July 18, 2025

Submitted via Federal eRulemaking Portal: https://www.regulations.gov

Charles Ezell, Acting Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Subject: Notice of Proposed Rulemaking—Office of Personnel Management, Suitability and Fitness, 90 Fed. Reg. 23467 (Jun. 3, 2025)—RIN 3206-AO84, Docket No. OPM-2025-0007

Dear Director Ezell:

The undersigned organizations submit this comment in opposition to the above-referenced proposed rule concerning suitability and fitness processes for executive branch employees. The proposed rule is part of a broader scheme to undermine the merit system for federal employment that thousands of the people's representatives in Congress have developed over the last 142 years to protect the American public against a politicized federal workforce.

Through this rulemaking, the Office of Personnel Management (OPM) proposes a radical transformation of the civil service that would degrade the quality, effectiveness and impartiality of governmental services on which all Americans rely. It would further increase political favoritism, covert patronage practices, corruption and consolidation of power by the executive branch at the expense of legislative branch authority. This proposed rule is fully in line with the accelerating transformation of OPM into a tool to carry out unlawful actions that threaten our nonpartisan, merit-based civil service.

I. BRIEF SUMMARY OF PROPOSED CHANGES

On March 20, 2025, President Trump issued a memorandum delegating OPM authority "to make final suitability determinations and take suitability actions regarding employees in the executive branch based on post-appointment conduct, consistent with applicable law."[1] As to whether the President had any such authority to delegate, the memorandum refers only vaguely to the Constitution and "laws."[2]

On June 3, 2025, OPM issued a notice of proposed rulemaking (NPRM) that would purport to authorize suitability determinations and actions against tenured career employees (as opposed

[1] Presidential Mem., *Strengthening the Suitability and Fitness of the Federal Workforce*, § 1(a) (Mar. 20, 2025), reprinted in 90 Fed. Reg. 13683 (Mar. 25, 2025) [link] (hereinafter referenced as "Pres. Mem., Mar. 20, 2025").
[2] *Id*.

to only applicants and appointees)[3] based on post-appointment conduct.[4] Taking suitability actions based on post-appointment conduct would be a novel application of suitability processes. Suitability actions include removal (termination), cancellation of eligibility for the competitive service, cancellation of reinstatement eligibility, and debarment. OPM also proposes to expand the criteria that can serve as the basis for a suitability or fitness determination.[5] The proposed rule would centralize the decision to take a suitability action against an employee based on post-appointment conduct in OPM, increasing the administration's capacity to influence such suitability actions.

OPM estimates that it would use this new regulation expansively to transform 50% of all removal actions normally taken under the adverse action procedures of chapter 75 of Title 5 ("Chapter 75") into suitability actions.[6] The effect would be to strip employees with accrued adverse action rights of their Chapter 75 rights and to strip the Merit Systems Protection Board (MSPB) of authority to reverse an unwarranted action against an employee.[7]

II. THE PROPOSED RULE IS CONTRARY TO LAW.

The proposed regulation is contrary to law. By addressing post-appointment conduct through suitability actions, OPM would circumvent civil service protections that Congress granted tenured competitive service employees and career Senior Executive Service (SES) members.[8]

a. OPM's reliance on sections 3301 and 7301 of Title 5 cannot support the proposed regulation.

Though the presidential memorandum references only "laws,"[9] the NPRM cites sections 3301 and 7301 of Title 5 as authority for its proposed rulemaking.[10] These statutes do not provide authority for either the presidential memorandum or OPM's proposed rule because they do not authorize suitability actions against tenured competitive service and SES employees based on post-appointment conduct. Instead, Chapter 75 provides the mechanisms for addressing post-appointment conduct.

In *Scott v. OPM*, the MSPB correctly held that section 3301 does not authorize suitability determinations based on post-appointment conduct:

> It is axiomatic that the interpretation of a statute begins with the language of the statute itself. Here, it is evident from the plain language of [section 3301] that it is

[3] OPM's regulations define an appointee as an individual who is in the first year of employment or serving a probationary or trial period. 5 C.F.R. § 731.101(a).

[4] "Suitability" refers to the process for assessing the character and conduct individuals for competitive service, positions in the excepted service in which incumbents become eligible for noncompetitive conversion to the competitive service, and career Senior Executive Service members. For the sake of convenience, this comment refers to the first two categories collectively as "competitive service" employees.

[5] A fitness determination is the analog of a suitability determination for excepted service employees and contractors.

[6] Suitability and Fitness, 90 Fed. Reg. 23467, 23473 (June 3, 2025) (hereinafter, "90 Fed. Reg. at [pin cite]").

[7] Compare 5 U.S.C. § 7701 with 5 C.F.R. § 731.501.

[8] 5 U.S.C. ch. 75, subchs. II & V.

[9] Pres. Mem., Mar. 20, 2025, at 1.

[10] 90 Fed. Reg. at 23474. OPM also cites section 1302, but that statute authorizes regulations regarding the competitive service only to the extent that the President has validly delegated authority to issue such regulations. 5 U.S.C. § 1302(a). Because the President cannot delegate authority he lacks, discussion of section 1302 would be redundant of other points made in this comment.

> concerned solely with regulating the admission process and determining the fitness of *applicants*. . . . [T]he statute does not preclude OPM from making an after-the-fact determination that a tenured employee was improperly admitted or was unfit at the time he applied. It does not follow, however, that OPM may base a suitability determination solely on conduct occurring after an individual's admission into the competitive service, and there is nothing in the language of the statute that would authorize such a determination.[11]

OPM has not articulated any rationale for rejecting *Scott*'s interpretation of section 3301, and, in light of that section's clear application only to the "admission" of individuals into the civil service and its reference to fitness "for the employment sought," it is clear that *Scott* was correct.[12]

In *Scott*, the MSPB left open the question of whether section 7301 "may" support suitability actions based on post-appointment conduct.[13] The MSPB did not resolve that question, but section 7301 does not provide such authority. Section 7301 provides only that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." That section permits the President to issue rules setting forth substantive conduct requirements, but it does not permit the President to prescribe the *means for addressing misconduct*. That is, that statutory authority permits the President to issue regulations prohibiting or permitting types of employee conduct. And that is what numerous Presidents have done, for example prohibiting illegal drug use by federal employees[14] or requiring federal employees to adhere to certain principles of ethical conduct.[15]

These orders were valid exercises of the President's power under section 7301 precisely because they were enforced through existing mechanisms. Thus, in rejecting a challenge to President Reagan's Executive Order requiring a "Drug-Free Federal Workplace," the Fifth Circuit held that the Order did not "violate rights granted by the CSRA" because the Order provided that "any action to discipline an employee who is using illegal drugs … shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act."[16] Similarly, both OPM and the Office of Government Ethics have relied on delegated authority under section 7301 to issue rules establishing the ethical obligations of federal employees.[17] Neither agency purported to supplant Chapter 75 processes, nor could they.[18]

That is because Congress preemptively addressed the question of the *means* by which employee misconduct is to be addressed when it enacted Chapter 75 as part of the Civil Service Reform Act (CSRA). Section 7301 pre-dates the adoption of the CSRA[19], and it strains credulity to believe that when Congress enacted the CSRA in 1978 and established a comprehensive scheme for

---

[11] *Scott v. Off. of Pers. Mgmt.*, 116 M.S.P.R. 356, 361 (2011) (emphasis added) (citations and footnote omitted), *modified on denial of reconsideration*, 117 M.S.P.R. 467 (2012).

