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Legal Sidebar

A New Civil Service "Policy/Career" Schedule: Issues for Lawmakers

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On January 20, 2025, President Trump issued an Executive Order (EO) reinstating and amending EO 13957—an EO issued during the first Trump Administration in late 2020 that had originally directed each executive branch agency head to identify 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" and place or petition to place those positions in a new Office of Personnel Management (OPM) appointment classification originally named Schedule F. Such positions would be excepted from notice and appeal rights for personnel actions such as removals and suspensions. The 2025 amendments replaced the "F" in "Schedule F" with "Policy/Career" (also described in this Sidebar as "the new schedule") and made other amendments, which are discussed in more detail below.

This Sidebar examines the existing statutory structure of the civil service, explains the history of EO 13957, its repeal and reissuance, and relevant rulemaking. The Sidebar further analyzes the legislative and executive authorities over the civil service, the possibility of judicial intervention, and legislative options for Congress relevant to the new schedule.

Background

Positions in the executive branch are categorized into three types of service: the competitive service (in which applicants compete and are evaluated according to objective standards before they may be appointed); the excepted service (in which positions are specifically excepted from the competitive service by statute, by the President, or by OPM); and the Senior Executive Service (SES) (which includes senior managerial, supervisory, and policy positions). The excepted service currently has five schedules or categories of appointment authority, Schedules A to E, which are organized based on the duties or training required for their relevant positions. In general, a position is included in the excepted service following a determination that appointment through competitive examination is not practicable or that the recruitment of certain types of individuals would be better achieved through alternate recruitment and assessment processes.

Before an agency takes certain adverse actions, such as removals, against federal employees, Subchapter II of Chapter 75, Title 5, U.S. Code, prescribes the right to notice of such actions and the right to appeal such actions to the Merit Systems Protection Board (MSPB), an independent, quasi-judicial agency that

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reviews and adjudicates specified personnel actions taken against qualifying federal employees. These rights are generally available to competitive service and some excepted service employees who satisfy specified durational requirements. These rights are not available, however, to employees in positions that have a "confidential, policy-determining, policy-making or policy-advocating character," such as those in Schedule C of the excepted service. Schedule C includes most political appointments below the cabinet and subcabinet levels which are policy-determining or involve a close and confidential working relationship with the head of an agency or other key appointed officials.

In addition to the Chapter 75 notice and appeal rights, Section 2302 of Title 5, U.S. Code, generally provides protections for executive branch employees in covered positions from "prohibited personnel practices"—such as employment discrimination, retaliation, nepotism, whistleblower retaliation, and other misconduct—which are investigated by an independent federal agency, the Office of Special Counsel (OSC). Covered positions include positions in the competitive service, career appointee positions in the SES, and certain positions in the excepted service—but, like the Chapter 75 notice and appeal rights, they do not include positions described as having a "confidential, policy-determining, policy-making, or policy-advocating character."

The Original EO 13957 (2020), Repeal, and 2025 Reinstatement

On October 21, 2020, the first Trump Administration issued EO 13957, "Creating Schedule F in the Excepted Service." On January 22, 2021, President Biden signed EO 14003, "Protecting the Federal Workforce," which revoked EO 13957—in addition to other presidential and regulatory actions by the prior administration—and ordered all executive departments and agencies to suspend or rescind all proposed actions, rules, regulations, or other guidance to effectuate Schedule F. On January 20, 2025, the second Trump Administration reinstated EO 13957 with some amendments and rescinded the Biden Administration's EO 14003. In issuing the original EO 13957 and the 2025 amendments, President Trump cited his authority under Sections 3301, 3302, and 7511 of Title 5 of the U.S. Code to regulate the civil service. EO 13957 directs each agency head to identify federal government career positions appropriately categorized as having a "confidential, policy-determining, policy-making, or policy-advocating character that are not normally subject to change as a result of a Presidential transition" and provides processes for placing those positions in a new schedule (previously called "Schedule F") in the excepted civil service.

Section 5 of EO 13957 provides that when conducting a review of positions to include in the new schedule, agency heads should "give particular consideration" to positions whose duties include "substantive participation in the advocacy for or development or formulation of policy," especially in the "development or drafting of regulations or guidance" or in an agency "component that primarily focuses on policy," "the supervision of attorneys," "substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law," "working with proposed regulations, guidance, executive orders, or other non-public policy proposals or deliberations generally covered by deliberative process privilege" and either reporting to or regularly working with a certain level of politically appointed employees or working in an executive secretariat or equivalent, or "conducting, on the agency's behalf, collective bargaining negotiations under chapter 71 of title 5, United States Code." The 2025 amendments add two more categories of positions to consider for inclusion in the new schedule: positions "directly or indirectly supervising employees in Schedule Policy/Career positions" and positions with "duties that the Director otherwise indicates may be appropriate for inclusion." Those additional categories, particularly the latter one, could substantially expand the scope of positions considered for inclusion in the new schedule. The 2025 amendments require the Director of OPM to issue guidance about the additional positions that may be appropriate for inclusion within 30 days from the EO's issuance.

