



**PARTNERSHIP  
FOR PUBLIC SERVICE**

Better government. Stronger democracy.

November 9, 2023

Office of Personnel Management  
1900 E Street NW  
Washington, DC 20415-1000

Re: RIN 3206-AO56

Dear Director Ahuja:

On behalf of the Partnership for Public Service, I am writing to share comments on the Office of Personnel Management's (OPM) proposed rule regarding "Upholding Civil Service Protections and Merit System Principles" released on September 18, 2023.

The Partnership is a nonprofit, nonpartisan organization committed to building a better government and a stronger democracy. Core to our mission is the belief that a merit-based, nonpartisan civil service, who represents the diversity of the country, is central to our system of government. Since the Partnership's founding over two decades ago, we have advocated across administrations for changes to federal law, regulations, policies, and programs that improve our government's ability to attract, hire and retain a talented and diverse workforce that effectively serves the public.

The Partnership commends OPM for focusing on the critical issue of sustaining a career civil service free from partisan interference. Proposals to strip employment protections from tens of thousands of nonpartisan career federal employees and replace them with political appointees would undermine the professional civil service, degrade government performance, and ultimately further damage the public's trust in government. Without nonpartisan career experts, accountability within existing merit system principles, and the balance of powers in policymaking, it will be challenging for our government to fully deliver on its mission and meet public expectations.

Additionally, while it is important to make sure the system is fair and free from political interference, there is also a strong need to ensure that OPM is helping agencies streamline processes for hiring, performance management and accountability, and preparing managers to support the workforce through the talent lifecycle – from hiring to development to effectively dealing with problem employees. Some of these proactive policy proposals are noted below:

- *Streamline employee performance and accountability processes* – Employees with legitimate grievances against their agency, as well as managers who act in good faith to hold employees accountable, would benefit from a simplified system.
- *Strengthen the probationary period* – Requiring supervisors to make an affirmative decision that an employee has the necessary skills to retain a permanent position in the agency would create an additional layer of accountability for supervisors and create an incentive for agencies to weed out poor performers before they become tenured federal employees.
- *Expand supervisor and manager training* – Supervisor development, training and leadership attention are critical to holding employees accountable. OPM, Congress and agencies should work together to ensure that federal managers have the necessary tools and training to hold employees to high performance standards.

- *Set caps on Schedule C appointments* – Setting limits on the overall numbers of Schedule C political appointments (typically used for positions such as senior advisor or special assistant) would be an additional guard against politicization of the workforce.

We believe these tenets and specific proposals will help ensure that the career federal workforce is equipped to address the nation’s complex challenges today and in the future. Below we further outline suggestions and technical considerations for OPM regarding the proposed rule, including clarifying policy-making definitions, considering the implications of burrowing and the potential for new hires to be placed into an at-will schedule, detailing what happens if the Merit Systems Protection Board (MSPB) lacks a quorum, and clarifying use of the probationary period.

### **Nonpartisan, career experts are the backbone of the federal workforce**

Federal civil servants are the heart of our system of government, responsible for protecting our national security and delivering vital public services across administrations. They take an oath to support and defend the Constitution, and they honor this oath by being careful stewards of taxpayer dollars and committed to the public good. Therefore, it is crucial to ensure that the career workforce is comprised of nonpartisan experts who carry out their duties and agency missions—which are borne out of laws and authorized by Congress, not just directed by each administration—regardless of who occupies the Oval Office.

America’s roughly 2 million civil servants are primarily located outside of the Washington D.C. region. In fact, at least 80% of the federal workforce is located across the country as well as around the world. Our nation’s federal employees deliver essential services including Social Security and Medicare benefits, assist small businesses, care for veterans, disrupt international criminal syndicates, maintain the safety of our transportation systems, protect the food supply, find cures for diseases, carry out the nation’s foreign policy, and advance our national security. It isn’t hard to imagine how allowing political leaders to fire career federal employees at-will could be used to require these civil servants to only provide services to certain sectors of the country, toe the party line or silence any internal disagreements. And that is particularly troubling because the people in these roles are often called upon to offer impartial and objective advice, report illegal activity or misconduct, raise alarms about major problems and propose uncomfortable solutions to complex challenges.

