

118TH CONGRESS
1ST SESSION

H. R. 5346

To establish Schedule F in the excepted service, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 5, 2023

Mr. JAMES introduced the following bill; which was referred to the Committee on Oversight and Accountability

A BILL

To establish Schedule F in the excepted service, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Creating Schedule F
5 in the Excepted Service Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) To effectively carry out the broad array of
9 activities assigned to the executive branch under law,
10 the President and his appointees must rely on men
11 and women in the Federal service employed in posi-

1 tions of a confidential, policy-determining, policy-
2 making, or policy-advocating character. Faithful exe-
3 cution of the law requires that the President have
4 appropriate management oversight regarding this se-
5 lect cadre of professionals.

6 (2) The Federal Government benefits from ca-
7 reer professionals in positions that are not normally
8 subject to change as a result of a Presidential tran-
9 sition but who discharge significant duties and exer-
10 cise significant discretion in formulating and imple-
11 menting executive branch policy and programs under
12 the laws of the United States. The heads of execu-
13 tive departments and agencies (agencies) and the
14 American people also entrust these career profes-
15 sionals with non-public information that must be
16 kept confidential.

17 (3) With the exception of attorneys in the Fed-
18 eral service who are appointed pursuant to schedule
19 A of the excepted service and members of the Senior
20 Executive Service, appointments to these positions
21 are generally made through the competitive service.
22 Given the importance of the functions they dis-
23 charge, employees in such positions must display ap-
24 propriate temperament, acumen, impartiality, and
25 sound judgment.

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

5 (5) Further, effective performance management
6 of employees in confidential, policy-determining, pol-
7 icy-making, or policy-advocating positions is of the
8 utmost importance. Unfortunately, the Government's
9 current performance management is inadequate, as
10 recognized by Federal workers themselves. For in-
11 stance, the 2016 Merit Principles Survey reveals
12 that less than a quarter of Federal employees believe
13 their agency addresses poor performers effectively.

14 (6) Separating employees who cannot or will
15 not meet required performance standards is impor-
16 tant, and it is particularly important with regard to
17 employees in confidential, policy-determining, policy-
18 making, or policy-advocating positions. High per-
19 formance by such employees can meaningfully en-
20 hance agency operations, while poor performance
21 can significantly hinder them. Senior agency officials
22 report that poor performance by career employees in
23 policy-relevant positions has resulted in long delays
24 and substandard-quality work for important agency
25 projects, such as drafting and issuing regulations.

1 (7) Conditions of good administration make
2 necessary an exception to the competitive hiring
3 rules and examinations for career positions in the
4 Federal service of a confidential, policy-determining,
5 policy-making, or policy-advocating character. These
6 conditions include the need to provide agency heads
7 with additional flexibility to assess prospective ap-
8 pointees without the limitations imposed by competi-
9 tive service selection procedures. Placing these posi-
10 tions in the excepted service will mitigate undue lim-
11 itations on their selection. This action will also give
12 agencies greater ability and discretion to assess crit-
13 ical qualities in applicants to fill these positions,
14 such as work ethic, judgment, and ability to meet
15 the particular needs of the agency. These are all
16 qualities individuals should have before wielding the
17 authority inherent in their prospective positions, and
18 agencies should be able to assess candidates without
19 proceeding through complicated and elaborate com-
20 petitive service processes or rating procedures that
21 do not necessarily reflect their particular needs.

22 (8) Conditions of good administration similarly
23 make necessary excepting such positions from the
24 adverse action procedures set forth in chapter 75 of
25 title 5, United States Code. Chapter 75 of title 5,

1 United States Code, requires agencies to comply
2 with extensive procedures before taking adverse ac-
3 tion against an employee. These requirements can
4 make removing poorly performing employees dif-
5 ficult. Only a quarter of Federal supervisors are con-
6 fident that they could remove a poor performer. Ca-
7 reer employees in confidential, policy-determining,
8 policy-making, and policy-advocating positions wield
9 significant influence over Government operations
10 and effectiveness. Agencies need the flexibility to ex-
11 peditiously remove poorly performing employees
12 from these positions without facing extensive delays
13 or litigation.

14 **SEC. 3. SCHEDULE F OF THE EXCEPTED SERVICE.**

15 (a) IN GENERAL.—Appointments of individuals to
16 positions of a confidential, policy-determining, policy-mak-
17 ing, or policy-advocating character that are not normally
18 subject to change as a result of a Presidential transition
19 shall be made under schedule F of the excepted service,
20 as established by subsection (b).

