To the US Office of Personnel Management in response to its solicitation in the September 18, 2023 Federal register.

Introduction and Background. On September 18, 2023, the US Office of Personnel Management (OPM) published a proposed rule in the Federal Register (Docket ID: OPM–2023–0013; RIN 3206–AO56, Upholding Civil Service Protections and Merit System Principles) that among other things, would establish a regulatory basis for the federal government's civil service merit principles, as well as the current exceptions to general and specific employment authorities currently set forth in relevant chapters of the Code of Federal Regulations (CFR). In so doing, OPM solicited comments pursuant to the Administrative Procedures Act from groups and individuals regarding the substance of that proposed rule. OPM reviewers and other readers should take two notes in that regard.

First, while I am providing comments in a personal capacity, I believe that I do so with some credibility. For example, as a 20+ year career member of the Senior Executive Service (SES) with over 37 years of federal service, I was appointed as Associate Director of OPM for Strategic Human Resources Policy in 2002, serving in that capacity until 2005. In addition, I also subsequently served in a political position in OPM, appointed by President Donald J. Trump in 2018 to serve as Member (and subsequently, Chair) of the US Federal Salary Council, until my resignation in October 2020 in protest over the establishment of Schedule F via Executive Order 13957 (see https://www.npr.org/2020/10/27/928336806/official-on-why-he-resigned-from-federal-salary-council).

Secondly, I am also writing as a Fellow of the National Academy of Public Administration, first named as such in 2006, as well as an elected member of the American Society for Public Administration's National Council. In that capacity, I endorse supportive comments made by the latter and other 'public interest' organizations (such as the Partnership for Public Service), as well as numerous other individuals in that regard. Thus, my comments should not be read as anything but strong and unequivocal support for OPM's rulemaking objectives overall. Those objectives are laudable, and while the comments that follow may take issue with some of the proposed rule's content, they should not be read as opposition to the rule itself. To the contrary, absent some outright statutory ban on Schedule F—which so far has proved politically difficult and will likely remain so—I believe that OPM's administrative efforts must continue.

Specific Comments on the Proposed OPM Rule. The following are submitted in response to the aforementioned Federal Register notice and are highly technical in nature.

1. **Clarifying the Definition of Senior Executive Service (SES) Positions.** In its otherwise admirable effort to cast a sharper regulatory distinction between career members of the Senior Executive Service (SES) and those in Schedule C and similar (albeit higher paid) non-career SES positions that are clearly of a "political" nature, the proposed OPM rule may inadvertently add to the present ambiguity and confusion in that distinction.

    a. For example, title 5 USC §3132(a)(2)(E) provides that among other things, a career member of the Senior Executive Service "...exercises important *policymaking, policy-determining, or other executive functions*" (emphasis added). Non-career SES positions are similarly defined. However, this same impact on policy making and policy determining is also found in the statutes governing Schedule C positions, which includes "...positions which are *policy*

determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials" (emphasis added).

b. Thus, the proposed OPM rule's apparent reliance on 'policymaking' and 'policy determining' responsibilities as a basis for any distinction between career and political executives is misplaced. Rather, it is clear that by law, *policymaking* and *policy determining* responsibilities are extant in both career and political executive and near-executive positions, and while this overlap may have been intended by those who drafted the law, it has since caused much confusion in its application. Therefore, in my view, such responsibilities should not be used to distinguish between career and non-career SES and/or Schedule C positions in the rule that are political, both *de facto* and *de jure*.

c. However, this commenter believes that there are other factors that OPM may use—and emphasized in a final rule—to distinguish between the two and should be considered. Such factors include the current expectation (on the part of career senior executives) of more permanent employment beyond the end of a time-limited appointment and/or the term(s) of a particular Presidential Administration. In addition to that expectation of more permanent, merit-based employment, OPM may also want to consider establishing additional regulatory distinctions between career and non-career SES and Schedule C employees that are political in nature.