Career employees allow a president to begin their administration by tapping into valuable institutional expertise that can help drive their agenda from day one, rather than starting from scratch. Reclassifying a large number of competitive service positions into the excepted service would create chaos when those estimated tens of thousands of positions must then turn over with the change of administration. Presidents already struggle to fill roughly 4,000 political appointments, of which approximately 1,250 must go through Senate confirmation, meaning agencies must already contend with political vacancies at the leadership level. Adding this magnitude of additional churn would introduce unnecessary turmoil into the operations of our federal government during a tenuous moment of transition in the country.

And while out of the scope of this rulemaking, we note that the Partnership has long recommended that Congress reduce the number of political appointees requiring Senate approval, and streamline the nomination and confirmation processes, while still ensuring those individuals are held to the highest standards of ethics and competence. This would allow the president to appoint individuals more quickly



Better government. Stronger democracy.

into agencies to begin working on administration priorities. Combined with the preservation of a skilled nonpartisan civil service, which is the purpose of this rulemaking, these changes would lead to a more effective and accountable government.

The public benefits most when career civil servants and political appointees have strong, collaborative relationships. The Partnership assists transition teams and provides onboarding for political appointees through our Center for Presidential Transition<sup>®</sup> and Ready to Govern training and resources.<sup>i</sup> It is notable that there typically are no set criteria for political jobs, though we have tried to assist with this challenge by creating position descriptions for more than 400 key politically appointed positions. Career federal employees who serve across administrations ensure the continuity of government, and effective collaboration with career staff is critical to political appointees' success.<sup>ii</sup>

### **Employee accountability within the merit system framework**

The business of any organization in effectively managing its employees relies upon decisions made within existing policies and performance management processes, and the federal government is no different. Critics often claim that it is impossible to fire poor performing federal employees, but data shows that over 10,000 federal employees are terminated or removed due to discipline or performance issues each year (a trend that goes back to at least 2005).<sup>iii</sup> Despite many misconceptions about the prevalence of poor performers in government, there are reasonable approaches to ensuring managers are trained in using disciplinary and removal procedures and have the necessary tools to manage their workforce, including a streamlined adjudicatory and appeals process.

In addition to streamlining existing practices, government reform efforts must also focus on strengthening the workforce through increased skills-based hiring and by placing more emphasis on training and developing employees, managers and leaders. Accountability and effectiveness begin before an employee's first day on the job, as agencies spend enormous amounts of time and resources to recruit, hire and onboard employees. Focusing on the front end of the talent lifecycle is where agencies will see significant return on investment and should result in fewer performance problems on the back end. Moreover, OPM and federal agencies should work to increase effective supervisor training efforts governmentwide, streamline the competitive hiring process and scale skills-based hiring, and create skilled and well-resourced talent offices by investing in human resources operations.

Another effective way to increase accountability would be to ensure agencies make more effective use of the probationary period – the initial period during which an individual should demonstrate successful performance as a federal employee. Too often, employees continue beyond the probationary period with no action on the part of their managers and supervisors to affirm they are an effective fit for the agency and the job. OPM should require managers and supervisors to make and document such an affirmative decision, which would create an incentive for weeding out poor performers.

Accountability is a shared goal by policymakers on both sides of the aisle, but policies like Schedule F that throw out due process and existing civil service protections won't hold problem employees accountable. Instead, our government must do the more difficult work of identifying areas that need change and providing agency leaders and managers with the tools to make those changes. The ideas outlined above, among others, would begin to change the incentive structure in dealing with poor

performers by removing barriers to action and proactively dealing with performance issues, rather than getting rid of the underlying framework as proposed in policies that aim to create an at-will civil service.

### **Balancing the multiple roles in policy-making**

An important part of both this proposed rule and the broader conversation around Schedule F-related policies is the role of “confidential, policy-determining, policy-making, or policy-advocating” federal employees. When having a more specific conversation about how this definition applies to those in the competitive service, it’s useful to consider what we mean by “policy-making” in the federal government more broadly.

The president sets and drives an agenda focused on their policy priorities, with appointed political leaders at agencies playing a key role in delivering on that agenda. Additionally, Congress passes a variety of bills not necessarily tied to an executive’s agenda that also need to be carried out by agencies. Both Congress and the president are elected by the people and this balance of powers in setting and executing policy is fundamental to our system of government. It’s also important to note that Congress often passes laws that may be relatively broad and require additional regulations or policies that provide pertinent details for implementation, identify use cases, and ensure that appropriate safeguards are in place. The public has an opportunity to weigh in on this process as well by offering public comments on proposed rules and policies, as we are doing through this letter.