[12] 5 U.S.C. § 3301(1), (2).

[13] *Scott*, 116 M.S.P.R. at 363 ("[I]t *may be* that the President could, pursuant to 5 U.S.C. § 7301, issue an Executive Order authorizing OPM to make suitability determinations and take or direct suitability actions based on post-admission or post-appointment conduct." (emphasis added)).

[14] Exec. Order 12564 (Sept. 15, 1986), reprinted at 51 Fed. Reg. 32889 (Sept. 17, 1986).

[15] Exec. Order 12674 (Apr. 12, 1989), reprinted at 54 Fed. Reg. 15159 (Apr. 14, 1989); Exec. Order 13989 (Jan. 20, 2021), reprinted at 86 Fed. Reg. 7029 (Jan. 25, 2021).

[16] *Nat'l Treasury Emps. Union v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989) (cleaned up).

[17] 5 C.F.R. pts. 735 & 2635.

[18] *See* 5 C.F.R. §§ 735.102, 2635.106(a).

[19] *See, e.g.,* Pub. L. No. 89-554, 80 Stat. 378, 524 (Sept. 6, 1966).

taking adverse action against employees in Chapter 75, it believed that the pre-existing authority in Section 7301 to issue regulations "for the conduct of employees" would allow the President to ignore the carefully calibrated disciplinary system it just enacted. Especially against the background of Congress' enactment of Chapter 75, Section 7301 simply cannot bear the weight put on it by OPM.

OPM (and the President) have thus failed to identify any "laws" granting the President the authority to remove competitive service employees from the civil service via a suitability action based on post-appointment conduct. The only law governing such removals (and other adverse actions) based on post-appointment conduct is Chapter 75, and the President and OPM are required to "faithfully execute" that law, as opposed to undermining it via an unsupported regulation.

b. OPM's reliance on 5 U.S.C. § 7512(F) stretches the reach of that provision too far.

i. Section 7512(F) does not expand the scope of permissible suitability actions.

OPM also relies on an exclusion to the coverage of subchapter II of Chapter 75, at 5 U.S.C. § 7512(F) ("Paragraph (F)"), to support expanding the reach of suitability actions to post-appointment conduct.[20] Paragraph (F) excludes suitability actions taken by OPM from adverse action procedures for competitive service employees but says absolutely nothing about whether suitability actions can properly be taken based on post-appointment conduct. Congress' addition of that paragraph in 2015 did not transform the core remedial scheme for adverse actions under the CSRA.

Paragraph (F) is not a source of authority to take a suitability action. By its plain terms, Paragraph (F) does not purport to grant the President or OPM any authority. In fact, it is silent as to what constitutes a suitability action. All that Paragraph (F) does is provide that suitability actions authorized and taken under other laws—which it does not purport to change—are excluded from the scope of subchapter II of Chapter 75. Paragraph (F), therefore, cannot be the source of the President's or OPM's authority to take suitability actions based on post-appointment conduct.

In addition, the NPRM fails to identify any indication of congressional intent to apply Paragraph (F) to post-appointment conduct. To the contrary, the legislative history of Paragraph (F), existing OPM regulations at the time of its enactment, and the long history of OPM's practice all demonstrate that the exclusion of suitability actions under Paragraph (F) from Chapter 75 procedures was not intended to apply to (and certainly did not purport to authorize) suitability actions for post-appointment conduct.

Congress added Paragraph (F) in the National Defense Authorization Act for 2016 and, as is often the case with that massive annual legislation, it did so with little explanation of the Act's provisions.[21] A June 2015 Senate amendment inserted the provision on Paragraph (F).[22] The full Senate agreed to that amendment—without floor debate—as part of a slate of unanimous consent amendments.[23] But the record is not completely devoid of explanation. The two chambers of Congress issued a joint explanatory statement for this statutory provision, which identified its purpose to address a particular type of *pre-appointment* conduct: "Clarify Title 5 U.S.C. section

[20] 90 Fed. Reg. at 23469.

[21] Pub. L. 114-92, div. A, tit. X, § 1086(f)(9), 129 Stat. 1010 (2015).

[22] 161 Cong. Rec. S4268 (daily ed. June 18, 2015) (S.Amdt. 1944 to S.Amdt. 1463 to S.1356, Nat'l Def. Auth. Act for Fiscal Year 2016) [link].

[23] 161 Cong. Rec. S4263 (daily ed. June 18, 2015) [link].

7512 to strengthen the Federal Government's ability to take action against individuals who falsify background investigation information."[24] That congressional intent is relevant.

OPM asserts in its NPRM that "[t]his legislation overruled a Federal Circuit case (*Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015)) that had held that suitability-based removals were in fact subject to Chapter 75 procedures."[25] The legislative history offers no hint, other than the Senate amendment's timing, that *Hopper* inspired the amendment.[26] If *Hopper* was the inspiration, however, the correlation between that case and the Senate amendment serves only to undermine OPM's position in the instant NPRM. *Hopper* involved a suitability action based on *pre-appointment* conduct, specifically a charge of falsification during the examination process.[27]

Under OPM's regulations in 2015, when Congress added Paragraph (F), falsification was one of only three grounds on which OPM could take a suitability action against an employee: (1) material, intentional false statement, or deception or fraud in examination or appointment; (2) refusal to furnish testimony, when required under 5 C.F.R. § 5.4, to the Merit Systems Protection Board (MSPB) or the Office of Special Counsel (OSC); and (3) any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.[28] The first and third grounds addressed only *pre-appointment* conduct.