For competitive service positions and excepted service Schedule A, Schedule B, or Schedule D positions meeting the new schedule criteria, EO 13957 had required agency heads to petition OPM to reschedule

such employees. For positions already excepted from the competitive service by statute, agency heads were required to determine which excepted service positions met the criteria of the new schedule and to publish that determination in the *Federal Register*. OPM's grant of a petition and an agency head's publication would appear to constitute final agency action for purposes of a possible legal challenge under the Administrative Procedure Act (APA). These kinds of challenges are discussed in more detail below.

The 2025 amendments change EO 13957's process for transitioning competitive service employees to the new schedule (but retains the process for positions excepted from the competitive service by statute). Instead of giving OPM authority to reschedule the competitive service employees upon petition, the 2025 amendments provide that "[t]he Director shall promptly recommend to the President which positions should be placed in Schedule Policy/Career." Agency recommendations, in contrast to decisions, are less likely to constitute final agency action under the APA, meaning they may be less likely to form a basis for certain judicial challenges. Additionally—as discussed further below—courts may be less likely to entertain challenges to the President's decision to reschedule a competitive service position, at least under the APA.

Section 5 of EO 13957 also requires that each agency head shall "expeditiously petition the Federal Labor Relations Authority (FLRA) to determine whether any new schedule position must be excluded from a collective bargaining unit" under the Federal Service Labor-Management Relations Statute, based on "whether incumbents in such positions are required or authorized to formulate, determine, or influence the policies of the agency," and thereby removing such employees from federal labor-management protections.

Seemingly recognizing that EO 13957 would result in employees being reorganized into a personnel category without a statutory mandate against prohibited personnel practices, Section 6 of EO 13957 requires that agencies "establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5, United States Code" for new schedule employees and applicants. Neither the original text of EO 13957 nor its 2025 amendments address, however, whether the OSC should be involved with remediating alleged prohibited personnel practices. It seems possible that the new schedule employees could be subject to a prohibited personnel practice investigation and enforcement process that is not only different from what is currently available, but that varies across agencies.

The 2025 amendments also add a new paragraph specifying that employees in, or applicants for, the new schedule positions "are not required to personally or politically support the current President" but "are required to faithfully implement administration policies to the best of their ability, consistent with their constitutional oath and the vesting of executive authority solely in the President." It continued, "[f]ailure to do so is grounds for dismissal." This language may be intended to lower the likelihood of lawsuits based on claims that the new schedule infringes on civil service employees' free speech rights, but some may argue that it nonetheless represents a potential conflict with the oath that civil service employees (other than the President) are required to take. Section 3331 of Title 5, U.S. Code, requires elected and appointed civil service employees to swear that they "will support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

Schedule F Rulemaking

Pursuant to EO 13957, on October 23, 2020, OPM issued *Instructions on Implementing Schedule F* to the heads of executive departments and agencies. OPM's instructions provided guidance that the attributes requiring "particular consideration" in Section 5 were "guideposts" for OPM and implementing agencies and were "not determinative." OPM maintained that it was "not required to transfer positions to Schedule F simply because they fall within the section 5 guideposts" and that it "retain[ed] final authority" over the types of positions that would be placed in the new schedule. OPM's instructions suggested that its granting of petitions would constitute final agency action for purposes of a possible

legal challenge under the APA. Under the 2025 amendments, if the President rather than OPM grants the petition, that analysis could change: If no agency has final authority over competitive service positions placed in the new schedule, those placements may not be subject to APA requirements.

The 2020 OPM instructions further recognized that the terms "confidential," "policy-determining," "policy-making," and "policy-advocating" in EO 13957 derived from 5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i), the previously discussed civil service laws exempting such positions from merit-based hiring and removal protections and prohibited personnel practices.

Following the Biden Administration's revocation of EO 13957, OPM issued a final rule, "Upholding Civil Service Protections and Merit System Principles," which, according to OPM, preserved congressional intent regarding the ability of career civil servants to "offer their objective analyses and educated views . . . without fear of reprisal" by "clarif[ying] and reinforc[ing]" the retention of the rights prescribed by Subchapter II of Chapter 75, Title 5, of the U.S. Code for federal employees who are involuntarily moved from the competitive service to the excepted service or from one excepted service schedule to another.

