Arthrex* to the constitutional violation. The problem in *Arthrex* was APJs exercising unreviewable authority, which was inconsistent with their method of appointment as inferior officers. Invalidating restrictions on higher-level review of their decisions precisely remedied this violation without further disruption to the statutory framework. By contrast, where the Court has agreed with separation of power challenges arguing federal officials were insufficiently accountable to the President, the Court has routinely invalidated the removal protections at issue.[306]

In the April 2024 final rule OPM stated that inferior officer status, even where it applies, does not generally require employees to be at-will.[307] That analysis was correct but incomplete.

[299] 89 FR 25007.

[300] 89 FR 24992.

[301] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 506–507 (2010).

[302] 89 FR 24992.

[303] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 506–507 (2010).

[304] *United States* v. *Arthrex,* 141 S. Ct. 1970 (2021).

[305] 89 FR 24992.

[306] *See, e.g., Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477 (2010); *Seila Law* v. *Consumer Finance Protection Bureau,* 591 U.S. 197 (2020); *Collins* v. *Yellen,* 594 U.S. 220 (2021).

[307] 89 FR 25007.

The Supreme Court has upheld restrictions on removing some inferior officers. But, as discussed above, the Supreme Court has also held that inferior officers with substantive policymaking or administrative responsibilities and inferior officers whose superiors can only be removed for cause do not fall within these precedents. Insulating such officers from full accountability to the President exceeds the ''outermost constitutional limits'' of Congressional authority.[308]

The 2024 final rule also argued that the removal restrictions at issue in *Free Enterprise Fund* were much more stringent than those for the broader civil service. The inferior officers at issue in that case could only be removed for violations of or failure to enforce federal securities laws, while chapter 75 allows dismissal of civil servants for any reason that promotes the efficiency of the service. Recalling the Court's admonition that nothing in *Free Enterprise Fund* should be taken to question the constitutionality of the civil service system more generally, OPM concluded that *Free Enterprise Fund* did not implicate the validity of chapter 75's less rigorous removal restrictions.[309]

Upon further review, OPM has concluded this was a poor reading of *Free Enterprise Fund.* Throughout the majority opinion the court described the relevant violation as multiple layers of for-cause removal restrictions. While the Court noted the unusually stringent restrictions on removing Public Company Accounting Oversight Board (PCAOB) members, that was not the focus of the majority's reasoning. The analysis instead focused on the multiple layers of for-cause removal protections.

Justice Breyer's dissent criticized the majority for not grounding its holding on the narrow grounds for dismissing PCAOB members. He explained that the Court had ''avoid[ed] so narrow a holding in favor of a broad, basically mechanical rule'' and that ''the only characteristic of the relationship . . . that the Court apparently deems relevant is that the relationship includes two layers of for-cause removal.'' [310] While the majority opinion contested many arguments raised in Justice Breyer's dissent, it did not take issue with this characterization. Moreover, when the majority explained why its holding did not generally implicate the constitutionality of civil service procedures it pointed to the President's ability to turn those removal restrictions off—not their degree of stringency. OPM believes Justice Breyer accurately characterized the majority opinion in *Free Enterprise Fund,* and the relevant constitutional rule is a prohibition on multiple levels of for-cause removal protections. The unusually narrow grounds for removing PCAOB members heightened, but did not create, the underlying constitutional violation.

Construing the CSRA to prevent the President from exempting policy-influencing officers from chapter 75 procedures would create significant conflicts with baseline constitutional requirements for Presidential supervision of the executive branch. The 2024 final rule rejected these concerns, but further consideration has persuaded OPM they are serious and meritorious. OPM believes that the best construction of the CSRA is one that avoids these constitutional issues.

5. Additional Objections

OPM also previously reasoned it would be inappropriate to construe title 5 to allow the President to except positions from chapter 75 because ''the Supreme Court has cautioned against using vague statutory provisions to alter 'fundamental details of a regulatory scheme' ''.[311] This was a reference to the Major Questions Doctrine, which requires agencies to point to ''clear congressional authorization'' before asserting novel sweeping powers.[312]

Upon further review, OPM has determined this objection is misplaced. Congress clearly authorized the President to reclassify employees and exclude them from chapter 75 procedures.[313] 5 U.S.C. 7511(b)(2)(A) expressly gives the President authority to except positions from the scope of chapter 75, setting forth a two-part test: if (a) the President has determined the position is of a confidential, policy-determining, policy-making, or policy-advocating character; and (b) excepted it from the competitive service. All positions that meet those criteria are statutorily excepted from chapter 75. Congress also used the terms ''policy-determining'' and ''policy-making'' to define thousands of expressly career positions.[314] These CSRA provisions ''clearly authorize'' the President to take policy-influencing career positions out of chapter 75. Congress could hardly have spoken more clearly on these matters. That is why the Supreme Court has already interpreted the CSRA to allow the President to exempt policy-influencing civil service positions from adverse action procedures.[315] This rulemaking fully complies with the Major Questions Doctrine.

Commenters in the prior rulemaking also argued that Schedule F was a novel and thus impermissible use of 5 U.S.C. 7511(b)(2). But Schedule F was far from novel. It sought to restore the removal procedures that prevailed for the vast majority of American history. The Supreme Court has recognized that the 7511(b)(2) exception can be used to strengthen accountability in policymaking positions, and as previously discussed, found the authority to do so constitutionally significant.

D. Schedule Policy/Career Will Improve Government Performance

In the April 2024 final rule OPM concluded that implementing Executive Order 13957 would undermine the government's performance along several dimensions. Upon further consideration OPM now concludes those concerns were misplaced. OPM now believes that implementing E.O. 14171 would improve the Federal Government's performance and accountability to the American people for several reasons.