The second ground, regarding refusal to furnish testimony,[29] might have been read in some cases to address post-appointment conduct; however, suitability actions include loss of eligibility and debarment for non-employee applicants if they refused to testify before the MSPB or OSC in the past.[30] In any event, that provision was effectively defunct in 2015, as OPM did not actually take suitability actions based on such conduct and the MSPB's decision in *Scott* precluded using the testimony factor to address post-appointment conduct. The NPRM itself concedes that OPM has not taken suitability actions against employees for post-appointment conduct since at least 2011 (and OPM does not state that it has ever done so):

> [S]ince the Merit Systems Protection Board's (MSPB) decision in *Scott v. OPM* in 2011, which held that suitability actions cannot be taken for post-appointment conduct, OPM has not itself taken suitability actions regarding employees, regardless of employment status as an 'appointee' or 'employee' per 5 CFR 731.101, for post- appointment conduct.[31]

For these reasons, Congress had no reason to think its amendment adding Paragraph (F) would apply to post-appointment conduct. Indeed, it would have been odd for Congress to adopt such a dramatic change to the CSRA—allowing an end-run around Chapter 75 for all manner of post-appointment conduct—with no debate or consideration. "Congress … does not alter the

---

[24] Legislative Text and Joint Explanatory Statement to Accompany S. 1356, 114th Cong. (Comm. Print No. 2), Pub. L. 114-92, 750 (2015) [link], *reprinted in* 161 Cong. Rec. H7747-05, H7955, H7958 (Nov. 5, 2015).

[25] 90 Fed. Reg. at 23469.

[26] *All Actions: S.1356—114th Congress*, Congress.gov [link] (last visited June 12, 2025).

[27] *Archuleta v. Hopper*, 786 F.3d 1340, 1343-44 (Fed. Cir. 2015) ("Roughly 15 months after his appointment, OPM informed Hopper that it found 'a serious question' regarding his suitability for federal employment due to false statements he made in connection with his application and appointment.").

[28] 5 C.F.R. §§ 731.105(d) (giving OPM jurisdiction over actions based on § 731.202(b)(3), (4), and (8)."), 731.202(b)(3), (4) and (8) (2015) [link].

[29] 5 C.F.R. § 731.202(a)(4) (2015) [link].

[30] 5 C.F.R. §§ 731.204, 731.205, 731.301, 731.401 (2015) [link]. The MSPB and OSC can subpoena private citizens, 5 U.S.C. §§ 1204(b)-(d), 1212(b), so the applicability of this provision to non-employees is perfectly plausible.

[31] 90 Fed. Reg. at 23468-69 (internal citation omitted).

fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[32]

Finally, narrow exclusions such as Paragraph (F) must not be read to swallow or significantly alter the rules they modify. Exceptions must be read "fairly,"[33] which sometimes means "narrowly in order to preserve the primary operation of the provision" to which they apply.[34] "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people" through their elected representatives in Congress.[35] For that reason, courts have avoided overbroad interpretations of exceptions.[36]

To the extent that Paragraph (F) sheds any light on the scope of permissible suitability actions (and the section itself says nothing about that scope), it supports an understanding of that term as referring solely to actions based on pre-appointment conduct—because that had been OPM's unbroken practice, because that is what the limited legislative history suggests, and because one would not expect Congress to adopt so radical a change in the law in the manner in which this paragraph was added.

ii. The statutory term "suitability action" covers actions for pre-appointment conduct.

Authority to modify mechanisms for removing tenured competitive service employees rests exclusively with Congress. Courts have recognized that "Congress' careful work in crafting the intricate remedial scheme of the CSRA"[37] centered on a "comprehensive and integrated review scheme" for adverse actions.[38] The "CSRA's reticulated remedial scheme"[39] "'prescribes in great detail the protections and remedies applicable to' adverse personnel actions against federal employees."[40] Reading the term "suitability action" as it is used in Paragraph (F) broadly to cover post-appointment conduct would undo the great care Congress took in drafting the CSRA. It would establish parallel mechanisms for taking action against tenured employees between which the government could freely choose, with the government's selection of one mechanism effectively stripping *the* core civil service protection that Congress afforded.[41]

---

[32] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[33] *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 396 (2021),

[34] *Garland v. Aleman Gonzalez*, 596 U.S. 543, 555 n.6 (2022). *See also Maracich v. Spears*, 570 U.S. 48, 60 (2013); *Comm'r v. Clark*, 489 U.S. 726, 739 (1989); *Piedmont & N. Ry. Co. v. Interstate Com. Comm'n*, 286 U.S. 299, 311-12 (1932); 2A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, 6th ED. § 47:11, 246–47 (2000).

[35] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). *See also Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009) (interpreting exception narrowly to avoid swallowing rule to which it applied); *Kosak v. United States*, 465 U.S. 848, 853-54 n.9 (1984) ("[U]nduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute.").

[36] *See, e.g., In re Woods*, 743 F.3d 689, 699 (10th Cir. 2014); *Baude v. United States*, 955 F.3d 1290, 1301 (Fed. Cir. 2020); *Starry Assocs., Inc. v. United States*, 892 F.3d 1372, 1381 (Fed. Cir. 2018); *Gentry v. Harborage Cottages-Stuart, LLLP*, 654 F.3d 1247, 1258 (11th Cir. 2011); *Markowitz v. Ne. Land Co.*, 906 F.2d 100, 105 (3d Cir. 1990); *De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297, 1302 (9th Cir.1979).

[37] *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 965 (D.C. Cir. 1990). *See also Hamlet v. United States*, 63 F.3d 1097, 1106 (Fed.Cir.1995) ("Title 5's 'elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations'") (quoting *Bush v. Lucas*, 462 U.S. 367, 388 (1983)).

[38] *United States v. Fausto*, 484 U.S. 439, 454-55 (1988).

[39] *Fed. L. Enf't Officers Ass'n v. Ahuja*, 62 F.4th 551, 559 (D.C. Cir. 2023).

[40] *Elgin v. Dep't of Treasury*, 567 U.S. 1, 11 (2012) (quoting *Fausto*, 484 U.S. at 443).

[41] *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009) (holding that the CSRA "constitutes

Chapter 75 must be interpreted in the broader context of the CSRA's statutory scheme.[42] And as remedial legislation, any perceived ambiguity must be resolved in favor of those whom Congress enacted the legislation to protect.[43] "Remedial legislation is traditionally construed 'broadly to effectuate its purposes,' with exceptions 'construed narrowly.'"[44] That principle holds especially true here, with OPM threatening to gut Chapter 75 procedures by turning *half of all removals into suitability actions*.[45] OPM would have the exception swallow the rule.

The best interpretation of what Congress accomplished by enacting Paragraph (F), therefore, is that Congress created a path for suitability actions taken by OPM against tenured competitive service employees only based on *pre-appointment* conduct. After *Loper Bright Enterprises v. Raimondo*, the best interpretation is the only one that matters: "In the business of statutory interpretation, if it is not the best [interpretation], it is not permissible."[46]

c. OPM lacks authority to strip career SES members of adverse action appeal rights.

OPM's argument that it has the authority to remove career SES members via suitability actions is even weaker. Two of the three statutory authorities on which OPM relies do not apply to SES members at all. Section 3301 addresses only admission to the competitive service, not the SES. Paragraph (F) addresses the coverage of subchapter II of Chapter 75, which is inapplicable to SES members.[47] Career SES members are covered by subchapter V of Chapter 75, which does not exclude suitability actions from its adverse action procedures.[48] The third authority, 5 U.S.C. § 7301, is inapplicable to suitability actions for the reasons discussed above.