Under these revised OPM regulations, an employee in a competitive service position who is moved to an excepted service position "remains in the competitive service for purposes of status and any accrued adverse action protections, while the employee occupies that position or any other position to which the employee is moved involuntarily." An excepted service employee moved involuntarily to a different schedule similarly retains accrued status and protections. The rule also permits an involuntarily reclassified employee to appeal to the MSPB for an order directing the agency to guarantee any previously accrued status or procedural and appeal rights. In finalizing the rule, OPM stated its legal position that "[i]f a future Administration concludes that a policy that implements the principles of Schedule F is preferable to this rule and seeks to rescind this rule and replace it with such a policy, a future Administration would need to comply with the Administrative Procedure Act and principles of reasoned decision-making."

The 2025 amendments direct the OPM Director to "promptly amend" OPM regulations "to rescind all changes" that would "impede the purposes of" EO 13957. In the meantime, according to the 2025 amendments, the portions of the Code of Federal Regulations covering "Moving Employees and Positions into and Within the Excepted Service" and the definitions of "confidential," "policy-determining," "policy-making," and "policy-advocating" "shall be held inoperative and without effect."

Potential and Current Legal Challenges to the EO

Congress has expressly provided the President with substantial statutory authority to regulate the executive branch civil service, including in Sections 3301, 3302, and 7511 of Title 5 (all cited in EO 13957). In particular, Section 3302 gives the President authority to "prescribe rules governing the competitive service," including providing for "necessary exceptions of positions from the competitive service." The President also has rulemaking authority similar to that of executive agencies, albeit with an important difference. Current case law suggests that, unlike agencies, the President is not subject to notice-and-comment rulemaking requirements or the APA's judicial review provisions "because the President is not an 'agency' within the meaning of the [APA]." At the same time, final agency actions implementing a presidential directive *would* likely be subject to those procedural requirements. For example, the 2025 amendments' directive to OPM to reverse its previous rulemaking still necessitates a final agency action to implement—an action that could be subject to separate or different challenges than the executive order itself. The nature, timing, and viability of any legal challenges to the new schedule could thus depend on how OPM and other agencies choose to implement it.

Three potential categories of legal challenges are (1) those arguing that the EO itself is facially unlawful, (2) those bringing facial challenges to OPM's or an agency's implementation of the reissued EO, and (3) those claiming that the EO or its implementation as applied harmed specified individuals (such as persons

fired after reclassification). In the first category, federal employee unions have demonstrated that they will promptly file judicial challenges to the reissued EO. In 2020, for example, the National Treasury Employees Union (NTEU) filed a lawsuit in federal court challenging EO 13957 days after it was issued. NTEU argued that EO 13957 exceeded the President's authority (in legal terms, that the EO was *ultra vires*). Central to NTEU's challenge were issues of statutory interpretation implicating the separation of powers (e.g., whether, when Congress delegated the ability to make "necessary" exceptions to the competitive service regime, "necessity" became a judicially reviewable precondition for exercising the delegated authority). The United States, responding to NTEU's complaint with a motion to dismiss, argued among other things that NTEU lacked standing and that its claims were not ripe because EO 13957 "did not, on its own, change the status of any employee or position." NTEU asked the court to declare EO 13957 unlawful and to prevent the President and OPM from implementing or enforcing it. Following the original EO 13957's repeal, NTEU voluntarily dismissed the case, so the court did not issue a decision. NTEU filed a new complaint challenging the amended and reinstated EO 13957 on January 21, 2025.

In the second category, challenges to OPM or other agency actions may be raised under the APA. Within the APA, Congress created a cause of action for individuals to challenge final agency actions that are arbitrary, capricious, not in accordance with law, "contrary to constitutional right, power or privilege," or "in excess of statutory jurisdiction, authority, or limitation." In subjecting agency decisions to such review, the APA also requires that agencies sufficiently explain their decisions. EO 13957 stated that certain federal positions "wield significant influence over Government operations and effectiveness" and argued that "[a]gencies need the flexibility to expeditiously remove poorly performing employees from these positions without facing extensive delays or litigation." As a statement *in an EO*, that language likely could not be challenged under the APA, but if *agencies* echo that rationale for reclassifying positions, the sufficiency of that reasoning could be challenged in court. Efforts to reclassify competitive service positions have been challenged in the past. In *NTEU v. Horner*, for example, the U.S. Court of Appeals for the D.C. Circuit determined that a reclassification of certain competitive service positions as excepted service Schedule B positions was arbitrary and capricious because OPM failed to provide any support for its claim that the cost of developing new competitive examinations would be prohibitive and unwarranted. The court indicated that several provisions of Title 5, including Section 3302, require courts to conduct a meaningful review of reclassification decisions and that OPM may except positions from the competitive service "only when 'necessary' for 'conditions of good administration.'" As previously noted, the 2025 amendments vest some of the rescheduling decisions with the President and not OPM and, therefore, it is less certain how courts may review those determinations.

