



SENIOR
EXECUTIVES
ASSOCIATION

The voice of career federal executives since 1980

November 15, 2023

VIA FEDERAL eRULEMAKING PORTAL
(<http://regulations.gov>)

U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

RE: Senior Executives Association comments on OPM proposed rule, “Upholding Civil Service Protections and Merit System Principles,” RIN 3206-AO56, Docket No. 2023-19806

The Senior Executives Association (SEA) is a nonprofit, nonpartisan professional association which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders. Since the association’s founding in 1980, directly following the establishment of the SES as one of the government’s three career personnel services via the Civil Service Reform Act of 1978, SEA has served as “the voice of the SES” before OPM, administrations, courts, and the Congress. Today, the federal government employs nearly 10,000 members of the SES, which includes a majority of career appointees and a smaller portion of political, term, and limited appointment SESers.

SEA commends OPM for issuing the Proposed Rule Upholding Civil Service Protections and Merit System Principles, 88 Fed. Reg. 63862 (Sept. 18, 2023). This important rule clarifies the application of merit system and civil service rules and procedures. SEA encourages OPM to finalize the rule as expeditiously as possible.

The association’s comments are organized as follows:

- 1) We identify those areas where SEA concurs and supports OPM’s proposed regulatory updates. Occasionally technical feedback is provided to address specific questions raised by OPM for commenters.
- 2) We offer suggestions for areas to strengthen the proposed rule. Specifically, the proposed rule is generally silent on the SES, which raises questions given the keystone role career executives play as a conduit between political appointees and the career federal workforce. In light of this, OPM’s interpretation of the terms “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining” could provide greater clarity about application of these terms to the SES.

- 3) Throughout, SEA addresses the list of specific areas OPM requested feedback from commenters around. We conclude by suggesting additional considerations for OPM to uphold civil service protections and merit system principles.

General Comments

Preamble comments / Comments on OPM proposed amendments to 5 CFR chapter 1, subchapter B:

Amending 5 CFR Part 752 (Adverse Actions) – SEA supports OPM’s proposal to clarify that employees who are moved from the competitive service to a position in the excepted service, or from one excepted service to another, should retain the status and civil service protections accrued from their original appointment, unless the employee voluntarily waives such rights. SEA believes OPM’s proposal is sufficiently protective and provides adequate clarity.

Amending 5 CFR Part 210 (Basic Concepts and Definitions (General)) – SEA agrees that in 5 U.S.C. 7511(b), Congress excepts noncareer, political appointees from the civil service protections. Still, it is not clear that *only* political employees are involved in policy-related processes and policy decision support. The extent of policy support roles across the government and the history of the civil service suggest otherwise.

Officials from the prior administration did openly admit that Schedule F could have been applied to as many as 50,000 employees.¹ Other estimates predict Schedule F could have been applied to hundreds of thousands of employees. If tens of thousands of GS 13-15 employees could have been reclassified under the prior order, providing clarity on the appropriate application of the terms “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining” to those employees and the SES is essential. SEA further addresses this issue in our substantive comments below regarding the Senior Executive Service and the role of career senior executives in policy-related processes.

As context for impact of the protections that OPM’s proposed rule offers, SEA interprets the OPM proposed rule’s definition of “policy determining, making, and advocating” positions as only applying to political appointments and schedule C hires – and that civil service officials fall outside this definition, and thus should maintain civil service protections. OPM cites as a basis for this several statutes that use similar language.

SEA notes that this definition is inconsistent with how many senior career officials in agencies operate. As noted above, many career staff support the policy making process, including support for decisions that could be categorized as consistent with policy work. There could be negative impacts for agency officials supporting government missions and programs if future political appointees were to cite the regulation to limit to the role of career civil servants in providing expertise and experience for the policy development process. This could result in additional reviews by political appointees for actions that have long been carried out by agency staff, and contrary to the intent of the rule may result in an increase in political considerations for non-political “policy” analysis and support.

¹ *How Trump could reimpose "Schedule F" in 2025*, Axios (July 23, 2022)
<https://www.axios.com/2022/07/22/trump-presidency-schedule-f-federal-employees>

One way to address this concern would be to define “policy determining, making, and advocating” as covering issues that rise to a level needing decisions by Presidential appointees. The rule could then explain that many career officials support the policy making process, and that the rule is not intended to shift agency practices regarding the level of decision-making; a definition of “policy supporting” could potentially help to further clarify this distinction.

