



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

Friday, October 23, 2020

MEMORANDUM FOR: HEADS OF EXEC DEPTS AND AGENCIES CHCOs AND HR DIRECTORS

FROM: MICHAEL J. RIGAS
ACTING DIRECTOR

Subject: Instructions on Implementing Schedule F

Note: The guidance within the memorandum below has been rescinded by Executive Order; please refer to OPM's March 5, 2021 memorandum: <https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>

On October 21, 2020, the President signed an Executive Order titled "Creating Schedule F in the Excepted Service." This Executive Order excepts from the competitive service positions that are of a confidential, policy-determining, policy-making, or policy-advocating character, typically filled by individuals not normally subject to replacement or change as a result of a Presidential transition. As a result of this Executive Order, such positions will be rescheduled into the newly created Schedule F and exempt from both the competitive hiring rules as well as the adverse action procedures set forth in chapter 75 of title 5 of the United States Code.

The terms "confidential," "policy-determining," "policy-making," and "policy-advocating" in the Executive Order are drawn from 5 U.S.C. § 7511(b)(2) and 5 U.S.C. § 2302(a)(2)(B)(i). Neither the U.S. Code nor judicial precedents precisely define these terms in the context of their statutory usage. Although the Supreme Court has generally addressed the concepts of policymaking and confidential positions for purposes of employee First Amendment rights*, no case law binds the President's particular delineation of specific characteristics within the scope of the ordinary meaning of these terms for purposes of adding positions to a new Schedule F. *See, e.g.,* 5 U.S.C. § 7511(b)(2)(A) (expressly envisioning the President excepting from the competitive service those positions that he determines "to be of a confidential, policy-determining, policy-making or policy-advocating character"). In Section 5 of the order the President provided guideposts for agencies about the characteristics suggesting that a position category belongs in Schedule F, which include positions and job categories involving:

- *"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"*
- *"the supervision of attorneys"*
- *"substantial discretion to determine the manner in which the agency exercises functions committed to the agency by law"*

- “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)”
- “conducting, on the agency’s behalf, collective bargaining negotiations under chapter 71 of title 5, United States Code”

The Executive Order directs each agency head to review positions within his or her agency and identify those positions appropriately categorized as confidential, policy-determining, policy-making, or policy-advocating, and then petition OPM to place those positions in Schedule F. Agencies have 90 days to conduct a preliminary review of positions and submit petitions, with an additional 120 days to finalize that review and submit any remaining petitions.

The position attributes described in section 5 are guideposts; they are not determinative. Agencies may include positions based on additional characteristics not expressly specified in section 5 in their petitions, and OPM may except those positions so long as the agency demonstrates that the position is of a confidential, policy-determining, policy-making, or policy-advocating character. Conversely, OPM is not required to transfer positions to Schedule F simply because they fall within the section 5 guideposts. OPM retains final authority over which categories and types of positions will be placed in Schedule F.

The order further directs that all agency petitions “shall include a written explanation documenting the basis for the agency head’s determination that such position[s] should be placed in Schedule F.” Written explanations must demonstrate that the position’s duties are policy-determining, policy-making, or policy-advocating, or require working closely with senior officials in the case of confidential positions. That objective definition of the position’s duties must be derived from a statute, regulation, or internal agency document such as the position description. To ensure placement into Schedule F satisfies procedural due process, the individualized characteristics and attributes of the particular employee encumbering a position are irrelevant to whether the underlying position or office itself is appropriately categorized into Schedule F. *See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (concluding, in a landmark case routinely cited regarding whether procedural due process rights apply to generalized classes, that individuals have rights to notice and a hearing only where a “relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds” and not where a government policy or rule is operating on a general class).

For questions regarding implementation, please contact workforce@opm.gov.

* *See, e.g., Elrod v. Burns*, 427 U.S. 347, 367–68 (1976) (plurality opinion).

cc: Deputy Chief Human Capital Officers