    1. For example, more permanent career-reserved SES members should continue to be subject to selection on the basis of statutory and regulatory merit principles—such as those enumerated in the proposed rule—and Qualifications Review Board (QRB) approval, but OPM may want to consider *exempting* non-career SES members from such review altogether, or at least revising the review criteria to reflect the limitations of such a temporary appointment, to include a more inherently political orientation; thus, the selection of some non-career SES appointees may be specifically linked to approval by the White House's Office of Presidential Personnel or its agency delegees, all of which are formally designated.

    2. In that regard, I would go further, proposing that OPM also consider establishing two distinct types of non-career SES via this regulation, one specifically time-limited but still selected on the basis of merit principles and subject to QRB review, the other exempt from such review in order to reflect a more confidential/political orientation. Again, the objective would be to articulate something other than 'policy' impact as a significant difference between these two types of SES. Note here that except as provided below, the current numerical limitations on non-career SES and Schedule C positions are set in statute and should not be disturbed.

d. Accordingly, in my view, the final OPM rule should acknowledge the inherent, law-based policymaking and policy-determining responsibilities of both of these career and non-career positions and clarify the definition of Schedule C and non-career SES positions to state that they cover (in whole or in part) those incumbents who (1) require the approval of the Office

of Presidential Personnel (PPO) or its delegee, to include those that are established by law and/or require Senate confirmation or Presidential appointment; (2) do not come with the expectation of continued, more permanent employment and the due process protections that may attend; and/or (3) clearly have a "close and confidential working relationship with the head of an agency or other key appointed officials" who are political in nature.

e. In any event, I would assert that the final rule issued by OPM should continue to state that that career members of the SES—that is, those that have *policymaking* and/or *policy determining* responsibilities, who have received official QRB approval, and who are in the career-reserved (that is, 'regular') SES—cannot be involuntarily reassigned to positions in a newly created 'excepted' service like Schedule F, individually, by organizational locus, and/or by occupational series.

2. **Limitations on the Movement Between Excepted Systems.** The above notwithstanding, proposed OPM rule would establish a number of conditions that would serve to limit the involuntary movement—both individual and more generally as a result of factors such as those enumerated above—of civil service employees in both the 'regular' career-reserved SES, as defined herein, and from one 'excepted' senior service systems, to similar a position in an(other) such senior service system, including but not limited to employee consent.

a. In contrast, I have long argued (https://www.govexec.com/management/2023/02/say-no-politicizing-civil-service-yes-more-flexibility/383215/) that such conditions and limitations restrict hard-won personnel flexibilities—flexibilities approved by OPM—should apply only to the former; that is, the involuntary movement from the 'regular' SES to an 'excepted' senior system, but not to movement between two of the latter systems. In so recommending, these comments acknowledge that the 'regular' SES has, by stature, many of the attributes of an 'excepted' system; that is why these comments use the term 'regular' (in quotation marks) to describe that system. In that regard, limitations on the movement between that 'regular' SES and some other 'excepted' system, such as the Defense Intelligence Senior Executive Service (DISES), would and should apply, especially insofar as the latter exists by virtue of OPM approval.

b. Thus, while a member of the career-reserved 'regular' SES may be asked to give up certain terms and conditions of continued employment (including certain somewhat more limited due process and appeal rights) in moving from the regular SES to another 'excepted' senior system, such limitations—especially employee consent—would seem to be justified. However, to the extent that an individual's rights are not diminished in a substantive way, such conditions and limitations should not apply to involuntary, officially directed movement between two such otherwise 'excepted' (and approved) systems, such as a reassignment from a DISES position to one in the senior system established by and for the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) or the State Department's Senior Foreign Service.

c. As noted above, all such 'excepted' senior systems (that is, senior systems that exist outside of the 'regular' SES) do so by virtue of OPM approval, and it is in the best position to judge whether an individual employee or group of employees is being asked to relinquish certain substantive rights and privileges in the process. And where they are not, such involuntary movement should not be impeded. See the example provided above, which would apply to a non-veteran hired under and into DCIPS, promoted to the DISES, and subsequently reassigned as a career executive to another 'excepted' system in the Intelligence Community. When such a reassignment is done for justifiable mission reasons—and without any substantive diminution of rights afforded by the 'losing' excepted system—that personnel action should be facilitated by OPM, not impeded by procedure.

d. And I should point out in passing that retaining 'excepted' personnel flexibilities without subjecting covered incumbents to political control is not antithetical to collective bargaining for non-managerial, non-executive, and other non-excluded employees—indeed, agencies covered by the Federal Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which establishes 'excepted' personnel systems for those agencies—regularly negotiate terms and conditions of employment with duly elected exclusive union representatives.