1. Recruitment and Retention Unharmed

In both OPM's notice of proposed rulemaking and the 2024 final rule, OPM expressed concerns that Executive Order 13957 would undermine agency recruitment and retention efforts. OPM feared it would eliminate a competitive advantage in federal hiring and recruitment, and that fear of job loss or reprisal or politicization would reduce the attractiveness of Federal jobs.[316] OPM argued that individuals ''considering whether to accept a career civil service position need to know that they will be valued for their knowledge,

[308] *Seila Law* v. *Consumer Finance Protection Bureau,* 591 U.S. 197, 218 (2020).

[309] 89 FR 25008.

[310] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 537 (2010).

[311] 89 FR 24992.

[312] *West Virginia* v. *Environmental Protection Agency,* 597 U.S. 697 (2022).

[313] OPM further notes that it is not clear that the MQD applies to Presidential civil service directives. The Supreme Court has formulated the MQD as a tool for assessing the extent of Congressional delegations of authority to the executive branch. However, the President uses his own Article II executive authority to manage the Federal workforce, not delegated Congressional authority. The President could constitutionally supervise the executive branch without ''clear congressional authorization'' for the civil service and did so for nearly the first century of America's existence. No theoretical basis exists for applying the MQD to situations where Congress is restricting Article II Presidential authority, as opposed to delegating its own Article I authority. Rather, the appropriate judicial tests come from applying the Supreme Court's separation of powers precedents like *Free Enterprise Fund* and *Seila Law.*

[314] 5 U.S.C. 3132(a)(2)(E).

[315] *Free Enterprise Fund* v. *Public Company Accounting Oversight Board,* 561 U.S. 477, 506 (2010).

[316] 89 FR 25037, 25040.

skills, and abilities; evaluated based on merit; and not only protected from retribution for offering their candid opinions but encouraged to do so.'' [317] OPM expressed related concerns that Schedule F could disrupt agency missions by destabilizing the civil service, with large numbers of experienced staff leaving their positions during each change of administration. OPM argued the final rule was needed in part to avoid such losses of experienced staff, and also the cost of recruiting and replacing employees who leave after their positions are transferred to Schedule F.[318]

OPM believes that the new Schedule Policy/Career will not create substantive recruitment and retention concerns or service disruption. To the extent that assessment is mistaken, however, OPM believes benefits of Schedule Policy/Career outweigh any such potential costs.

Many of OPM's previously expressed concerns were related to the belief that Executive Order 13957 was an attempt to politicize career positions and create a new de facto schedule for political appointees. Such a proposal would naturally lead to mass dismissals of incumbent employees who did not share political affiliation with the President of the day. It would also lead to recruitment concerns, as many prospective employees would not be interested in what are by definition short-term political positions. However, as discussed in section III(A), Executive Order 14171 rejected that approach. The order clarifies that Schedule Policy/Career positions are definitionally career—not political—appointments and requires filling them using standard career hiring procedures. The order also provides that political loyalty to the President must not be a prerequisite of holding Schedule Policy/Career positions and requires agencies to establish procedures to ensure compliance with its directive, to the extent these are not already in place.

Schedule Policy/Career positions remain career positions, and employees who perform well and faithfully implement the President's agenda to the best of their ability have little reason to fear dismissal based on non-merit factors. Firing experienced policy-influencing employees who are helping advance his policy agenda would undermine the President's ability to implement that agenda. The President has unsurprisingly forbidden agencies from doing so. Dismissals of policy-influencing career employees, to the extent they occur, would instead be concentrated among poor performers, corrupt employees, or those who injected partisanship into the performance of their duties. While dismissing such employees may create some disruption, over the long-term the government benefits from employing a high-performing and ethical workforce that understands that democracy requires subordinating their personal policy preferences to those of the voters. Consequently, OPM expects Schedule Policy/Career would not bring about the destabilizing separations commenters and OPM previously feared would occur under the proposed Schedule F, nor would it necessarily lead to losses of institutional knowledge or reduced employee investment in skills within agencies.

OPM also does not believe that Schedule Policy/Career would impair Federal recruitment and hiring efforts. Employees considering whether to apply for a Policy/Career position would know that they will be valued for their knowledge, skills, and abilities and evaluated based on merit. They would also be filling long-term positions that would not typically disappear upon a change in administration. OPM also notes that systematically retaining poor performers, or those who engage in serious misconduct such as that which occurred at the FDIC, harms employee morale and can hurt recruitment and retention.

It is true that adverse action procedures and appeals give Federal employees greater job security than exist in most other jobs. To the extent that workers value this job security, Schedule Policy/Career's removal of adverse action procedures would reduce the relative value of the total Federal compensation package. However, OPM no longer believes that this change will significantly impair federal recruitment or hiring.

Even excluding the value of job security, the Federal Government offers a more generous benefits package than most comparable private-sector employers. For example, the Federal Government provides its employees with both defined benefit and defined contribution retirement plans. Very few private employers offer comparably generous retirement benefits. As a result, the Government generally offers Federal employees a benefits package that exceeds what they could expect to earn elsewhere. Congressional Budget Office data shows that Federal employees with a bachelor's degree receive $31.70 an hour in non-wage benefits, while comparable private-sector workers receive only $22.00 an hour in non-wage benefits. For employees with a Master's degree, those figures are $33.50 and $26.20 an hour in the Federal and private sectors, respectively.[319] So even if Schedule Policy/Career reduces job security to some degree, the Federal Government will still offer a highly competitive benefits package. The vast majority of American employers also operate at-will. Consequently, agencies will not operate at a disadvantage in this regard vis-à-vis alternative jobs that prospective civil servants could apply for.