21 (b) REGULATIONS.—The Director of the Office of
22 Personnel Management shall—

23 (1) amend section 6.2 of title 5, Code of Fed-
24 eral Regulations, to read as follows:

1 “OPM shall list positions that it excepts from the
2 competitive service in Schedules A, B, C, D, E, and F,
3 which schedules shall constitute parts of this rule, as fol-
4 lows:

5 “Schedule A. Positions other than those of a con-
6 fidential or policy-determining character for which it is not
7 practicable to examine shall be listed in Schedule A.

8 “Schedule B. Positions other than those of a con-
9 fidential or policy-determining character for which it is not
10 practicable to hold a competitive examination shall be list-
11 ed in Schedule B. Appointments to these positions shall
12 be subject to such noncompetitive examination as may be
13 prescribed by OPM.

14 “Schedule C. Positions of a confidential or policy-de-
15 termining character normally subject to change as a result
16 of a Presidential transition shall be listed in Schedule C.

17 “Schedule D. Positions other than those of a con-
18 fidential or policy-determining character for which the
19 competitive service requirements make impracticable the
20 adequate recruitment of sufficient numbers of students at-
21 tending qualifying educational institutions or individuals
22 who have recently completed qualifying educational pro-
23 grams. These positions, which are temporarily placed in
24 the excepted service to enable more effective recruitment
25 from all segments of society by using means of recruiting

1 and assessing candidates that diverge from the rules gen-
2 erally applicable to the competitive service, shall be listed
3 in Schedule D.

4 “Schedule E. Position of administrative law judge ap-
5 pointed under 5 U.S.C. 3105. Conditions of good adminis-
6 tration warrant that the position of administrative law
7 judge be placed in the excepted service and that appoint-
8 ment to this position not be subject to the requirements
9 of 5 CFR, part 302, including examination and rating re-
10 quirements, though each agency shall follow the principle
11 of veteran preference as far as administratively feasible.

12 “Schedule F. Positions of a confidential, policy-deter-
13 mining, policy-making, or policy-advocating character not
14 normally subject to change as a result of a Presidential
15 transition shall be listed in Schedule F. In appointing an
16 individual to a position in Schedule F, each agency shall
17 follow the principle of veteran preference as far as admin-
18 istratively feasible”;

19 (2) amend section 6.4 of title 5, Code of Fed-
20 eral Regulations, to read as follows:

21 “Except as required by statute, the Civil Service Rules
22 and Regulations shall not apply to removals from positions
23 listed in Schedule A, C, D, E, or F, or from positions ex-
24 cepted from the competitive service by statute. The Civil
25 Service Rules and Regulations shall apply to removals

1 from positions listed in Schedule B of persons who have
2 competitive status.”;

3 (3) adopt such regulations as the Director de-
4 termines may be necessary to implement this title,
5 including, as appropriate, amendments to or rescis-
6 sions of regulations that are inconsistent with, or
7 that would impede the implementation of, this title,
8 giving particular attention to—

9 (A) section 302.101 of title 5, Code of
10 Federal Regulations;

11 (B) subpart D of part 212 of such title;
12 and

13 (C) subparts A and C of part 213 of such
14 title; and

15 (4) provide guidance on conducting a swift, or-
16 derly transition from the existing appointment proc-
17 esses to the schedule F process established by this
18 title.

19 **SEC. 4. EXECUTIVE AGENCY ACTIONS.**

20 (a) REVIEW.—

21 (1) IN GENERAL.—Each Executive agency head
22 shall conduct, not later than 90 days after the date
23 of enactment of this Act, a preliminary review of the
24 positions in the Executive agency that are covered
25 by subchapter II of chapter 75 of title 5, United

1 States Code, and shall conduct a complete review of
2 the positions in the agency not later than 210 days
3 after the date of enactment of this Act. Thereafter,
4 each agency head shall conduct a review of such po-
5 sitions that are covered by subchapter II of chapter
6 75 of title 5, United States Code, on at least an an-
7 nual basis.

8 (2) PETITIONS.—

9 (A) IN GENERAL.—Following a review
10 under paragraph (1), each agency head shall,
11 for positions not excepted from the competitive
12 service by statute, petition the Director to place
13 in schedule F any such competitive service,
14 schedule A, schedule B, or schedule D positions
15 in the Executive agency that the agency head
16 determines to be of a confidential, policy-deter-
17 mining, policy-making, or policy-advocating
18 character and that are not normally subject to
19 change as a result of a Presidential transition.

20 (B) PETITION EXPLANATION.—Any peti-
21 tion submitted under subparagraph (A) shall
22 include a written explanation documenting the
23 basis for the agency head's determination that
24 such position should be placed in schedule F.