3. **Additional Miscellaneous Concerns and Comments.** The proposed OPM rule includes a number of other issues that are worth addressing but that do not rise to the importance of the critically necessary distinction between 'regular' career SES positions and those non-career SES/Schedule C positions that are political in nature. These are enumerated briefly below.

a. **Multi-Year Probationary Periods.** The proposed OPM rule states in several places that probationary periods are—without exception—one year in duration. However, my reading of the law gives OPM the authority to determine the length of such a probationary period, which is also defined in statute as an extension of the examination period intended to assess whether an individual is suitable for a career appointment beyond a formal, one-off assessment via test and/or interview.

1. OPM should retain the option of exercising that authority, even if it is only expressly on an 'exception' basis, where a particular occupation's career ladder so warrants. For example, Revenue Agents employed by the Internal revenue Service (IRS) are subject to an intense, multi-year training program that includes both classroom and on-the-job experiences, and it may not be evident that an individual is otherwise suitable for such employment until well after a single year has passed, but before the individual has otherwise been deemed suitable—technically and otherwise—for continued employment. Air Traffic Controllers employed by the Federal Aviation Administration (FAA) are similarly trained and should be treated accordingly.

2. This is especially the case, given that dismissal during the probationary period's examination process is significantly less difficult (from a procedural standpoint) for what should be obvious reasons—after all, it is still part of the individual's

examination—and is inherently linked to the notion of accountability, the very impetus for Schedule F (and much of the arguments countering it). Note here that a one-year probationary period has its roots in the last century, when federal jobs were much different than those of today, and that history must also be taken into account. To be sure, this particular OPM may not want to take on a rule that would extend the probationary period beyond a year (like the Defense Department did in its National Defense Authorization Act of a few years ago), but it should at least leave the option open to subsequent OPMs without significant regulatory barriers.

3. Finally, note that as a more general rule, this commenter is among those who believe that current procedures under title 5 USC chapters 43 and 75 and their implementing regulations are far too legalistic, administratively onerous, and time-consuming, and these must be addressed in rulemaking and in law (for example, see https://www.govexec.com/management/2023/05/accountability-system-broken-fix-it/385823/). And while this may appear to be beyond the scope of the proposed OPM rule, it is ostensibly the reason beyond the issuance of the since-rescinded Executive Order 13957 and its establishment of Schedule F, and in our view, it must be addressed one way or another.

b. **Lack of MSPB Quorum.** The proposed rule should also clarify what happens when, by deliberate or inadvertent act, the Merit Systems Protection Board (MSPB) is without a quorum and thus cannot issue decisions on adverse actions and other administrative appeals. Instead of leaving that quorum exclusively to the political appointments process—which, by almost every account is broken, for a variety of reasons—OPM should consider a regulatory policy providing that when an adverse action appeal has been pending with the MSPB for some period certain (for example, 120 days), a default decision should be inferred by the quorum-less MSPB that is considered adverse to the appellant and thus permit that appellant to elevate that appeal to the Federal Circuit Court for judicial review, in accordance with that Court's precedents. Note here that the new Speaker of the House has been favorably disposed to time limits on certain adverse actions, so he may be supportive of a rule that actually expedites the appellate process.

Let me reiterate that my comments, while critical of some of the specifics of the proposed OPM rule, should be read as generally supportive of the agency's efforts in that regard, especially since statutory reforms (on this issue and others) have proved so difficult. Thus, OPM should be applauded for the effort, whatever the rule's final form. Any questions of comments may be directed electronically to the undersigned at 'rsandrs100@gmail.com' or at my company's Web site, at www.publicavirtu.com.

/signed/ Dr. Ronald Sanders, 17 November 2023.