In the 2024 rule OPM expressed concerns that Executive Order 13957 could impede agencies' ability to hire scientific and technical personnel, particularly for cybersecurity positions.[320] Commenters pointed out that such positions do not appear eligible for the policy-influencing exception. In response, OPM explained its belief these could reasonably be considered confidential positions and thus eligible for inclusion. OPM also cited responses from commenters, including those in IT positions, who said that inclusion in Schedule F would dissuade them from seeking federal employment.[321]

OPM does not believe including technical positions in Schedule Policy/Career would hurt agency recruitment or retention efforts. But, after reviewing E.O. 14171, OPM also sees little likelihood that purely technical positions like cybersecurity personnel would move into Schedule Policy/Career. This schedule applies to career employees who can shape agency policy through the performance of their duties. That does not generally describe cybersecurity staff, auditors, or other highly technical positions. Neither section 5 of Executive Order 13957, as amended, nor OPM's guidance tells agencies to consider recommending such positions. To the extent that the policy-influencing terms could be seen as encompassing such technical positions, and agencies recommend putting cybersecurity staff into Schedule Policy/Career, OPM does not plan on making that recommendation to the President. Schedule Policy/Career is not meant for line cybersecurity or other technical employees. It is intended for employees whose work directly influences agency policy.

[317] 89 FR 24984.

[318] 89 FR 25038, 25040, 25044.

[319] Congressional Budget Office, ''Comparing the Compensation of Federal and Private-Sector Employees in 2022,'' (April 2024) at 15, *https://www.cbo.gov/system/files/2024-04/59970-Compensation.pdf.*

[320] 89 FR 24994, 25043–25044.

[321] 89 FR 24994.

Finally, even if OPM believed that Schedule Policy/Career would impair agency recruitment and retention efforts, such costs must be considered alongside the benefits discussed above. The President has determined that these benefits outweigh the costs. Constitutionally and statutorily, the President is the individual authorized to weigh those policy costs and benefits and decide which course of action to pursue. The President has determined that the challenges discussed in section I(C) above necessitate creating Schedule Policy/Career. It is OPM's responsibility to assist the President in the carrying out of his duties, not vice versa. Consequently, even if OPM were not independently persuaded that the benefits of Schedule Policy/Career outweigh the costs—and OPM is—the office would defer to a Presidential judgement on the matter and adopt the same conclusion.

2. Improving Performance Management

In the 2024 final rule OPM stated that it believed Executive Order 13957 was poorly designed as an effort to meaningfully improve performance management or allow managers to more effectively address performance issues because the characteristics of an employees' job—including whether the employee works on policy—has nothing to do with their performance. OPM reasoned that because Executive Order 13957 sought to streamline terminations based on the type of work that an employee performs, not based on how well they employee performs, it was difficult to understand how Schedule F would help address poor performance.[322]

OPM also asserted that an executive order exempting employees from the scope of chapter 43 and 75 procedures would not effectively address the complexity of the various remedial schemes Congress has created. For example, Schedule F would not prevent a particular employee from lodging a complaint of unlawful discrimination under the various civil rights statutes; would not stop administrative judges of the Equal Employment Opportunity Commission from presiding over discovery in relation to such complaints and adjudicating them; and may result in decisions adverse to managers that will then be non-reviewable in a Federal court. OPM also argued that excepting individuals from adverse action procedures may lead to them attempting to file constitutional claims in Federal district courts.[323]

Upon further review, OPM has concluded that these concerns are not a reason to avoid implementing Schedule Policy/Career. Neither Executive Order 13957 nor Executive Order 14171 claimed to solve performance management challenges across the entire Federal workforce. Instead, they explained that poor performance by policy-influencing employees is especially problematic because they shape how the agency itself executes its mission. So, while OPM agrees with the fact that an employee encumbers a policy-influencing position says nothing about their individual performance, OPM now recognizes that it says a lot about the ramifications if they perform poorly. As explained in section I(C)(2)(i), OPM now also acknowledges that chapter 43 and 75 procedures make it difficult for supervisors to effectively address poor performance or misconduct. The President has determined, and OPM agrees, that heightened performance accountability is necessary in policy-influencing positions. Executive Order 13957 is not intended to address all performance management across the entire federal workforce, but to address the serious consequences of poor performance by the subset of the workforce in policy-influencing positions.[324]

While it is true that policy-influencing employees could still file Equal Employment Opportunity (EEO) complaints, and such complaints could increase as a result, OPM believes this will not eliminate the benefits of Schedule Policy/Career. For one, EEO complaints are generally limited to charges of unlawful discrimination. Terminations for misconduct or poor performance are out-of-scope for EEO appeals unless they are also discriminatory. OPM believes that such discriminatory terminations would be rare and that employees would have difficulty successfully claiming warranted terminations were pretextual. Second, OPM notes that while agencies cannot generally appeal decisions by an EEO administrative judge to federal court, they can appeal EEOC administrative decisions, after issuing a final order not fully implementing a decision, to the full Equal Employment Opportunity Commission (EEOC).[325] The at-will principal officers who run the EEOC can police any efforts by rogue administrative judges to convert EEO appeals from a process to prevent invidious discrimination to de facto adverse action appeals.

With respect to appeals to district court, binding Supreme Court precedent holds that the CSRA is the exclusive remedial statutory framework for adverse action appeals and judicial review.[326] Employees the CSRA statutorily precludes from appealing adverse actions cannot obtain judicial review in Federal court. Indeed, the CSRA was passed in large part to create a unified framework for judicial review of adverse actions instead of a patchwork of district court rulings. Executive Order 13957 provides for internal executive branch procedures to prohibit unlawful discrimination. The CSRA does not give district courts jurisdiction to separately hear challenges to Policy/Career dismissals.