* * *

OPM's reinterpretation of sections 3301, 7301 and 7512(F) is a novel assertion of authority that would radically transform the federal workforce. If the rule change converts half of all adverse action removal cases into suitability actions, as OPM anticipates, the effect will be a gutting of the

---

the remedial regime for federal employment and personnel complaints" (emphasis in original)).

[42] *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

[43] *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971). *See also Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) (recognizing "remedial legislation" requires an "expansive view").

[44] *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (citing "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *Cobb v. Cont. Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly." (citation omitted)); *E.E.O.C. v. Fox Point-Bayside Sch. Dist.*, 772 F.2d 1294, 1302 (7th Cir. 1985) ("[A]n exception to a remedial statute . . . is to be construed narrowly").

[45] 90 Fed. Reg. at 23473 ("OPM estimates that approximately 50 percent, or 1226, of these Chapter 75, or Chapter 75 equivalent, removal actions presently taken by agencies could be referred to OPM for suitability actions instead.").

[46] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

[47] *See* 5 U.S.C. § 7511(a).

[48] 5 U.S.C. §§ 3592(a) (limiting grounds for removing SES members), 3595 (addressing reductions in force), 7542 ("This subchapter applies to a removal from the civil service or suspension for more than 14 days, but does not apply to an action initiated under section 1215 of this title, to a suspension or removal under section 7532 of this title, or to a removal under section 3592 or 3595 of this title."), 7543 (establishing adverse action procedures for SES members). This distinction further supports the reading of Paragraph (F) articulated above. Under OPM's reading, competitive service employees would be subject to suitability actions based on post-appointment conduct, but SES members would not be.

CSRA's cornerstone remedial mechanism. The NPRM fails to cite any clear indication of congressional intent to destroy the intricate remedial scheme that it worked so carefully to create.

III. OPM HAS FAILED TO ENGAGE IN REASONED DECISIONMAKING, AND ITS JUSTIFICATION FOR THIS RULEMAKING IS UNSUPPORTED BY THE RECORD.

Even were OPM's proposed rule not contrary to law, the NPRM fails to offer a reasoned justification for the radical change OPM has proposed and fails to grapple with numerous problems created by the rule. Nor is the rule supported by the evidentiary record.

a. OPM's claims of problems with existing procedures are unsupported by the record.

The NPRM claims that adverse action protections "seriously impair[] the efficiency, effectiveness, and public perception of the federal service."[49] In support of these claims, OPM has offered no evidence of specific mission-related deadlines or target dates having been missed due to procedures that ensure fairness and prohibit whistleblower retaliation, or that any mission-related outcomes have been harmed. In fact, OPM has not, and cannot, demonstrate that the suitability process is faster than the adverse action process; both processes permit MSPB appeals. In support of its claim about public perception, OPM has offered no evidence that the public at large harbors a perception that holding OPM accountable for adhering to the MSPB's objective findings has caused criminals or other bad actors to run loose in government. For all three claims, OPM offers nothing at all. Not one single verifiable example.

OPM says it hopes that stripping competitive service employees of due process protections "will encourage agencies and managers to act, rather than choosing not to act because the Chapter 75 process is perceived as too difficult."[50] But the evidence does not support the conclusion that this perception—if it even exists on any broad scale—is accurate. OPM offers no evidence that it has conducted an independent investigation of any actual instances in which a specific employee who should have been removed was not removed. In any event, if OPM believes Chapter 75 procedures are too burdensome, the solution is for OPM to ask Congress to change the law, not to reinterpret the law to eviscerate the legislative scheme Congress established.

Moreover, OPM's proposed rule would serve only to facilitate *unwarranted and improper* removals. Employees would still be able to appeal suitability actions to the MSPB, but the MSPB could not overturn an unwarranted or improper removal.[51] The MSPB's adjudication would yield an independent assessment of the facts on which OPM relied, but the proposed rule would permit OPM to ignore the MSPB's findings when a removal is unwarranted under suitability procedures. The only real effect of the proposed rule, therefore, would be to permit OPM to remove competitive service employees without legitimate cause. That outcome would facilitate the administration's effort to politicize the civil service—and it would stand in direct opposition to the congressional decision to protect employees against unwarranted actions and prohibited personnel practices.

b. The proposed rule would result in excepted service employees having greater rights than competitive service employees.

The proposed rule runs contrary to the comprehensive statutory remedial scheme that Congress created by enacting the CSRA. Under that scheme, as under prior legislation and regulations, the

[49] 90 Fed. Reg. at 23469.
[50] 90 Fed. Reg. at 23472.
[51] 5 C.F.R. § 731.501.

government has consistently provided more rights to competitive service employees over excepted service employees. This divide dates back at least as far as the Pendleton Act of 1883.[52] Now, without even acknowledging this bizarre outcome, for the first time OPM proposes to shift the advantage to excepted service employees—while competitive service employees could be removed for post-appointment conduct via a suitability action, excepted service employees who engaged in the same conduct could only be removed under Chapter 75 processes.[53]

The proposed rule would strip the MSPB's ability to overturn removals of competitive service employees while leaving intact the MSPB's ability to overturn removals of excepted service employees.[54] This change would turn the remedial scheme Congress created on its head.

c. OPM's assertions about criminal conduct are unsupported by the record.

The NPRM rationalizes its proposal in part with a misleading assertion that "[a]llowing employees who engage in gross—and at times criminal—misconduct to remain in their positions undermines the integrity of the Federal service."[55] This statement is based on a false premise, because agencies are already able to immediately exclude employees from the workplace, and they can do so indefinitely, either with or without[56] pay. And under existing Chapter 75 processes that Congress established, they may use an expedited procedure for removal when "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed."[57] An agency would have little difficulty demonstrating that removal of an employee who committed a serious crime promotes the efficiency of the service.