The role of federal employees is to impartially carry out the laws passed by Congress and the lawful policies put forth by a president, and they do so at the direction of both while ensuring that rules, regulations and guidance are underpinned by the expertise that career federal employees bring to the table. Career federal employees are not driving policy absent the broad direction of an administration or Congress.

Merit system principles note that “employees should be retained on the basis of 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.”<sup>iv</sup> The Civil Service Reform Act (CSRA) of 1978 provided new mechanisms to hold federal employees accountable, from performance measures up to and including firing, while also giving employees appeals rights. As a 2015 report from MSPB noted, “due process’s deep roots in American jurisprudence, the Constitution, and more than a century of Federal civil service laws ensure that it is an issue that is fundamental to the question of Federal employee rights.”<sup>v</sup>

Finally, Congress has made it abundantly clear through the Hatch Act and other ethics rules that career federal employees are expected to be apolitical and impartial in carrying out their work. Civilian career employees must follow a number of ethics laws (including the Hatch Act, which limits the political activities of federal employees) to ensure that they are carrying out the lawful policies of an administration and upholding merit system principles while doing so. They are bound by strict ethics and political interference laws, including potential criminal penalties for violations of conflicts of interest statutes. For decades, across parties and ideologies, these basic foundations have been broadly accepted. Tossing out those rights and reclassifying swaths of the civil service would fly in the face of these deeply rooted principles.

## **A modern, responsive government can boost public trust**

A strong democracy requires a government that is trusted and trustworthy. The American public already has low trust in government, and says they believe it aims to benefit primarily the powerful and well-connected at the expense of others. Would a more political government, driven by the partisan desires of elected leaders with no room for dissent, foster more public trust? There is precious little evidence to suggest it would.

Polling conducted by the Partnership found that only 35% of Americans trust the federal government to do what is right at least some of the time.<sup>vi</sup> On a brighter note, people view the federal government more positively when asked about specific agencies and their missions and services, or non-elected government officials and their work in public service. A future with a less independent federal workforce would likely diminish current positive views about individual agencies and their services.

In addition, we know from our polling that that the public overwhelmingly wants a more accountable, transparent and responsive government, and also believes civil servants should be hired based on merit, not their political beliefs. A nationally representative survey conducted by the Partnership in late 2022 found that the American public overwhelmingly believe that civil servants should serve the people and the Constitution more than any individual president. This remained true across party lines, with 79% of Democrats and 75% of Republicans agreeing that civil servants should serve the people more than any president, and 57% of Democrats and 62% of Republicans saying civil servants should serve the Constitution first.

To truly boost public trust in government, it needs to work well and be accountable to taxpayers – not just one president, as proposed under Schedule F-style policies. We need a modern, responsive government that provides user-friendly and accessible services to the public. In addition to investments in technology infrastructure and modern ways of working, a key tenet of a modernized organization is understanding its customers and how they experience services. Streamlining workforce processes and leaning into customer experience efforts should collectively be viewed as ways to modernize government. Ultimately, this will require a whole of government approach, with political appointees and career experts working together to help agencies to achieve their missions and deliver on those services as the public expects and deserves.

### **Technical Comments**

In addition to our core belief that the public is best served by having a career federal workforce free from political interference, we offer the following technical recommendations to strengthen the rule as proposed:

**Clarify dual definitions:** The definition of policy-making may unintentionally impact Senior Executive Service (SES) members in senior roles, and OPM should clarify if or how the proposed rule applies to SES members. For example, OPM’s SES Desk Guide notes that a position meets SES criteria if that individual “exercises important policy-making, policy-determining, or other executive functions.”<sup>vii</sup> We are concerned that the proposed rule may take necessary, regular policy-making away from career officials who are directed to draft regulations or guidance based off laws passed by Congress or directed by the president. Additionally, will the definition of “noncareer, political appointments” hamper career SES



## **PARTNERSHIP FOR PUBLIC SERVICE**

Better government. Stronger democracy.

who act in political positions when those positions are vacant? We also urge OPM formally to set caps on Schedule C political appointees, potentially looking to caps on noncareer SES as a model.