Another area for OPM to consider is how to address the “or” within both phrases: “confidential, policy-determining, policy-making, or policy-advocating” and “confidential or policy-determining.” Are political appointees responsible for final policy-determining, whereas career officials may be advocating? Is there an appropriate way to parse the terms, or are they truly interchangeable? Clarity here will also address the issue of how Schedule F could be used to reclassify 50,000 or more employees, and how to protect against inappropriate rescoping of work done by career officials (SES and otherwise) who support the policy process relative to politically appointed policy decisionmakers.

Amending 5 CFR part 302 – SEA supports OPM’s proposal to provide and clarify additional procedures and rights that apply when moving positions from the competitive service to the excepted service, or from one excepted service schedule to another. SEA similarly supports OPM’s proposed amendment to 5 CFR part 212 (Competitive Service and Competitive Status).

Specific Comments and Feedback Regarding the SES

Members of the SES, most of whom are career civil servants, are the critical link between the President’s senior political appointees and the rest of the Federal workforce. Congress created the SES for the express purpose of “...ensur[ing] that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”

While presenting a plan to overhaul the civil service, to Congress in March 1978, President Jimmy Carter argued, “A critical factor in determining whether Federal programs succeed or fail is the ability of the senior managers who run them.”² But prior to establishing the SES, then-Chairman of the Civil Service Commission Dr. Alan “Scotty” Campbell, observed, “We could see the dysfunctional effects of the career/noncareer interface.”³ While career civil servants focused on technical programmatic details, political appointees focused on achieving political priorities and using executive skills to run the agencies. The differing objectives bred tension. In part to address this dichotomy, the President proposed a new Senior Executive Service, “A highly qualified corps of top managers with strong incentives and opportunities to improve the management of the Federal government.”⁴

Initial career appointments to the SES are based on merit competition. Federal law requires agencies to establish Executive Resources Boards (ERBs) to oversee and participate in the merit

² President Jimmy Carter, Federal Civil Service Reform Message to the Congress (March 2, 1978) (available through The American Presidency Project).

³ Maeve P. Carey, CONGR. RSCH. SERV., R41801, *The Senior Executive Service: Background and Options for Reform* 4 (2012).

⁴ President Carter, *supra* note 2.

staffing process.⁵ Generally, the process includes widespread public notification of the job announcement, where diverse populations are engaged in the recruitment phase and rating and ranking of applicants by a panel with in-depth knowledge of the job's technical requirements.

While job-specific qualifications are important, the keystone of the SES is executive leadership. Candidates for SES career positions must exhibit professional integrity, broad perspectives, and commitment to the highest ideals of public service. OPM administers independent Qualification Review Boards (QRBs) consisting of senior executive service members who assess the executive core qualifications of SES candidates. All SES candidates must have their executive qualifications certified by an independent QRB before being appointed as career members of the SES. This independent and objective review ensures that the Government is hiring executives with the qualifications needed in today's environment, especially the ability to lead in times of change.

OPM's proposal provides little detail about the impact and coverage of this proposed rule on the career Senior Executive Service (SES). Although the administration that created Schedule F said in a fact sheet that it did not apply to the SES,⁶ SEA found that to be unclear. It is often hard to distinguish the role career senior executives play as leaders in federal agencies from their support for policy-related activities. Indeed, Congress defined one of the key functional criteria for the SES as "exercises important policy-making, policy-determining, or other executive functions."⁷ Many SES are engaged in activities that the Schedule F order sought to increase political accountability over, and thus SEA recommends that OPM's final rule strengthen this critical role that career executives play in supporting political cadres of government.

According to OPM's SES Desk Guide, last updated in in December 2020, there are five elements of functional criteria to determine what roles should be classified as SES level.⁸

"Functional criteria. A position meets the SES functional criteria if its incumbent engages in any of the following activities:

- directs the work of an organizational unit;
- is held accountable for the success of one or more specific programs or projects;
- monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;
- supervises the work of employees (other than personal assistants); or
- ***otherwise exercises important policy-making, policy-determining, or other executive functions.*** [emphasis added]

OPM's SES Desk Guide provides further guidance and clarity on classification of executive level roles. Several of the provisions included in OPM's SES Desk Guide make clear that SESers jobs support policy, including the following:

⁵ 5 U.S.C. 3393(b).

⁶ *President Donald J. Trump Is Taking Action to Promote Good Governance and Accountability Within the Federal Workforce*, White House (October 21, 2020).