---

[52] *See, e.g.*, Ch. 27, §2(5), 22 Stat. 404 (Jan. 16, 1883) [link]; Exec. Order of May 7, 1893 [link]; Exec. Order of May 6, 1896 [link]; Exec. Order 119 (May 29, 1899) [link]; Exec. Order of Oct. 17, 1905 [link]; Exec. Order of Nov. 17, 1905 [link]; Lloyd-LaFollette Act, § 6, 37 Stat. 555 (1912) [link]; 5 U.S.C. § 652 (1934) [link]; 5 C.F.R. § 12.1 (1938) [link]; Ramspeck Act, Pub. L. 76-880, §1, 54 Stat. 1211 (1940) [link]; 5 C.F.R. § 9.101-.102 (1949) [link]; 5 U.S.C. §§ 631a, 631b (1952); 20 Fed. Reg. 599, 599, 601 (Jan. 28, 1955) (5 C.F.R. § 9.109) [link]; 5 C.F.R. § 01.3(d) (1955) [link]; Exec. Order 10,987 (1962) [link]; Exec. Order 11491, § 22 (1969) [link]; 5 C.F.R. pt. 752 (1964) [link]; 5 C.F.R. pt. 771 (1964) [link]; 5 C.F.R. § 212.401(b) (1964) [link]; 5 C.F.R. pt. 752 (1970) [link]; 5 C.F.R. pt. 771 (1970) [link]; Pub. L. No. 95-454, tit. II, § 202(a), 92 Stat. 1111, 1135-36 (1978); 5 C.F.R. pt. 752 (1982) [link]; Pub. L. No. 101-376, § 2, 104 Stat. 461 (1990) (5 U.S.C. § 7511(a)(1)) [link]; 5 C.F.R. pt. 752 (1997) [link]; 5 C.F.R. pt. 752 (2023) [link]. As originally enacted, the CRSA granted nonpreference eligible competitive service employee MSPB appeal rights, but it denied such rights to nonpreference eligible excepted service employees. Pub. L. 95-454, § 204(a), 92 Stat. 1135. Even after Congress granted appeal rights to nonpreference eligible excepted service employees, it conditioned their accrual on completion of a longer service period than applied to competitive service employees. Pub. L. 101-376, § 2(a), 104 Stat. 461 (1990) (amending 5 U.S.C. § 7511(a)(1)).

[53] Paragraph (F)—and its limitation to suitability actions, as opposed to actions based on fitness determinations—is not an inversion of the ordinary preferential treatment of competitive service *employees*. Instead, it is consistent with Congress' longstanding approach of applying more rigor to the to the competitive service *hiring* process as compared to the excepted service hiring process. It of course makes sense that Congress would more carefully guard *admission* into the competitive service, because, once an employee gains competitive service status, they generally have more rights than their counterparts in the excepted service. This is further support for interpreting Paragraph (F) as applying only to pre-appointment conduct, which is consistent with a legislative scheme that favors the excepted service in hiring but favors the competitive service in employment. Even if this were not the case and, instead, Paragraph (F) were somehow viewed as treating excepted service *employees* better than competitive service *employees*, that would be yet another reason to interpret Paragraph (F) narrowly as only applying to pre-appointment conduct. A narrow interpretation would be necessary to reconcile that provision with the rest of the legislative scheme favoring competitive service employees.

[54] 90 Fed. Reg. at 23476 (5 C.F.R. §§ 731.203(e)); 5 C.F.R. § 731.501.

[55] 90 Fed. Reg. at 23472.

[56] 5 C.F.R. §§ 630.1502, 752.402, 752.403.

[57] 5 U.S.C. § 7513(b)(1).

OPM asserts that "[i]llogically, the government has far greater ability to bar someone from federal employment who has committed a serious crime or misconduct in the past than it does to remove someone who engages in the exact same behavior as a federal employee."[58] But there is nothing illogical about Congress having granted greater civil service protections to employees, including those with decades of loyal federal service, than to mere job applicants.[59] The expedited procedures for removing employees reasonably believed to have committed crimes significantly mitigate OPM's concern here.[60] Moreover, Congress has been quite clear when it believes that post-appointment criminal conduct should result in removal from federal service, without regard to Chapter 75 procedures, specifying a limited number of crimes and positions where a convicted individual "shall be removed from such position."[61]

Even if the employee is acquitted of criminal charges, the government could still remove the employee under adverse action procedures that require a lower burden of proof than criminal cases.[62] In such case, Chapter 75's procedural protections help ensure that OPM does not destroy the career and reputation of an innocent individual. But the proposed rule would allow OPM to remove an employee *after both the MSPB and a reviewing court have determined that record does not support the charges*. This cannot be what Congress intended.[63]

d. OPM's proposed rule addresses only management convenience and fails to address other values on which Congress based the CSRA.

Throughout the NPRM, OPM emphasizes only the value of management convenience in taking actions and ignores the other values that Congress determined are relevant to the CSRA.[64] This myopic view of federal employment stands directly at odds with the intricately constructed comprehensive remedial scheme that Congress established in the CSRA.

In the CSRA, Congress carefully balanced competing policy priorities, including the government's responsibility for dealing with employees fairly.[65] To strike what lawmakers viewed as the correct

---

[58] 90 Fed. Reg. at 23469.

[59] *Cf. Stone v. F.D.I.C.*, 179 F.3d 1368, 1374 (Fed. Cir. 1999) ("If the government gives a public employee assurances of continued employment or conditions dismissal only for specific reasons, the public employee has a property interest in continued employment. *See Loudermill*, 470 U.S. at 538, 105 S.Ct. 1487.").

[60] 5 U.S.C. § 7513(b)(1); 5 C.F.R. §§ 630.1502, 752.402, 752.403.

[61] 5 U.S.C. § 7313(a); *see also id.* § 7371(b) ("shall be removed from employment").

[62] 5 U.S.C. § 7701(c)(1)(B).

[63] *See, e.g.*, 5 U.S.C. § 2301(b)(2) ("All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management . . ."); Pub. L. 95-454, § 3(3) 92 Stat. 1111, 1112 (1978) ("Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees."); S. Rep. No. 95-969 ("The 'rights of employees' to be selected and removed only on the basis of their competence *are concomitant with the public's need to have its business conducted competently*. . . . One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, *but for the right reasons*." (emphasis added)).

[64] *See, e.g.*, 90 Fed. Reg. at 23469 ("Agencies have reported frustration with not being able to take the next logical step, a suitability action . . ."), 23472 ("[The rule] will allow for faster removals by the agencies of those employees against whom OPM takes suitability actions, as the suitability actions process is more streamlined for the agencies than the Chapter 75 process . . . . [T]he Chapter 75 process is perceived as too difficult.").

[65] *Bush v. Lucas*, 647 F.2d 573, 576-77 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983) ("We stress the remedies made available by Congress to an aggrieved civil servant in order to emphasize the care Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business. The very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees.").

balance, the Senate report explained that Congress chose to view "civil service reform from the standpoint of the public, rather than the more limited perspective of either the employee or manager."[66] This legislative policy led to a determination that "[t]he 'rights of employees' to be selected and removed only on the basis of their competence *are concomitant with the public's need to have its business conducted competently*."[67] Congress placed great value on procedural protections by "[a]llowing civil servants to be able to be hired and fired more easily, *but for the right reasons*."[68]

This emphasis on process to ensure fairness, in service of the public's interest, is reflected throughout the CSRA.[69] The NPRM fails entirely to explain how the radical change that OPM proposes to make to civil service employment specifically advances that or any other purpose of the CSRA. OPM has identified no clear congressional intent to support replacing half of all adverse action removals with suitability removals.

e. OPM distorts the history of vetting current employees in public trust positions.