E. Reliance Interests

OPM previously concluded that several groups had settled expectations or reliance interests in maintaining the scope of chapter 43 and 75 procedures, and that these interests warranted issuing the final rule. These groups included tenured federal employees, who have taken career jobs and invested in agency-specific expertise with the expectation that they would possess adverse action procedural and appeal rights.[327] They also included the American public, which relies on a non-partisan civil service in many aspects of their lives. OPM concluded that ''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.'' [328] OPM similarly concluded that Congress has a vested interest in a well-functioning federal workforce, as that workforce is tasked with carrying out the programs Congress authorizes.[329] OPM further concluded that the 2024 rule would provide valuable certainty to regulated entities, as a non-partisan federal workforce promotes regulatory stability that has many benefits, while ''substantial turnover in federal staff in service of whipsaw changes to federal regulations can cause turmoil for partners and regulated entities.'' [330]

[322] 89 FR 24995.

[323] *Ibid.*

[324] It is a basic principle of administrative law that agencies may tackle regulatory issues piecemeal over time by focusing on the most pressing matters first. *See Alon Ref. Krotz Springs, Inc.* v. *Env't Prot. Agency,* 936 F.3d 628, 659 (D.C. Cir. 2019) (explaining that agency ''discretion properly includes judgments about the scope of rulemakings and when to relegate ancillary issues to separate proceedings: 'Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop' '' (quoting *Massachusetts* v. *E.P.A.,* 549 U.S. 497, 524 (2007)).

[325] See 29 CFR 1614.405(c).

[326] *United States* v. *Fausto,* 484 U.S. 439 (1988).

[327] 89 FR 24999, 25014.

[328] 89 FR 25004.

[329] 89 FR 25005.

[330] *Ibid.*

Upon further review OPM has concluded that the concerns that motivated these reliance interests are largely misplaced, and to the extent they exist these reliance interests are outweighed by the policy benefits of the proposed rule. As discussed in section III(A) above, Executive Order 13957 is not intended to facilitate—and in fact expressly prohibits—converting career positions into political appointments. Schedule Policy/Career positions will be filled using the same nonpartisan procedures that apply to the rest of the civil service. The civil service will remain professional, non-partisan, and effective under this proposed rule; the rule would simply strengthen policy-influencing appointees' accountability to the President whose power they wield.

Many Federal career employees accepted their positions in the expectation they would possess adverse action procedural and appeal rights and the significant job security they entail. They invested in agency-specific expertise in the expectation their tenure would last beyond the four or eight years of a Presidential administration. Placing these employees in Schedule Policy/Career makes them functionally at-will, a significant change to their settled expectations. However, OPM believes that the prejudice to such employee reliance interests is small. Even if it were not, the policy benefits to the executive branch would outweigh them.

Employees who faithfully perform their jobs to the best of their ability have little to fear from Schedule Policy/Career. The order expressly prohibits discrimination based on political affiliation, and agencies have strong incentives not to dismiss employees who are competently performing their assigned duties. Doing so would undermine their ability to complete their mission. Employees should be assumed to understand their performance expectations when they take their jobs. Merit Principle Four requires employees to maintain high standards of integrity and conduct, and Merit Principle Six directs agencies to separate employees who do not improve inadequate performance.[331] The employees at risk of dismissal are those who fail to perform adequately or who engage in serious misconduct such as corruption or injecting their personal politics into the performance of their official duties. Congress has made it clear that the civil service benefits from such employees' removal. In such instances, an employee's actual reliance interest is the ability to violate merit principles with little risk of removal—which is not a legitimate reliance interest.

Further, OPM has concluded that the harms identified in section I outweigh any reliance interests employees in policy-influencing positions may possess. Poor performance, misconduct, corruption, and career employees injecting partisanship into the performance of their official duties are serious problems that undermine the efficiency and integrity of the service. Democracy depends on a nonpartisan civil service in which career employees effectively and faithfully implement the law and the policies of the elected President to the best of their ability. In our system of government, any reliance interests by policy-influencing career employees on the availability of adverse action procedures and appeals should be subordinate to the necessity of a competent, ethical, and democratically accountable government.

Finally, the President has determined that the harms discussed in section I outweigh any reliance interests in the status quo. The President is the individual statutorily and constitutionally vested with authority to make that determination. Even if OPM were not independently convinced of that fact—and it is—OPM would defer to a Presidential determination weighing the costs and benefits of prospective changes to the civil service rules and regulations.

IV. Regulatory Analysis

A. Statement of Need

The President has determined, and OPM independently agrees, that implementing Executive Order 14171 and effectuating Schedule Policy/Career is necessary to improve executive branch operations. This proposed rule would assist in carrying out that policy. As discussed extensively throughout the preamble, adverse action procedures and appeals make it prohibitively difficult for agencies to remove employees for all but the worst performance and conduct. This has led to significant problems with serious misconduct and corruption going unaddressed in contravention of Merit Principle Four, agencies failing to separate persistent poor performers in violation of Merit Principle Six, and many employees injecting partisanship into their duties and seeking to advance their personal political agendas while on the job. These problems are particularly acute in policy-influencing positions. Moving policy-influencing positions into Schedule Policy/Career will remove procedural impediments to holding career officials accountable for their performance and conduct, while retaining their status as career employees appointed based on merit.

The principal provisions of the April 2024 final rule have also either been rendered inoperative or OPM has concluded they exceed its statutory authority. OPM believes it is inappropriate to maintain obsolete or unlawful regulatory provisions.

B. Regulatory Alternatives

An alternative to this rulemaking is to not issue a regulation while increasing training for managers and supervisors in how to use chapter 43 and 75 procedures. OPM has concluded this is not a viable option. Prior attempts to address the management challenges created by adverse action procedures and appeals through better use of the existing framework have failed. MSPB research shows that only two-fifths of Federal supervisors are confident they could remove an employee for serious misconduct, and just one quarter are confident they could remove an employee for poor performance.[332] Neither OPM nor the President believe that additional training or greater management support would be sufficient to eliminate this problem, or the problem of career employees injecting partisanship into their official duties.

Furthermore, OPM is statutorily tasked with executing, administering, and enforcing the civil service rules and regulations of the President.[333] Executive Order 13957 amended the civil service rules to create Schedule Policy/Career. Declining to help the President execute this directive would be a dereliction of OPM's statutory duty.