In the third category of potential litigation, employees who are removed from their positions following a reclassification to the new schedule could argue that they were entitled to some form of due process before their employing agencies could have taken such an action. By generally permitting removal only for cause or unacceptable performance, the Civil Service Reform Act has arguably bestowed a property interest on continued employment for federal employees. If a reissued EO or related agency actions survive potential facial challenges described above, however, whether Schedule F employees have such a property interest seems less clear. Like Schedule C employees, it would appear that employees in the new schedule would not be entitled to procedural requirements like notice or a meaningful opportunity to be heard. Similarly, if a property interest had been afforded to an employee through a collective bargaining agreement, due process pursuant to the agreement may not be available if the employee's position were excluded from a bargaining unit and the employee were no longer covered by the agreement.

In 2024, the Supreme Court issued a decision in *Loper Bright Enterprises v. Raimondo* overruling the Chevron doctrine. The Chevron doctrine—named for the case that articulated it—required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutory provisions the agency administers. The Court in *Loper* held that the Chevron framework violated the APA, which requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine

the meaning or applicability of the terms of an agency action." The majority held that the APA's command required courts, rather than agencies, to exercise their own independent judgment on the meaning of a federal statute and "say what the law is." As discussed, EO 13957 draws the terminology "confidential, policy-determining, policy-making, or policy-advocating character" from 5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i)—laws exempting such positions from merit-based hiring and removal protections and prohibited personnel practices. The Supreme Court has recognized the exception in Section 7511 from adverse action rights for senior or policymaking positions, but it did not further define "confidential, policy-determining, policy-making, or policy-advocating." The original EO and subsequent implementing instructions from OPM interpreted such terms more broadly than past executive actions. For example, their interpretation covers positions involving "viewing, circulating, or otherwise working with proposed regulations, guidance, executive orders, or other non-public policy proposals." In the event legal actions are brought challenging the new schedule, agency interpretations of ambiguous statutory terms would likely not be afforded deference in federal courts. However, it is unclear the degree to which *Loper*'s holding would apply to such interpretations by a President in an EO—an issue that was not addressed by the Court, which grounded its *Loper* analysis in the APA. Additional analysis on *Loper*'s application may be found in this CRS report.

Considerations for Congress

While the second Trump Administration has issued an executive order reestablishing a new excepted schedule to the competitive service, Congress may act if it so chooses. The Constitution sets forth certain limitations on Congress's authority, including a system of checks and balances among the three branches—that is, the executive, legislative, and judicial branches—of the federal government. Relatedly, the separation-of-powers doctrine is a constitutionally derived and judicially defined legal doctrine that protects the core powers of each federal government branch against encroachment by the other branches. For example, the Supreme Court has explained that Congress may not impede executive authority by effectively vetoing presidential removal of an executive officer. Similarly, the Court has ruled that the President's executive orders may not usurp Congress's lawmaking authority. As the Supreme Court phrased it, the President has authority to issue an executive order only if authorized by "an act of Congress or . . . the Constitution itself."

Congress has delegated a substantial amount of authority to the executive branch to regulate the civil service, yet it may withdraw those delegations or substitute its own judgment in such matters through the legislative process. If Congress chooses to address civil service reforms in statute, those reforms may have a more lasting effect when compared to an executive order that could be repealed by future administrations.

Under the original EO 13957, agencies had 90 days from the date of the order to conduct a preliminary review of its positions. Agencies had an additional 120 days to finalize that review and submit petitions to OPM or publish their determinations in the *Federal Register*. As EO 13957 was reissued on January 20 with amendments, existing civil service positions will likely remain unchanged until August 2025 at the earliest. If the amended and reinstated EO 13957 or a specific reclassification becomes subject to legal challenges, or if repeal of the 2024 OPM rule creates delays, that timeline could also be delayed. Congress's decisions whether or not to legislate in this area could also have significant effects on the implementation of the new schedule.

Congress always has the option of refraining from action. Alternatively, Congress could consider any of several options to legislate its preferences regarding the civil service, including

- creating its own new schedule through the legislative process, or prohibiting or setting additional guidelines for the creation of any new schedules;

- defining terminology used in statute or in EO 13957 (such as "confidential, policy-determining, policy-making, or policy-advocating"), whether by adopting the definitions in 5 C.F.R. § 210.102 or substituting other definitions;
- explicitly authorizing the President to remove, or prohibiting the President from removing, an individual federal employee's civil service protections by reclassifying their position to a different schedule (for example, in the 118th Congress, the Saving the Civil Service Act (H.R. 1002/S. 399) would limit executive branch authority to change the classification of positions in civil service, among other reforms);
- requiring the President to abide by certain restrictions (such as APA-style reasonableness and explanation requirements) when exercising civil service-related authorities; or
- enshrining the 2024 OPM rule or future OPM rules in statute, or statutorily reversing such rules.

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