The NPRM asserts that "it has long been Presidential and executive branch policy to assess post-appointment conduct to determine an individual's ongoing suitability or fitness to remain in their position."[70] The word "assess" is carefully chosen because making a suitability determination and taking a suitability action are not the same thing.[71] OPM admits in the NPRM that suitability actions have not been used to remove employees for post-appointment conduct.[72] The government has used adverse action procedures to remove them.

OPM emphasizes the government's policies of reinvestigating employees in public trust positions every five years or applying continuous vetting processes to them.[73] What OPM fails to do is cite a single instance of an employee having been removed through a suitability action for post-appointment conduct as a result of any such reinvestigation. An agency's discovery of adverse

---

[66] S. Rep. No.. 95-969, at 4 (1978) [link].

[67] *Id*. (emphasis added).

[68] *Id*. (emphasis added).

[69] This value is manifest, for example, in provisions declaring that Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices, indicating that the power of the MSPB and OSC should "increased," determining that "[a]ll employees and applicants for employment should receive fair and equitable treatment" and should be " protected against arbitrary action, personal favoritism, or coercion for partisan political purposes," holding that "[e]mployees should be protected against reprisal for lawful disclosures of information," prohibiting political affiliation discrimination, prohibiting personnel actions against employees for cooperating with OSC or inspectors general or for refusing to obey orders that would require them to violate the law, and declaring that the SES system "shall be administered so as to . . . protect senior executives from arbitrary or capricious actions [and] maintain a merit personnel system free of prohibited personnel practices." *See, e.g.,* Pub. L. 95-454, §§ 3(1), (3)-(5), 101, 402, 92 Stat. 1111, 1112, 1114, 1155 (1978); 5 U.S.C. §§ 2301(b)(2), (8); 3131(7), (9).

[70] 90 Fed. Reg. at 23468.

[71] 5 C.F.R. § 731.101.

[72] 90 Fed. Reg. 23468-69 ("Although OPM has required agencies to make suitability determinations regarding employees based on post-appointment conduct, OPM has not permitted agencies to take suitability actions when the determination is unfavorable. Further, since the Merit Systems Protection Board's (MSPB) decision in *Scott v. OPM* in 2011 (116 M.S.P.R. 356 (2011), modified by 117 M.S.P.R. 467 (2012)), which held that suitability actions cannot be taken for post-appointment conduct, OPM has not itself taken suitability actions regarding employees, regardless of employment status as an 'appointee' or 'employee' per 5 CFR 731.101, for post- appointment conduct.").

[73] 90 Fed. Reg. at 23470.

information arising after appointment may well result in an employee's removal through chapter 75 adverse action procedures, rather than suitability procedures.[74]

f. OPM has failed to identify "surveys" on which it claims to rely and has drawn conclusions from them without conducting any independent inquiry.

The NPRM relies on unidentified "surveys" indicating that managers perceive taking adverse actions against employees as being too difficult.[75] Based on these undisclosed sources, OPM has drawn conclusions without investigation.

Specifically, OPM claims that an unspecified number of unidentified "[s]urveys show that only two-fifths of Federal supervisors believe they could remove an employee for serious misconduct."[76] The footnote accompanying this claim cross-references another footnote that cites a non-public OPM database of statistical information.[77] OPM states that its claim is based on an examination of "nature of action codes for terminations"—which cannot possibly reveal supervisors' perceptions. If OPM relied on any actual surveys, its failure to identify them has deprived the public of the opportunity to examine and comment on them.

If these surveys exist, OPM does not assert that it endeavored to ascertain the source of this reticence, leaving OPM unaware of whether managers consider the obstacle to be the MSPB process, some other employment process, or a lack of training and support from agency Human Resources offices and political leaders. OPM has made no effort to ascertain whether a shortage of resources or personnel has left managers feeling that they lack the time to address personnel matters. OPM fails to even cite individual examples of managers going on record to acknowledge having shirked their duty by shying away from taking a needed personnel action in a specific case. The reality is that the MSPB's administrative judges rarely rule in favor of employees outright, with management either winning cases or entering into settlements that can separate employees without conflict.[78]

OPM also vaguely asserts that "[a]gencies have reported frustration with not being able to take the next logical step, a suitability action, after finding an employee unsuitable for continued employment."[79] The NPRM fails to offer any support for this claim. OPM does not indicate who reported this frustration, to whom they reported it, how they reported it, when they reported it, or the context in which they reported it. Nor does OPM explain why those agencies could not move forward with the actual "next logical step" of removing such employees through Chapter 75

---

[74] *See, e.g.,* Def. Civilian Pers. Advisory Serv., Field Adv. Servs., Lab. & Emp. Rels. Div., *Changes to 5 CFR 731 Suitability Reinvestigation Requirements*, 4 (Dec. 9, 2011) ("In general, barring the limited circumstances described in 731.105(d), the subject of a reinvestigation, if a suitability issue is found in an investigation or reinvestigation, if the involved individual is an employee as defined by 5 USC § 7511, the agency may elect to initiate an adverse action under 5 CFR 752, which is distinct from a suitability action that OPM would initiate under 5 CFR 731.") [link].

[75] 90 Fed. Reg. at 23472.

[76] *Id*.

[77] The cross-referenced footnote reads: "This data comes from OPM's Enterprise Human Resources Integration Program's (EHRI) Data Warehouse and is analyzed using nature of action codes for terminations to identify Chapter 75 removals for misconduct. Certain data from EHRI is available to the public in summarized form on FedScope, accessible at https:// www.fedscope.opm.gov/. However, complete raw data from EHRI is not available due to concerns about identifying employees at the individual level." 90 Fed. Reg. at 23473 n.2.

[78] Eric Katz, *Feds Rarely Win Before MSPB*, GOV'T EXEC. (May 16, 2019) ("Federal employees won relief from administrative judges in just 3% of cases over the last three years, the agency said in a recent report.") [link]. This is not to say that management "wins" in 97% appeals, but it shows the degree to which OPM overstates its concerns.

[79] 90 Fed. Reg. at 23469.

removal processes. Here too, OPM has deprived the public of the opportunity to comment on the basis for its claims.

g. OPM's cost analysis is unsupported by the record and does not justify the deprivation of civil service protections for competitive service employees.

In the NPRM, OPM claims that this change will save the government approximately $35.7 million per year.[80] That alleged cost savings would be insufficient to justify deprivation of civil service protections for competitive service employees in half of all adverse actions. The estimate is also unsupported by the record. There are several glaring gaps in OPM's analysis.

The NPRM conflates savings to individual agencies with savings to the government. In making its calculation, OPM treats costs shifted from other agencies to OPM as savings to the government, but taxpayers fund OPM no less than they fund those other agencies.[81] OPM's shell game with numbers fails to demonstrate any costs savings.