Relatedly, Executive Order 14171 rendered several provisions of the 2024 final rule inoperative and without effect. Subpart F of part 302 and § 210.102(b)(3) and (b)(4) of title 5, Code of Federal Regulations, no longer reflect the operative legal standards governing the federal workforce. As OPM explained in the 2023 notice of proposed rulemaking, retaining out-of-date information in a Government regulation can confuse agencies, managers, and employees and produce unintended outcomes. Human resources specialists or managers may inadvertently rely on these particular regulations.[334]

[331] 5 U.S.C. 2301(b).

[332] U.S. Merit Sys. Prots. Bd., ''Remedying Unacceptable Employee Performance in the Federal Civil Service,'' p. 15. *supra,* note 93.

[333] 5 U.S.C. 1103(a)(5).

[334] 88 FR 63879.

For example, employees moved into Schedule Policy/Career who review OPM's § 210.102 definitions could be given the mistaken impression that they have been converted into political appointees because those regulations state policy-influencing positions are only political appointments. However, Executive Order 13957, as amended, provides that employees in Schedule Policy/Career remain career appointees who can expect to keep their jobs across changes of administration as long as they perform effectively and faithfully implement each new administration's policies to the best of their ability. OPM believes it is important that its regulations promote knowledge of applicable civil service requirements, rather than spreading misinformation. Declining to update its regulations to reflect operative legal requirements is thus not a viable option.

OPM also considered implementing Executive Order 13957, as amended, but permitting incumbent employees who are reclassified or moved into Schedule Policy/Career to retain adverse action procedures and appeals. This would functionally make Schedule Policy/Career effective only for new hires, not existing employees, and would entirely sidestep concerns about impairing employee property interests in their jobs. OPM nonetheless concluded that this approach would not satisfy policy or legal concerns.

As a matter of policy, applying Schedule Policy/Career prospectively would negate most of the benefits of the rule during this presidential administration. The heightened accountability would apply only to new hires, who are a minority of the policy-influencing workforce. Most employees in policy-influencing positions would retain the adverse action procedures and appeals that substantially reduce their accountability to the President. Moreover, the most senior and experienced policy-influencing employees would remain exempt. These are the employees most important to cover under the rule, as poor performance or misconduct in the course of their duties has the largest impact on agency operations. Executive Order 13957, as amended, also requires agencies to include existing positions in their reviews.[335] It would frustrate the purposes of the order to allow employees moved into Schedule Policy/Career to remain covered by chapter 75 procedures.

As a matter of law, OPM has, as previously discussed, concluded that the 2024 rulemaking's additions to part 752, subpart D exceeded its statutory authority. Section 7511(b)(2) of 5 U.S.C. categorically excludes from chapter 75 procedures excepted service employees in policy-influencing positions. Nothing in the CSRA or elsewhere in title 5 provides for incumbents in such positions to retain adverse action procedures and appeals. Even if OPM wanted to extend adverse action procedures and appeals to employees moved into Schedule Policy/Career, it lacks statutory authority to do so. Retaining the subpart D amendments that purport to provide such adverse action procedures is thus not legally viable.

C. Impact

OPM is proposing these revisions to align the civil service regulations with operative legal requirements in Executive Order 13957, as amended. OPM believes that Executive Order 14171 rendered 5 CFR 210.102(b)(3) and (b)(4)'s definition of the policy-influencing terms inoperative, as well as 5 CFR part 302, subpart F. To the extent these rules as finalized simply comport OPM regulations to existing law, OPM believes that they will have a negligible impact on agencies. If OPM took no action these provisions of the civil service regulations would remain inoperative and without effect, but their presence would likely foster confusion in the federal workforce.

The main change that finalizing OPM's proposed regulations would cause is reversing the April 2024 final rule's amendments to Part 752, Subpart D. Under OPM's proposal employees reclassified or moved into Schedule Policy/Career positions would no longer remain covered by chapter 43 and 75 procedures or MSPB appeals. As previously discussed, OPM now believes that the changes made by the 2024 final rule exceeded its statutory authority and thus were unenforceable in any event. But, if a reviewing court held that the Subpart D regulations were a permissible discretionary policy choice, the proposed rescission of those regulations on policy grounds would increase policy-influencing employees' accountability to the President for their use of his executive power.

To the extent policy-influencing employees who are engaged in misconduct or performing poorly respond to this heightened accountability by improving their performance and conduct, the rule will generally improve agency operations irrespective of whether separations occur. However, agencies may find it necessary to use this authority to expeditiously separate some policy-influencing employees for poor performance or misconduct. Such removal proceedings would occur more quickly and at lower cost than under current procedures.

D. Costs

In the 2024 rulemaking OPM concluded that implementing Schedule F would adversely affect agency recruitment and retention efforts. As discussed above, OPM has reconsidered those concerns and finds them unpersuasive. They were predicated on the assumption that the policy-influencing exception to chapter 75 would be used to resurrect the spoils system and convert large numbers of career positions to short-term political appointments. Executive Order 13957, as amended, provides that Schedule Policy/Career positions remain career appointments, filled using civil service hiring procedures, and forbids agencies from filling them based on political contributions or affiliation. Accordingly, OPM concludes that Schedule Policy/Career will not incur the costs it previously expected of Schedule F.

Agencies, if they have not done so already, must also update their internal policies and procedures to ensure compliance with Executive Order 13957, as amended, and the amendments it made to the civil service rules. OPM conforming its regulations to the operative legal requirements will not impose additional costs on agencies. However, if OPM finalizes this rule, agencies would be required to update their internal policies and procedures to conform to the regulatory amendments this rule proposes to parts 432 and 752. Since these proposed revisions rescind existing regulatory requirements to follow adverse action procedures and appeals, the rule would not increase agency compliance costs beyond updating internal procedures. In addition, this rulemaking would relieve agencies of any litigation costs that would have arisen under the appeal rights created by 5 CFR 302.602.