25 (3) DETERMINATIONS.—

1 (A) IN GENERAL.—Following a review
2 under paragraph (1), each agency head shall,
3 for positions excepted from the competitive
4 service by statute, determine which such posi-
5 tions are of a confidential, policy-determining,
6 policy-making, or policy-advocating character
7 and are not normally subject to change as a re-
8 sult of a Presidential transition.

9 (B) DETERMINATION EFFECT.—A position
10 which the agency head determines under sub-
11 paragraph (A) to be of a confidential, policy-de-
12 termining, policy-making, or policy-advocating
13 character and not normally subject to change as
14 a result of a Presidential transition shall be
15 considered a schedule F position for the pur-
16 poses of Executive agency actions under sub-
17 sections (d) and (f).

18 (C) PUBLICATION.—An agency head shall
19 publish each determination made under sub-
20 paragraph (A) in the Federal Register.

21 (b) APPLICABILITY.—The requirements set forth in
22 subsection (a) shall apply to currently existing positions
23 and newly created positions.

24 (c) ADDITIONAL CONSIDERATION.—When con-
25 ducting the review required by subsection (a), each agency

1 head should give particular consideration to the appro-
2 priateness of either petitioning the Director to place in
3 schedule F or including in the determination published in
4 the Federal Register, as applicable, positions of which the
5 duties include any of the following:

6 (1) Substantive participation in the advocacy
7 for or development or formulation of policy, espe-
8 cially—

9 (A) substantive participation in the devel-
10 opment or drafting of regulations and guidance;
11 or

12 (B) substantive policy-related work in an
13 Executive agency or Executive agency compo-
14 nent that primarily focuses on policy.

15 (2) The supervision of attorneys.

16 (3) Substantial discretion to determine the
17 manner in which the Executive agency exercises
18 functions committed to the agency by law.

19 (4) Viewing, circulating, or otherwise working
20 with proposed regulations, guidance, Executive or-
21 ders, or other non-public policy proposals or delib-
22 erations generally covered by deliberative process
23 privilege and either—

24 (A) directly reporting to or regularly work-
25 ing with an individual appointed by either the

1 President or an agency head who is paid at a
2 rate not less than that earned by employees at
3 Grade 13 of the General Schedule; or

4 (B) working in the Executive agency or
5 Executive agency component executive secre-
6 tariat (or equivalent).

7 (5) Conducting, on the Executive agency's be-
8 half, collective bargaining negotiations under chapter
9 71 of title 5, United States Code.

10 (d) PETITION DECISION.—The Director shall
11 promptly determine whether to grant any petition under
12 subsection (a). Not later than December 31 of each year,
13 the Director shall report to the President, through the Di-
14 rector of the Office of Management and Budget and the
15 Assistant to the President for Domestic Policy, concerning
16 the number of petitions granted and denied for that year
17 for each Executive agency.

18 (e) COLLECTIVE BARGAINING EXCLUSIONS.—Each
19 agency head shall, as necessary and appropriate, expedi-
20 tiously petition the Federal Labor Relations Authority to
21 determine whether any schedule F position must be ex-
22 cluded from a collective bargaining unit under section
23 7112(b) of title 5, United States Code, paying particular
24 attention to the question of whether incumbents in such

1 positions are required or authorized to formulate, deter-
2 mine, or influence the policies of the agency.

3 (f) PROHIBITED PERSONNEL PRACTICES.—Agency
4 heads shall establish rules to prohibit the personnel prac-
5 tices prohibited by section 2302(b) of title 5, United
6 States Code, with respect to any employee or applicant
7 for employment in schedule F of the excepted service.

8 **SEC. 5. DEFINITIONS.**

9 In this Act:

10 (1) AGENCY HEAD.—The term “agency head”
11 means the head of an Executive agency.

12 (2) DIRECTOR.—The term “Director” means
13 the Director of the Office of Personnel Management.

14 (3) EXECUTIVE AGENCY.—The term “Executive
15 agency” has the meaning given such term in section
16 105 of title 5, United States Code, but excluding the
17 Government Accountability Office.

18 (4) NORMALLY SUBJECT TO CHANGE AS A RE-
19 SULT OF A PRESIDENTIAL TRANSITION.—The term
20 “normally subject to change as a result of a Presi-
21 dential transition” refers to positions whose occu-
22 pants are, as a matter of practice, expected to resign
23 upon a Presidential transition, including all positions

- 1 whose appointment requires the assent of the White
- 2 House Office of Presidential Personnel.

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