⁷ 5 U.S.C. 3132(a)(2).

⁸ *OPM Senior Executive Service Desk Guide*, Office of Personnel Manager (December 2020).

- “Directing the work of an organizational unit includes the responsibility to— assess **policy**, program, and project feasibility;” [emphasis added]
- “A position with **policy-making or policy-determining functions** [emphasis from original OPM document] would be expected to include responsibility for:
 - reviewing staff recommendations of policies developed to affect the organization’s mission;
 - considering political, social, economic, technical, and administrative factors with potential impact on the recommended policies; and
 - approving the policies or formally recommending action to the approving official.”

As stated in 5 U.S.C. 3131, “It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”

The law further stipulates several criteria governing the administration of the SES as a third personnel service, the most pertinent for this regulatory proposal including:

- 5 U.S.C. 3131(7) – protect senior executives from arbitrary or capricious actions;
- 5 U.S.C. 3131(8) – provide for program continuity and **policy advocacy** in the management of public programs; [emphasis added]
- 5 U.S.C. 3131(9) – maintain a merit personnel system free of prohibited personnel practices;
- 5 U.S.C. 3131(13) – provide for an executive system which is guided by the public interest and **free from improper political interference**; [emphasis added]

Today, the federal government employs nearly 10,000 members of the SES, the vast majority of whom are career federal executives. There are “two types of positions and four types of appointments in the SES.”⁹

Career Reserved positions are those which, as defined in law, are *“to ensure impartiality, or public’s confidence of impartiality of government.”* These positions can only be filled by career appointees. [emphasis added]

General positions may be filled by any type of SES appointee – career, noncareer, limited term or limited emergency.

Career appointments may be to a General or Career Reserved position; rights of the individual are the same in either case. Incumbents are selected by agency merit staffing process and must have their executive qualifications approved by a Qualifications Review Board (QRB) convened by OPM.

Noncareer appointments are approved by OPM on a case-by-case basis and the appointment authority reverts to OPM when the noncareer appointee leaves the position. Appointments may be made only to General positions and cannot exceed 25% of the agency’s SES position allocation. Governmentwide, only 10% of SES positions may be filled by noncareer appointees.

A **Limited Term appointment** may be made for up to 3 years, is nonrenewable and must be to an SES General position which will expire because of the nature of the work (e.g., a special project).

⁹ *Senior Executive Service Overview & History*, Office of Personnel Management, <https://www.opm.gov/policy-data-oversight/senior-executive-service/overview-history/>.

A **Limited Emergency appointment** is also a nonrenewable appointment, may be for up to 18 months, and must be to an SES General position established to meet a bona-fide, unanticipated, urgent need.

The Federal Employees Pay Comparability Act of 1990 (FEPCA) established a pay system for certain senior-level positions (Scientific and Professional (ST) and Senior Level (SL)) classified above GS-15 in SES agencies based upon non-executive work, as well as some executive and non-executive positions classified above GS-15 in agencies not subject to the SES.¹⁰ All ST senior-level positions are in the competitive service.¹¹ SL positions are generally in the competitive service but may also be made through appointment in the excepted service. SEA recommends that OPM also clarify the application of this proposed rule to SL/ST employees.

In sum, SEA recommends that OPM address how OPM's proposed amendments to 5 CFR Part 210 (Basic Concepts and Definitions (General)) interact with these statutes and regulations governing the SES and other senior career leaders, which make clear that career SES are involved in many policy-related activities, explicitly including support for policy advocacy. Such a clarification should reinforce Congress' intent that the government maintain a career executive leadership cadre "to ensure impartiality, or public's confidence of impartiality of government."

Also, SEA notes that the Partnership for Public Service has provided additional comment on the role of SES, and supports the Partnership's perspective.

Additional Considerations for OPM

SEA believes there are additional critical actions which OPM can take to strengthen civil service protections and merit system principles in support of the goals of the proposed rule. For examples, finalizing regulations to implement the Administrative Leave Act of 2016¹² should be a top priority. These and other actions from OPM to strengthen accountability for the civil service can reduce potential future calls for increasing politicization of the civil service.

Thank you for the opportunity to submit comments on this proposed rule.

Sincerely,



Marcus L. Hill
President

¹⁰ 5 U.S.C. 5376.

¹¹ 5 U.S.C. 3104.

¹² Pub. L. 114-328, div. A, title XI, §1138(c)(1), Dec. 23, 2016, 130 Stat. 2461.