It stands to reason that most of the cost of a removal action comes during the litigation phase, and OPM acknowledges that the rule change will not reduce the number of MSPB appeals.[82] The MSPB process for adjudicating suitability actions will be the same as in adverse action proceedings,[83] with an Administrative Judge overseeing discovery and a hearing, and with the employee being able to appeal first to the MSPB and then to the Federal Circuit.[84] The same substantive standard applies in both types of cases.[85] The only difference is that the MSPB would lack the ability to reverse OPM's suitability action, and that difference is not a cost-determinative factor.[86]

OPM seems to have overlooked the fact that suitability cases are adjudicated in the MSPB regional office nearest to an employee's residence.[87] This geographic remoteness from OPM's Washington, D.C., offices will increase litigation costs because, unlike the agencies that litigate adverse action cases against their employees, OPM does not have field offices throughout the country where appellants live. Remote meeting capabilities will not necessarily eliminate the need to travel for discovery, witness preparation and, at the MSPB's discretion, hearings.

Moreover, OPM does not provide any information to support its estimate that suitability actions (which are limited to competitive service employees) will constitute 50 percent of all removals. OPM does not indicate what percentage of removals currently are of competitive service employees or what percentage of such removals are for conduct reasons, and the MSPB does

---

[80] 90 Fed. Reg. at 23473.

[81] 90 Fed. Reg. at 23473 ("While a portion of the 600 hours would still fall to the agency to establish a fulsome referral to OPM for a suitability action, OPM anticipates that referring the matter to OPM for a suitability action *would relieve the agencies* of at least thirty percent of the work involved in taking a Chapter 75 action, prior to appeals. This implies total savings of $32,767 per case and a total annual savings of $40.2 million." (emphasis added)).

[82] 90 Fed. Reg. at 23472 ("OPM assumes an individual willing to appeal a Chapter 75 action to MSPB would be equally willing to appeal a suitability action to MSPB.").

[83] 5 C.F.R. § § 1201.11.

[84] 5 U.S.C. §§ 7701, 7702, 7703; 5 C.F.R. §§ 731.501; 5 C.F.R. pt. 1201.

[85] Compare 5 U.S.C. § 7513(a) ("an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service") with 5 C.F.R. § 731.201 (requiring a finding that "the action will protect the integrity or promote the efficiency of the service.").

[86] 5 C.F.R. § 731.501.

[87] 5 C.F.R. § 1201.4(d).

not publish such statistics.[88] Nor does OPM's 50 percent estimate correspond to the overall percentage of competitive service employees in the executive branch (67.3%).[89] In short, OPM's estimate appears to be an arbitrary guess.

In addition, OPM's proposed rulemaking will not eliminate adverse actions appeals by SES members under 5 U.S.C. § 7543. As discussed above, OPM has no authority to eliminate the rights of career SES members to appeal suitability actions as adverse actions.[90]

h. OPM has failed to meet the very high standard to justify reversing a change to its regulations that became effective just this year.

One of the changes OPM has proposed is to reverse a December 2024 regulation that became effective in January 2025. That change removed an individual's failure to testify before the MSPB or OSC as a factor that could support a suitability action.[91] A change in administration is not a sufficient rationale for changing a rule so soon after issuance, for it does not address the need for the change. OPM fails to offer a substantive reason for its quick reversal. OPM states only that it intends to use this factor.[92]

The NPRM misstates the reason OPM made the change in 2024. The NPRM claims that OPM removed this factor in 2024 because OPM had rarely used it.[93] This statement is not supported by the record. OPM did not offer disuse as a justification for the change.[94] The preamble to OPM's notice of proposed rulemaking in 2023 explained that other mechanisms were appropriate for enforcing the requirement.[95] Enforcement mechanisms include the MSPB's ability to obtain an order from a U.S. District Court compelling a witness' compliance with a subpoena, which would entail judicially administered penalties for noncompliance.[96] The MSPB may obtain such an order not only in appeals before it but also on behalf of the OSC.[97] In addition, employing agencies can use adverse action procedures to enforce the requirement to testify.[98] OPM has failed to explain why these enforcement mechanisms are insufficient such that a reversal of the prior rule is warranted.

OPM's proposal to use suitability procedures to address contumacy or failure to comply with MSPB and OSC subpoenas is also an ineffective alternative. The type of witness most likely to resist providing testimony is a former federal employee or private citizen, who could not be removed and could well be indifferent to debarment from federal service. A court order, however, carries meaningful penalties that apply to these individuals.

---

[88] *See* Merit Sys. Prot. Bd., Annual Report for 2023 (May 1, 2024) [link].

[89] Drew DeSilver, *What the data says about federal workers*, Per Rsch. Ctr. (Jan. 7, 2025) [link].

[90] *See* 5 U.S.C. § 7542.

[91] Suitability and Fitness, 89 Fed. Reg. 102675 (Dec. 18, 2024).

[92] 90 Fed. Reg. at 23470 ("OPM now proposes to restore it as OPM intends to take suitability actions on appointees and employees for post-appointment conduct, consistent with the Presidential delegation.").

[93] *Id*. ("OPM removed this factor in the 2024 final rule because it was rarely, if ever used . . . .").

[94] *See* Suitability and Fitness, 89 Fed. Reg. 102675 (Dec. 18, 2024); Suitability and Fitness Vetting, 88 Fed. Reg. 6192 (Jan. 31, 2025).

[95] 88 Fed. Reg. at 6199 ("Eliminate current factor (4) Refusal to furnish testimony as required by § 5.4 of this chapter. Use of this factor was reserved by OPM. If eliminated, this change does not otherwise affect requirements established by § 5.4 nor does it limit an agency's ability to appropriately deal with an employee's refusal to furnish testimony under other applicable authorities.").

[96] 5 U.S.C. § 1204(c); 5 C.F.R. § 1201.85.

[97] 5 U.S.C. § 1212(b)(3).

[98] 5 U.S.C. § 7513.

IV. OPM'S PROPOSED REGULATION IS ARBITRARY, AND ITS IMPLEMENTATION WOULD REQUIRE ARBITRARY ACTION.

Finalizing the proposed regulation would be arbitrary, as would be its implementation. Absent from OPM's regulation are standards for determining which removals to pursue as suitability actions and which to pursue as adverse actions. That would render suitability actions based on post-appointment conduct inherently arbitrary.[99]

The lack of standards is glaring. OPM's proposed rule would require an agency head to refer a matter to OPM if an employee's post-appointment conduct "appears to warrant an unfavorable suitability determination;" however, the regulation does not specify how OPM will determine whether to take a suitability action.[100] It states only that OPM retains "sole jurisdiction" in such cases and "may, in its discretion" take a suitability action.[101] The phrase "in its discretion" does not merely permit arbitrary action by OPM*, it requires arbitrary action*.[102]

The complete absence of any standard leaves abundant room for politically motivated selective enforcement. By centralizing the authority to take suitability actions against employees, OPM further increases the capacity of the White House and OPM's political appointees to remove employees for any perceived lack of political loyalty to the President or his party under the guise of suitability actions. The vagueness of OPM's new factors—such as "[k]nowing and willful failure to comply with generally applicable legal obligations, including timely filing of tax returns"[103]—could permit OPM to fire an employee for minimal and non-job-related conduct like a traffic violation and would open the door to politicized implementation. OPM might decline to remove other employees for the same conduct if they have been observed wearing MAGA hats in the workplace, as the acting Special Counsel recently authorized them to do.[104]

Given the administration's efforts to date to politicize the civil service, this is not an unrealistic concern. President Trump said on the day of his inauguration that all federal employees should be fired.[105] Throughout the Department of Justice, the Trump administration has been taking politically motivated personnel actions against career employees.[106] OPM's proposed Schedule Policy/Career regulation risks a return to the spoils system for a large portion of the federal

---

[99] OPM's proposed rule also fails to establish minimum standards for ensuring that the OPM employee authorized to make the final decision on a suitability action is appropriately independent from the employee who made the suitability determination and proposed the action. 90 Fed. Reg. 23471-72. In the absence of written standards, the determination as to an official's independence will be arbitrary.