The rule would affect the operations of more than 80 Federal agencies, ranging from cabinet-level departments to small independent agencies. The cost analysis to update policies and procedures assumes an average salary rate of Federal employees performing this work at the 2025 rate for a GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate). As in the 2024 rulemaking, OPM assumes the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the

[335] E.O. 13957, sec. 5(b).

wage rate, resulting in an assumed labor cost of $154.76 per hour.

OPM estimates 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 $154.76 per hour. Upon publication of the final rule, this would result in first-year estimated costs of about $6,200 per agency, and about $495,000 governmentwide. There are ongoing costs associated with routinely reviewing and updating internal policies and procedures, but these costs will be incurred with or without the changes proposed here.

OPM estimates that approximately 50,000 positions would be moved or transferred into Schedule Policy/Career, about two percent of the Federal civilian workforce. The President may move a greater or smaller number of positions, but OPM believes this is a reasonable preliminary estimate. Of those positions moved into Schedule Policy/Career, OPM estimates 45,000 would be filled by incumbent employees and 5,000 would be vacancies filled by new hires upon the conclusion of the hiring freeze.[336]

OPM estimates that the 45,000 incumbent employees whose positions are moved into Schedule Policy/Career will incur some costs associated with these changes in the first year following publications of this rule. These employees will need to familiarize themselves with the changes in their rights and responsibilities due to their shift into Schedule Policy/Career. Once they've familiarized themselves with these changes, they may reconsider their approach to various work assignments, for example to improve performance, and they may consider seeking alternative employment. OPM estimates these 45,000 employees will spend an average of four hours total familiarizing themselves with these changes and determining the best course of action to respond to these changes. OPM assumes that these employees have average salary equivalent to Federal employees at GS–15, step 5 in the Washington, DC locality ($189,950 annual locality rate and $91.02 hourly locality rate). OPM again assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of $182.04. This implies total first year costs along these lines of approximately $32.8 million. OPM estimates that new hires will incur no additional costs related to changes proposed here.

OPM requests public comment on the costs generated by this rule.

E. Benefits

Excepting incumbent employees from chapter 43 and 75 procedures and MSPB appeals would reduce agency expenses during separations. Currently approximately one-quarter of one percent of tenured federal employees are dismissed for performance or conduct annually. Applying that percentage to the 45,000 incumbents estimated to be moved into Schedule Policy/Career implies that, in the absence of the rulemaking, agencies would be expected to separate 112 such employees annually.

OPM assumes that the exemption from chapter 75 will reduce the time agency supervisors and senior human resources staff must spend on each separation, prior to any administrative appeals, by a collective 600 hours, or 67,200 hours across all separations.[337] The cost analysis assumes an average salary rate of Federal supervisors and senior HR personnel performing this work at the 2025 rate for a GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate). OPM again assumes the total value of labor is 200 percent of the hourly wage rate, for a total average hourly cost of $182.04. This implies total annual agency savings of $12.2 million.

OPM further assumes that one-quarter of those separations would have otherwise resulted in initial MSPB appeals, or 28 appeals in total. OPM assumes supervisors and other senior agency HR personnel would spend 120 hours preparing evidence, providing testimony, and otherwise preparing for each such appeal, and agency attorneys would spend a further 100 hours reviewing evidence, preparing submissions, and arguing each appeal. OPM assumes initial MSPB decisions will be decided by MSPB administrative judges who are also paid at the GS–15, step 5 level, and they will spend 20 hours conducting each hearing and preparing their decision. This cost analysis again assumes an average hourly cost of $182.04 for supervisors and HR personnel, and the same labor cost for MSPB administrative judges. The attorneys are assumed to be GS–14, step 5 employees receiving Washington, DC locality pay ($161,486 annual locality rate and $77.38 hourly locality rate). With the total value of labor at 200 percent of hourly pay, the average hourly cost of an attorney is $154.76 per hour. This implies that agencies save $33,000 for each MSPB appeal forgone, for a total of $ 0.9 million in annual savings government-wide.

Thus, having these separations proceed through Schedule Policy/Career procedures instead of chapter 43 or 75 would be expected to save agencies approximately $13.2 million [338] This figure excludes the cost of appeals to the full MSPB and potentially federal court. As another consideration with respect to potential litigation, OPM notes that the number of Equal Employment Opportunity (EEO) complaints may increase as employees placed under Schedule Policy/Career will no longer be able to file initial appeals with the MSPB. Employees may turn to EEO as another avenue to contest agency actions. Consequently, some of the savings might not be realized. However, we do not have data on the potential number of EEO complaints, and it would be speculative to assign a cost.[339]

However, OPM expects that there would be significant additional benefits from the proposed rule that are harder to quantify. Increased accountability would be expected to incentivize employees, where applicable, to improve problematic performance and conduct. This would produce large gains in agency efficiency, but OPM does not have a reasonable basis for estimating the magnitude of these gains and thus cannot quantify them across agencies. Similarly, higher employee performance and greater adherence to nonpartisan norms would be expected to reduce the time it takes agencies to conduct rulemakings. This would allow the public to experience the benefits of new rules sooner. OPM expects these benefits vastly outweigh the benefits of reducing HR costs during separations, but OPM does not have a reasonable basis for estimating how much faster rulemakings would proceed or the benefits that would accrue from faster implementation of rules that have not yet been proposed or finalized.

A final benefit of this rule is that it will align OPM regulations with the operative legal standards. This will promote greater agency and employee understanding of the procedures governing the civil service.

[336] Executive Order 14171 directly exempts newly filled Schedule Policy/Career positions from chapter 75 procedures, so the proposed changes to part 752 will not affect new hires filling such positions.

