EXECUTIVE ORDERS

Executive Order on Creating Schedule F In The Excepted Service

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By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301, 3302, and 7511 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy. To effectively carry out the broad array of activities assigned to the executive branch under law, the President and his appointees must rely on men and women in the Federal service employed in positions of a confidential, policy-determining, policy-making, or policy-advocating character. Faithful execution of the law requires that the President have appropriate management oversight regarding this select cadre of professionals.

The Federal Government benefits from career professionals in positions that are not normally subject to change as a result of a Presidential transition but who discharge significant duties and exercise significant discretion in formulating and implementing executive branch policy and programs under the laws of the United States. The heads of executive departments and agencies (agencies) and the American people also entrust these career professionals with non-public information that must be kept confidential.

With the exception of attorneys in the Federal service who are appointed pursuant to Schedule A of the excepted service and members of the Senior Executive Service, appointments to these positions are generally made through the competitive service. Given the importance of the functions they discharge, employees in such positions must display appropriate temperament, acumen, impartiality, and sound judgment.

Due to these requirements, agencies should have a greater degree of appointment flexibility with respect to these employees than is afforded by the existing competitive service process.

Further, effective performance management of employees in confidential, policy-determining, policy-making, or policy-advocating positions is of the utmost importance. Unfortunately, the Government's current performance management is inadequate, as recognized by Federal workers themselves. For instance, the 2016 Merit Principles Survey reveals that less than a quarter of Federal employees believe their agency addresses poor performers effectively.

Separating employees who cannot or will not meet required performance standards is important, and it is particularly important with regard to employees in confidential, policy-determining, policy-making, or policy-advocating positions. High performance by such employees can meaningfully enhance agency operations, while poor performance can significantly hinder them. Senior agency officials report that poor performance by career employees in policy-relevant positions has resulted in long delays and substandard-quality work for important agency projects, such as drafting and issuing regulations.

Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures. Placing these positions in the excepted service will mitigate undue limitations on their selection. This action will also give agencies greater ability and discretion to assess critical qualities in applicants to fill these positions, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the authority inherent in their prospective positions, and agencies should be able to assess candidates without proceeding through complicated and elaborate competitive service processes or rating procedures that do not necessarily reflect their particular needs.

Conditions of good administration similarly make necessary excepting such positions from the adverse action procedures set forth in chapter 75 of title 5, United States Code. Chapter 75 of title 5, United States Code, requires agencies to comply with extensive procedures before taking adverse action against an employee. These requirements can make removing poorly performing employees difficult. Only a quarter of Federal supervisors are confident that they could remove a poor performer. Career employees in confidential, policy-determining, policy–making, and policy-advocating positions wield significant influence over Government operations and effectiveness. Agencies need the flexibility to expeditiously remove poorly performing employees from these positions without facing extensive delays or litigation.

Sec. 2. Definition. The phrase “normally subject to change as a result of a Presidential transition” refers to positions whose occupants are, as a matter of practice, expected to resign upon a Presidential transition and includes all positions whose appointment requires the assent of the White House Office of Presidential Personnel.

Sec. 3. Excepted Service. Appointments of individuals to positions of a confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a Presidential transition shall be made under Schedule F of the excepted service, as established by section 4 of this order.

Sec. 4. Schedule F of the Excepted Service. (a) Civil Service Rule VI is amended as follows:

(i) 5 CFR 6.2 is amended to read:
"OPM shall list positions that it excepts from the competitive service in Schedules A, B, C, D, E, and F, which schedules shall constitute parts of this rule, as follows:

Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by OPM.

Schedule C. Positions of a confidential or policy-determining character normally subject to change as a result of a Presidential transition shall be listed in Schedule C.

Schedule D. Positions other than those of a confidential or policy-determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs. These positions, which are temporarily placed in the excepted service to enable more effective recruitment from all segments of society by using means of recruiting and assessing candidates that diverge from the rules generally applicable to the competitive service, shall be listed in Schedule D.

Schedule E. Position of administrative law judge appointed under 5 U.S.C. 3105. Conditions of good administration warrant that the position of administrative law judge be placed in the excepted service and that appointment to this position not be subject to the requirements of 5 CFR, part 302, including examination and rating requirements, though each agency shall follow the principle of veteran preference as far as administratively feasible.