[100] 90 Fed. Reg. at 23474 (5 C.F.R. § 731.103(a)).

[101] *Id*. at 23475 (5 C.F.R. § 731.103(f)).

[102] *Id.* at 23476 (5 C.F.R. § 731.304) (requiring the OPM Director or designee to make the "final decision as to whether to take a suitability action," in the absence of standards for making that decision).

[103] 90 Fed. Reg. at 23476.

[104] Ayelet Sheffey, *Federal employees can now wear MAGA hats at work*, BUSINESS INSIDER (Apr. 30, 2025) [link].

[105] Erich Wagner, *Trump: Agencies should fire 'all' bureaucrats*, GOV'T EXEC. (Jan. 20, 2025) ("'Most of those bureaucrats are being fired, they're gone,' Trump said at a rally Monday afternoon while referring to his planned signing of a freeze on new federal regulations. 'It should be all of them.'") [link].

[106] Perry Stein & Jeremy Roebuck, *With many career lawyers gone, Justice Dept. hires Trump loyalists for court*, WASH. POST (Apr. 10, 2025) [link]; Andrew Goudsward, Sarah N. Lynch & Brad Heath, *Trump Justice Department fires more career officials*, REUTERS (Mar. 10, 2025) [link]; Ken Dilanian & Ryan J. *Reilly, Trump administration fires DOJ officials who worked on criminal investigations of the president*, NBC NEWS (Jan. 27, 2025) [link]; Andrew Goudsward & Sarah N. Lynch, *Trump administration reassigns close to 20 Justice Department officials, sources say*, REUTERS (Jan. 23, 2025) [link]; Julia Ainsley, *Trump fired four top immigration court officials hours after taking office*, NBC NEWS (Jan. 21, 2025) [link].

workforce.[107] The President's unlawful declaration that career SES members can be fired at will similarly opens the door to politicization,[108] as reflected in the politically motivated firings and reassignments of SES members.[109] OPM and the White House also recently issued new hiring guidelines that require all candidates for career positions at the GS-5 level and above to complete essays that appear designed to assess their political leanings.[110] These are but a few examples of a broader effort to politicize the processes for recruiting and retaining the federal workforce that administers services to everyday Americans. Given the administration's expansive efforts to undermine the civil service and the merit-based federal workforce, it is likely that it will use this proposed regulation in furtherance of those harmful goals.

V. CONCLUSION

Ultimately, the administration is trying to dismantle a cornerstone of American democracy: a federal civil service hired and retained based on employees' abilities, not their fealty to a politician. This effort directly challenges the will of the American people, whose elected representatives in Congress have worked for over a century to protect them by ensuring that federal employees loyally implement the laws of this nation and faithfully deliver services to the public, without fear of political retaliation.

The Presidential Memorandum of March 20, 2025, regarding suitability is ultra vires, such that the President had no authority to delegate to OPM. No statutory authority authorizes either the President or OPM to take suitability actions based on post-appointment conduct, and no statutory authority authorizes them to supplant the adverse action procedures that the people's representatives in Congress created when they enacted the Civil Service Reform Act.

OPM's proposed rule suffers from a variety of other fatal infirmities. OPM has failed to engage in the reasoned decisionmaking required under OPM's organic statute and the Administrative Procedure Act. OPM's decision to propose this rule was arbitrary and, if finalized, the rule would not only permit arbitrary action but compel it.

OPM should withdraw this proposed regulation and recommit itself to upholding merit system principles.

Respectfully submitted,

Democracy Forward
American Geophysical Union
Citizens for Responsibility and Ethics in Washington (CREW)
Protect Democracy
Center for Progressive Reform
Economic Action Maryland Fund
Environmental Protection Network

---

[107] *See* Protect Democracy & Walter M. Schaub Jr., Comment on Proposed Rule Improving Performance, Accountability and Responsiveness in the Civil Service, Docket No. OPM-2025-0004, Comment No. 30426 (June 5, 2025), [link].

[108] Presidential Mem., Restoring Accountability for Career Senior Executives (Jan. 20, 2025), *reprinted in* 90 Fed. Reg. 8481 (Jan. 30, 2025) [link].

[109] For example, within hours of President Trump taking office, the administration fired an employee who was on an activist organization's list of officials of "targets" for removal. Julia Ainsley, *Trump fired four top immigration court officials hours after taking office*, NBC NEWS (Jan. 21, 2025) (reporting on firing of Sheila McNulty) [link]; *DHS Bureaucrat Watch List, TARGETS, Sheila McNulty*, Am. Accountability Found. [link] (last visited June 17, 2025).

[110] Memorandum from Vince Haley, Assistant to the President for Domestic Pol'y, Charles Ezell, Acting Director, U.S. Off. of Pers. Mgmt., to heads and acting heads of departments and agencies, *Merit Hiring Plan* (May 29, 2025) [link]; *see also* Erwin Chemerinsky and Catherine Fisk, *Why on Earth Should Air Traffic Controllers Be Pro-Trump?*, N.Y. TIMES (June 6, 2025) [link].

Equality California
Franciscan Action Network
Government Information Watch
International Federation of Professional & Technical Engineers, AFL-CIO
Metal Trades Department, AFL-CIO
National Association of Government Employees, SEIU Local 5000
National Federation of Federal Employees (NFFE)
National Women's Law Center Action Fund
Oklahoma Policy Institute
Professional Managers Association (PMA)
Public Justice Center Responsibility
Senior Executives Association
Union of Concerned Scientists
Women Employed
Federal Education Association/NEA
Government Accountability Project
Human Rights First
Jacobs Institute of Women's Health
National Active and Retired Federal Employees Association (NARFE)
National Employment Law Project
National Weather Service Employees Organization
NETWORK Lobby for Catholic Social Justice
Patent Office Professional Association
Public Employees for Environmental (PEER)
Service Employees International Union (SEIU)
We the Builders
WorkLife Law