[337] OPM expects that supervisors will continue to document the basis for separations, but less time will be needed to prepare such documentation as it is no longer needed to support an appeal in which the burden of proof lies with the agency.

[338] For purposes of E.O. 14192 accounting, these benefits are considered cost savings.

[339] Please note that, with regard to prohibited personnel practices, there will not be an increase in complaints to the Office of Special Counsel because Schedule Policy/Career positions are excluded from 5 U.S.C. 2302(a)(2)(B)(i).

OPM requests public comment on the benefits generated by this rule.

V. Procedural Issues and Regulatory Review

A. Severability

OPM proposes that, if any of the provisions of this proposed rule as finalized is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. In enforcing civil service protections and merit system principles, OPM will comply with all applicable legal requirements.

B. Regulatory Flexibility Act

The Acting 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) and 13563 (Jan. 18, 2011), 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. A regulatory impact analysis must be prepared for major rules with effects of $100 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 Order 13563. This proposed rule is expected to be an Executive Order 14192 deregulatory action.

D. Executive Order 13132, Federalism

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

E. Executive Order 12988, Civil Justice Reform

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

F. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with the base year 1995). Thus, no written assessment of unfunded mandates is required.

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

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

List of Subjects

5 CFR Parts 210 and 212

Government employees.

5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

5 CFR Parts 302 and 432

Government employees.

5 CFR Part 451

Decorations, Government employees.

5 CFR Part 752

Government employees.

Office of Personnel Management.

Jerson Matias,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM is proposing to amend 5 CFR parts 210, 212, 213, 302, 432, 451, and 752 as follows:

PART 210—BASIC CONCEPTS AND DEFINITIONS (GENERAL)

■ 1. The authority citation for part 210 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

Subpart A—Applicability of Regulations; Definitions

■ 2. Amend § 210.102 by:

■ a. Removing paragraphs (b)(3) and (4); and

■ b. Redesignating paragraphs (b)(5) through (b)(20) as (b)(3) through (b)(18).

PART 212—COMPETITIVE SERVICE AND COMPETITIVE STATUS

■ 3. The authority citation for part 212 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

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) Unless expressly provided otherwise by the Civil Service Rules, an employee who has competitive status at the time his or her position is first listed in an excepted service schedule, or who is involuntarily transferred to a position in the excepted service, is not in the competitive service for any purpose but shall retain competitive status as long as he or she continues to occupy such position.

PART 213—EXCEPTED SERVICE

■ 5. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3161, 3301 and 3302. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14171, 90 FR 8625.

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. ch. 43; Pub. L. 105–339, 112 Stat. 3182–83; E.O. 12125, 44 FR 16879, 3 CFR, 1979 Comp., p. 16879; E.O. 13124, 64 FR 31103, 3 CFR, 1999 Comp., p. 192; E.O. 13562, 75 FR 82585, 3 CFR, 2011 Comp., p. 291; Presidential Memorandum—Improving the Federal Recruitment and Hiring Process, 75 FR 27157 (May 11, 2010).

Subpart A—General Provisions

■ 6. Revise § 213.101 to read as follows:

§ 213.101 Definitions.

(a) In this chapter:

(1) *Excepted service* has the meaning given that term by section 2103 of title 5, United States Code, and includes all positions in the executive branch of the Federal Government which are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and which are not in the Senior Executive Service. An employee encumbering an excepted position is in the excepted service, irrespective of whether they possess competitive status.

(2) *Excepted position* means a position in the excepted service.

(b) In this part:

(1) *Career position* means a position that is not a noncareer position.

(2) *Noncareer position* means a position associated with an appointment that carries no expectation of continued employment beyond the Presidential administration during which the appointment occurred and whose occupant is normally, as a matter of practice, expected to resign upon a Presidential transition. This phrase encompasses all positions whose appointments involve preclearance by the White House Office of Presidential Personnel.

■ 7. Amend § 213.102 by revising the section heading and adding paragraph (d) to read as follows:

§ 213.102 Identification of positions in Schedule A, B, C, D, or Policy/Career.

* * * * *

(d) The President may directly place positions in Schedule Policy/Career.

■ 8. Revise § 213.103 to read as follows:

§ 213.103 Publication of excepted appointing authorities in Schedules A, B, C, D, and Policy/Career.

(a) Schedule A, B, C, D, and Policy/Career appointing authorities available for use by all agencies will be published as regulations in the **Federal Register** and the *Code of Federal Regulations.*

(b) Establishment and revocation of Schedule A, B, C, and Policy/Career appointing authorities applicable to a single agency shall be published monthly in the Notices section of the **Federal Register**.

(c) A consolidated listing of all Schedule A, B, C, and Policy/Career authorities current as of June 30 of each year, with assigned authority numbers, shall be published annually as a notice in the **Federal Register**.

■ 9. Amend § 213.104 by revising the section heading and paragraphs (a) introductory text, (a)(1), (b)(1), and (b)(2) to read as follows:

§ 213.104 Special provisions for temporary, time-limited, intermittent, or seasonal appointments in Schedule A, B, C, D, or Policy/Career.

(a) When OPM specifies that appointments under a particular Schedule A, B, C, D, or Policy/Career authority must be temporary, intermittent, or seasonal, or when agencies elect to make temporary, intermittent, or seasonal appointments in Schedule A, B, C, D, or Policy/Career, those terms have the following meaning:

(1) *Temporary appointments,* unless otherwise specified in a particular Schedule A, B, C, D, or Policy/Career exception, are made for a specified period not to exceed 1 year and are subject to the time limits in paragraph (b) of this section. Time-limited appointments made for more than 1 year are not considered to be temporary appointments and are not subject to the time limits.

