

By electronic submission via www.regulations.gov

Kiran Ahuja, Director
U.S. Office of Personnel Management
1900 E St NW
Washington, DC 20415

November 17, 2023

Re: Comment on Proposed Rule concerning Upholding Civil Service Protections and Merit System Principles | Docket ID: OPM-2023-0013

Dear Director Ahuja,

The undersigned organizations thank you for the opportunity to submit this response to the Office of Personnel Management's (OPM) proposed revisions to and clarifications of civil service protections and the application of merit system principles to career federal employees. This rulemaking will impact virtually all federal policymaking and spending, from effective development and enforcement of consumer health and safety regulations, to protections for workers, to fair and equitable distribution of federal grant funds, and more.

As described more fully below, the undersigned organizations strongly support OPM's proposal, which would clarify the protections afforded to career federal employees and ensure those protections can't be arbitrarily withdrawn to suit the political desires of any given presidential administration. We further encourage OPM to clarify that the protections afforded to civil servants throughout its proposals also reach career employees in the Senior Executive Service wherever applicable.

The federal government relies on experienced and qualified civil servants who are shielded from the pressures of a political spoils system, who ensure that its programs are managed in the public interest, and who advance the goals of legislation passed by Congress.

Recent calls to weaken the independence of the civil service to make it more responsive to swings in political leadership, by empowering political leadership to hire and fire career staff at will, are misguided. During the last presidential administration, President Trump began the process of creating a new excepted service schedule, Schedule F, that would have allowed thousands of senior civil servants to be converted into political appointees by another name.¹ This change never fully went into effect,² but the threat of further future politicization of the civil service remains.

Such changes would be devastating to public trust, government capacity, and the efficacy

¹ See Exec. Order No. 13957, 85 Fed. Reg. 67,631 (2020).

² U.S. Gov't Accountability Off., GAO-22-105504, *Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions* 10 (Sep. 2022) ("GAO Schedule F Report"), <https://www.gao.gov/assets/gao-22-105504.pdf>.

of federal programs. We are pleased that OPM has proposed to clarify and strengthen protections for career civil servants. Our organizations' collective experiences working with the federal government strongly reinforces the value of a professional civil service protected from political interference.

A professional civil service ensures that the federal government has the experience and expertise necessary to manage complex federal programs.

OPM correctly emphasizes that the federal government depends on a huge number of “dedicated and talented professionals who provide the continuity of expertise and experience necessary for the Federal Government to function optimally across Presidents and their administrations.”³

Congress directly “create[s] agencies,” “detail[s] agency authority, and set[s] policy goals for the agency to achieve using its authority,” and “may choose to grant an agency the authority to issue legislative rules, enforce provisions of law, or adjudicate claims.”⁴ While leaders in the executive branch may shape implementation of agency programs, the agencies (and their staff) are themselves supposed to be stewards of programs created, funded, and given direction by acts of Congress.

Protecting the expertise and experience of agency staff ensures that agencies can fulfill this role. Many federal programs and projects are complex and longstanding, and are not designed to be subject to major shifts in staffing or approach every four years. Carrying out these programs effectively, efficiently, and consistent with Congress's intent requires thorough understanding of the particular statutory and regulatory schemes, institutional knowledge of the history of the programs, familiarity with relevant stakeholders inside and outside government, and substantial technical expertise.

Managing these programs, including work with program partners and grantees, requires personnel with the experience and capabilities necessary to balance competing (and shifting) operational, legal, and political needs.⁵ And federal agencies already face challenges hiring and retaining employees in positions that require highly-specialized technical expertise.⁶

³ 88 Fed. Reg. at 63,862, 63,862.

⁴ Todd Garvey & Sean M. Stiff, Cong. Rsch. Serv., R45442, *Congress's Authority to Influence and Control Executive Branch Agencies* 10 (Mar. 2023), <https://crsreports.congress.gov/product/pdf/R/R45442>.

⁵ See, e.g., Brink Lindsey, Niskanen Center, *State Capacity: What Is It, How We Lost It, And How to Get It Back* 10 (2021), <https://www.niskanencenter.org/wp-content/uploads/2021/11/brinkpaper.pdf> (career staff must have the “experience and clear authority to cut through red tape and work around the inconsistencies among directives that accrete over time.”).

⁶ See, e.g., U.S. Gov't Accountability Off., GAO-21-461T, *Testimony by Candice N. Wright, Acting Director, Science, Technology Assessment, and Analytics Before the House Subcommittee on Investigations and Oversight, Committee on Science, Space, and Technology, Strengthening and Sustaining the Federal Science and Technology Workforce* 6 (2021), <https://www.gao.gov/assets/gao-21-461t.pdf> (“agencies may experience challenges recruiting and

In the context of federal regulatory efforts and advocacy, many organizations participate in decades-long projects spanning multiple administrations, where stability and institutional memory are crucial to continue making progress. Agencies exist to carry out programs created and authorized by Congress that last much longer than any single administration, and our organizations see significant value in preserving the knowledge civil servants build over the course of many years carrying out these programs.