Schedule F. Positions of a confidential, policy-determining, policy-making, or policy-advocating character not normally subject to change as a result of a Presidential transition shall be listed in Schedule F. In appointing an individual to a position in Schedule F, each agency shall follow the principle of veteran preference as far as administratively feasible."

(ii) 5 CFR 6.4 is amended to read:
"Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, D, E, or F, or from positions excepted from the competitive service by statute. The Civil Service Rules and Regulations shall apply to removals from positions listed in Schedule B of persons who have competitive status."

(b) The Director of the Office of Personnel Management (Director) shall:

(i) adopt such regulations as the Director determines may be necessary to implement this order, including, as appropriate, amendments to or rescissions of regulations that are inconsistent with, or that would impede the implementation of, this order, giving particular attention to 5 CFR, part 212, subpart D; 5 CFR, part 213, subparts A and C; and 5 CFR 302.101; and

(ii) provide guidance on conducting a swift, orderly transition from existing appointment processes to the Schedule F process established by this order.

Sec. 5. Agency Actions. (a) Each head of an executive agency (as defined in section 105 of title 5, United States Code, but excluding the Government Accountability Office) shall conduct, within 90 days of the date of this order, a preliminary review of agency positions covered by subchapter II of chapter 75 of title 5, United States Code, and shall conduct a complete review of such positions within 210 days of the date of this order. Thereafter, each agency head shall conduct a review of agency positions covered by subchapter II of chapter 75 of title 5, United States Code, on at least an annual basis. Following such reviews each agency head shall:

(i) for positions not excepted from the competitive service by statute, petition the Director to place in Schedule F any such competitive service, Schedule A, Schedule B, or Schedule D positions within the agency that the agency head determines to be of a confidential, policy-determining, policy-making, or policy-advocating character and that are not normally subject to change as a result of a Presidential transition. Any such petition shall include a written explanation documenting the basis for the agency head's determination that such position should be placed in Schedule F; and

(ii) for positions excepted from the competitive service by statute, determine which such positions are of a confidential, policy-determining, policy-making, or policy-advocating character and are not normally subject to change as a result of a Presidential transition. The agency head shall publish this determination in the Federal Register. Such positions shall be considered Schedule F positions for the purposes of agency actions under sections 5(d) and 6 of this order.

(b) The requirements set forth in subsection (a) of this section shall apply to currently existing positions and newly created positions.

(c) When conducting the review required by subsection (a) of this section, each agency head should give particular consideration to the appropriateness of either petitioning the Director to place in Schedule F or including in the determination published in the Federal Register, as applicable, positions whose duties include the following:

(i) substantive participation in the advocacy for or development or formulation of policy, especially:

(A) substantive participation in the development or drafting of regulations and guidance; or

(B) substantive policy-related work in an agency or agency component that primarily focuses on policy;

(ii) the supervision of attorneys;

(iii) substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law;

(iv) viewing, circulating, or otherwise working with proposed regulations, guidance, executive orders, or other non-public policy proposals or deliberations generally covered by deliberative process privilege and either:

(A) directly reporting to or regularly working with an individual appointed by either the President or an agency head who is paid at a rate not less than that earned by employees at Grade 13 of the General Schedule; or

(B) working in the agency or agency component executive secretariat (or equivalent); or

(v) conducting, on the agency's behalf, collective bargaining negotiations under chapter 71 of title 5, United States Code.

(d) The Director shall promptly determine whether to grant any petition under subsection (a) of this section. Not later than December 31 of each year, the Director shall report to the President, through the Director of the Office of Management and Budget and the Assistant to the President for Domestic Policy, concerning the number of petitions granted and denied for that year for each agency.

(e) Each agency head shall, as necessary and appropriate, expeditiously petition the Federal Labor Relations Authority to determine whether any Schedule F position must be excluded from a collective bargaining unit under section 7112(b) of title 5, United States Code, paying particular attention to the question of whether incumbents in such positions are required or authorized to formulate, determine, or influence the policies of the agency.

Sec. 6. Prohibited Personnel Practices Prohibited. Agencies shall establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5, United States Code, with respect to any employee or applicant for employment in Schedule F of the excepted service.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstances, is held to be invalid, the remainder of this order and the application of any of its other provisions to any other persons or circumstances shall not be affected thereby.

(e) Nothing in this order shall be construed to limit or narrow the positions that are or may be listed in Schedule C.

DONALD J. TRUMP

THE WHITE HOUSE,
October 21, 2020.