* * * * *

(b) * * *

(1) *Service limits.* Agencies may make temporary appointments for a period not to exceed 1 year, unless the applicable Schedule A, B, C, D, or Policy/Career authority specifies a shorter period. Except as provided in paragraph (b)(3) of this section, agencies may extend temporary appointments for no more than 1 additional year (24 months of total service). Appointment to a successor position (*i.e.,* a position that replaces and absorbs the original position) is considered to be an extension of the original appointment. Appointment to a position involving the same basic duties, in the same major subdivision of the agency, and in the same local commuting area is also considered to be an extension of the original appointment.

(2) *Restrictions on refilling positions under temporary appointments.* Except as provided in paragraph (b)(3) of this section, an agency may not fill any position (or its successor) by a temporary appointment in Schedule A, B, C, D, or Policy/Career if that position had previously been filled by temporary appointment(s) in either the competitive or excepted service for an aggregate of 2 years, or 24 months, within the preceding 3-year period. This limitation does not apply to programs established to provide for systematic exchange between a Federal agency and non-Federal organizations.

* * * * *

Subpart C—Excepted Schedules

■ 10. 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 normally subject to change as a result of a Presidential transition.

(a) Upon specific authorization by OPM, agencies may make appointments under this section to noncareer positions that are of a confidential or policy-determining character and are normally subject to change as a result of a Presidential transition. 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.

* * * * *

■ 11. Add a new undesignated, centered heading after § 213.3402 to read as follows:

Schedule Policy/Career

■ 12. Add new § 213.3501 below the undesignated heading Schedule Policy/Career.

§ 213.3501 Career positions of a confidential, policy-determining, policy-making, or policy-advocating character.

(a) As authorized by the President, agencies may make appointments under this section to career positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not in the Senior Executive Service. Positions filled under this authority are excepted from the competitive service and constitute Schedule Policy/Career.

(b) Employees in or applicants for Schedule Policy/Career positions are not required to personally or politically support the current President or the policies of the current administration. They are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President. Failure to do so is grounds for dismissal.

(c) Individuals appointed to positions in Schedule Policy/Career are not subject to probationary or trial periods and acquire competitive status after completing one year of continuous service.

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 13. The authority citation for part 302 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14171, 90 FR 8625. Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95–454, 92 Stat. 1112. Sec. 302.501 also issued under 5 U.S.C. ch. 77. Sec. 302.107 also issued under 5 U.S.C. 9201–9206; sec. 1122(b)(1), Pub. L. 116–92, 133 Stat. 1605.

Subpart A—General Provisions

■ 14. Amend § 302.101 by:

■ a. In paragraph (c)(6), removing the period at the end of the sentence and adding a semicolon;

■ b. Revising paragraph (c)(7);

■ c. In paragraph (c)(8), removing the ''and'' after the semicolon;

■ d. In paragraph (c)(9), removing the period at the end of the sentence and adding a semicolon; and

■ e. In paragraph (c)(10), removing the period at the end of the sentence and adding ''; and''.

The revisions 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);

* * * * *

■ 15. Amend § 302.102 by

■ a. In paragraph (b) introductory text adding the phrase ''or (d)''after ''paragraph (c)'';

■ b. Revising the last sentence of paragraph (c); and

■ c. Adding a new paragraph (d) to read as follows:

§ 302.102 Method of filling positions and status of incumbent.

* * * * *

(c) * * * Persons appointed pursuant to a specific authorization by OPM under this paragraph may acquire a competitive status.

(d) Agencies shall make appointments to positions in Schedule Policy/Career of the excepted service in the same manner as to positions in the competitive service, unless such positions would, but for their placement in Schedule Policy/Career, be listed in another excepted service schedule. Appointments to positions in Schedule Policy/Career of the excepted service that would, but for their placement in Schedule Policy/Career, be listed in another excepted service schedule shall be made pursuant to the rules applicable to such positions in the corresponding schedule. Individuals appointed to a position under 5 CFR 213.3501 acquire competitive status after completing one year of continuous service in the position.

Subpart F—[Removed]

■ 16. Remove subpart F, consisting of §§ 302.601 through 302.603.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

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

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

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

§ 432.102 Coverage.

* * * * *

(f) * * *

(10) An employee occupying a position in Schedule C or Schedule Policy/Career as authorized under part 213 of this chapter;

* * * * *

PART 451—AWARDS

■ 19. 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

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

§ 451.302 Ranks for senior career employees.

* * * * *

(b) * * *

(3) * * *

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

* * * * *

PART 752—ADVERSE ACTIONS

■ 21. The authority citation for part 752 is revised to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; 38 U.S.C. 7403; Sec. 512, Pub. L. 114–328, 130 Stat. 2112; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

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

■ 22. Amend § 752.201 by revising paragraphs (b), (c)(5) and (6), and removing 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;

(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;

(3) An employee with competitive status who occupies a position under Schedule B of part 213 of this chapter;

(4) An employee who was in the competitive service at the time his or her position was first listed under Schedule A or B of the excepted service and still occupies that position;

(5) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3); and

(6) An employee of the Government Publishing Office.

(c) * * *

(5) Of a National Guard Technician; or

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

* * * * *

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

■ 23. 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;

(2) An employee in the competitive service—

(i) Who is not serving a probationary or trial period under an initial appointment; or

(ii) Who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(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;

(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;

(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;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or

her position was first listed under Schedule A or B of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under 38 U.S.C. 7401(3); and

(9) An employee of the Government Publishing Office.

(d) * * *

(2) An employee whose position is in Schedule C or Schedule Policy/Career.

* * * * *

■ 24. Amend § 752.405 by revising paragraph (a) to read as follows:

§ 752.405 Appeal and grievance rights.

(a) *Appeal rights.* Under the provisions of 5 U.S.C. 7513(d), an employee against whom an action is taken under this subpart is entitled to appeal to the Merit Systems Protection Board. Employees listed under § 752.401(d) of this subpart may not appeal to the Merit Systems Protection Board under this section, irrespective of whether they or their positions were previously covered by this subpart.

* * * * *

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