**Consider how burrowing fits in:** The procedures outlined in the proposed rule for moving positions from the competitive service to the excepted service strengthen protections for potentially affected employees, but how might those protections translate for a political appointee who converts to another position in the federal government? OPM should make explicit its procedures for reviewing these types of conversions (commonly referred to as “burrowing”), and whether the new procedures established by this proposed rule warrant any changes to OPM’s processes for reviewing the conversion of current or recent political appointees to career positions.

**State what happens if the Merit Systems Protection Board (MSPB) does not have a quorum:** When MSPB lacks a quorum, employees are deprived of their full due process rights and it can be difficult for employees and managers to resolve cases. Additionally, without a quorum, MSPB can’t issue final decisions on whistleblower retaliation cases. There are bipartisan proposals to encourage whistleblowers to root out waste, fraud and abuse and without a functioning MSPB in place, and employee protections, it would suppress those whistleblowers from coming forward. For these reasons, it would be helpful to clarify for employees moved to new schedules how appeal rights could be impacted in the event of a lack of quorum.

**Specify implications for new hires into an at-will schedule:** While the proposed rule notes that “a competitive service employee whose position is first listed under any future excepted service schedule remains in the competitive service as long as the employee continues to occupy the position,” it does not appear to account for the possibility that new hires (who won’t have accrued status and protections elsewhere) could be hired into a schedule without any protections. For instance, what happens if there is an effort to create attrition and new hires are placed into a new, at-will schedule? While we appreciate the need to maintain agency flexibility for hiring, this needs to be done consistent with merit system principles to ensure a nonpartisan civil service and OPM should develop rules and procedures for new schedules.

**Clarify how agencies should use the probationary period:** While the proposed rule seeks to clarify inconsistencies since the rulings under Van Wersch and McCormick, it is apparent that more clarification on these points may be needed. Given that agencies use the probationary period inconsistently, clarifying through direct communication to agencies that the new rule only applies to employees who already have a certain length of service and how that interacts with affirmatively using the probationary period would be helpful. Additionally, as discussed above, we encourage you to use this proposed rule as a basis for providing clear guidance and best practices on use of the probationary period to supervisors and human resources staff.

### **Conclusion**

We appreciate OPM’s efforts to safeguard the civil service against future partisan interference through this proposed rule. Ensuring that the federal career workforce is comprised of nonpartisan experts is an area of critical importance – not only for delivering on agencies’ missions but also for building and restoring the public’s trust in government.



**PARTNERSHIP  
FOR PUBLIC SERVICE**

Better government. Stronger democracy.

In addition to efforts aimed at preserving civil service protections, like those proposed in this rule, OPM and policymakers should continue to seek opportunities to deal more effectively with poor performers and maintain the highest standards of accountability, while also helping agencies put existing performance management standards into practice effectively. Finally, as outlined above, we offer a few questions about how certain provisions may be implemented and opportunities for clarification to guard against future misinterpretation.

Thank you for the opportunity to share our thoughts and recommendations. We welcome the opportunity to work together toward our shared goal of supporting the federal civil service today and in the future.

Sincerely,

Max Stier  
President and CEO

---

<sup>i</sup> Center for Presidential Transition, <https://presidentialtransition.org/>

<sup>ii</sup> "Collaboration with career staff is critical to appointees' success", Partnership for Public Service blog, March 23, 2023, <https://ourpublicservice.org/blog/collaboration-with-career-staff-is-critical-to-appointees-success/>

<sup>iii</sup> Statistics on federal employees are drawn from Office of Personnel Management FedScope data on the federal workforce unless indicated otherwise.

<sup>iv</sup> Merit System Principles (5 USC § 2301), U.S. Merit Systems Protection Board, <https://www.mspb.gov/msp/meritsystemsprinciples.htm>

<sup>v</sup> *What is Due Process in Federal Civil Service Employment?*, U.S. Merit Systems Protection Board, May 2015, [https://www.mspb.gov/studies/studies/What\\_is\\_Due\\_Process\\_in\\_Federal\\_Civil\\_Service\\_Employment\\_1166935.pdf](https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf)

<sup>vi</sup> *Trust in Government: A Close Look at Public Perceptions of the Federal Government and Its Employees*, Partnership for Public Service, March 2022, <https://ourpublicservice.org/publications/trust-in-government/>

<sup>vii</sup> *Senior Executive Service Desk Guide*, Office of Personnel Management, December 2020, <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/ses-desk-guide.pdf>