The loss of experienced senior leaders is extremely disruptive to federal programs..

Despite President Trump’s Schedule F proposal never fully going into effect, other significant disruptions to civil service staffing occurred during the prior administration. After the Bureau of Land Management announced its headquarters relocation to Grand Junction, Colorado, 77 percent of relocated staff chose to be separated from their positions rather than move with the agency.⁷ Similarly, USDA’s Economic Research Service and National Institute of Food and Agriculture lost roughly half of their staff after the agencies were relocated to Kansas City, and new staff are substantially less experienced than the prior staff.⁸ And data has shown that federal employees across the government quit government at a rate 14.1% higher under President Trump than under President Obama’s second term.⁹

A professional civil service provides valuable regulatory certainty.

Regulatory certainty provides a stable framework for regulated entities, partners, the beneficiaries of regulatory protections, and federal grantees to understand their regulatory obligations and regulatory interactions and plan for the future, including across presidential administrations. Predictability enables these entities to make investments, ensure compliance with legal requirements, develop programs, and focus on delivering impact in their work rather than navigating uncertain and ever-changing legal frameworks. And stable regulatory frameworks advance values of uniformity and fairness.

A professional and stable civil service bolsters regulatory certainty by preserving agency expertise and institutional capacity, and by ensuring that political appointees seeking to change regulatory policy can do so with the counsel of experts who have been managing federal programs for decades. When regulatory changes are necessary, experienced career staff are best positioned to ensure that those changes are implemented in ways that minimize disruption and legal uncertainty.

retaining a diverse, highly-qualified scientific and technical workforce due to differences in pay compared to private sector employers and challenges related to the hiring process”).

⁷ U.S. Gov’t Accountability Off., GAO-22-104247, *Better Workforce Planning and Data Would Help Mitigate the Effects of Recent Staff Vacancies* 15 (2021), <https://www.gao.gov/assets/gao-22-104247.pdf>.

⁸ U.S. Gov’t Accountability Off., GAO-22-105504, *Following Leading Practices Will Better Position USDA to Mitigate the Ongoing Impacts on its Workforce* 13, 16, 57 (2022), <https://www.gao.gov/assets/gao-23-104709.pdf>.

⁹ Partnership for Public Service, *The Federal Workforce and the Trump Administration*, , <https://ourpublicservice.org/fed-figures/the-federal-workforce-and-the-trump-administration>.

By contrast, substantial turnover in federal staff in service of whipsaw changes to federal regulations can cause turmoil for partners and regulated entities. These changes can be particularly costly for smaller entities who may lack the resources to effectively navigate confusing, onerous, and uncertain regulatory changes.

A stable civil service benefits even those partners and regulated entities who might prefer to see some policy changes. As described above, expertise and experience at federal agencies are hugely important for a functioning government, and excessive churn and loss of institutional memory can be devastating to institutional capacity.¹⁰ Political purges of agency staff are a poorly-tailored and excessively blunt tool for policy change, handicapping agencies' ability to actually develop and implement new policies effectively while also potentially misdiagnosing barriers to policy change as personnel-related rather than legal, political, or practical. Regulated entities and beneficiaries have more productive tools at their disposal to directly push for policy changes, including lobbying Congress, advocating before agencies, electioneering, or litigation.

For these reasons, the undersigned organizations support OPM's proposals to clarify the protections afforded to civil servants, ensure merit system protections for employees currently serving in career staff roles, and protect senior civil servants from further exposure to political pressures. And we encourage OPM to ensure that its final rule clarifies that similar protections attach to career staff serving in Senior Executive Service positions.

Thank you for taking the time to consider our views, and for OPM's efforts to ensure that the American people are served by highly-qualified, experienced, and dedicated civil servants in the management of important federal programs.

Sincerely,

350.org
American Federation of Government Employees, AFL-CIO
Americans United for Separation of Church and State
Asian Pacific American Labor Alliance (APALA)
Brennan Center for Justice
Center for Progressive Reform
Democracy Forward Foundation
Disability Policy Consortium
Disability Rights Education and Defense Fund
Earthjustice
Environmental Protection Network
Equal Rights Advocates
Government Accountability Project
Japanese American Citizens League

¹⁰ See, e.g., Rodney Scott et al., *Public sector institutional memory through storytelling* 14-15 (2019) <https://tinyurl.com/2hsryh3s>; Heidi Hardt, *NATO's Lessons in Crisis: Institutional Memory in International Organizations* 8 (2018).

JustLeadershipUSA
League of Conservation Voters
MomsRising
National Active and Retired Federal Employees Association
National Community Action Partnership
National Employment Law Project
National Women's Law Center
Project On Government Oversight
Public Employees for Environmental Responsibility
Public Rights Project
Revolving Door Project
Rise Economy (formerly California Reinvestment Coalition)
South Carolina Appleseed Legal Justice Center