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Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415
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Re: "Improving Performance, Accountability and Responsiveness in the Civil Service,"
Proposed Rule, 90 Fed. Reg. 17182, Docket ID: OPM-2025-0004

Dear Office of Personnel Management:

Public Employees for Environmental Responsibility (PEER) submits these comments in opposition to the Office of Personnel Management's (OPM) Proposed Rule "Improving Performance, Accountability and Responsiveness in the Civil Service." PEER is a nonprofit, non-partisan organization incorporated in the District of Columbia and headquartered in Silver Spring, Maryland. PEER provides direct services to environmental and public health professionals, land managers, scientists, enforcement officers, and other civil servants dedicated to upholding environmental laws and values. PEER provides pro bono legal services to current and former public employees who hold the government accountable to environmental ethics, compliance with environmental laws, and scientific integrity standards. PEER represents and defends federal whistleblowers, investigates and exposes improper or illegal government actions, and works to improve laws and regulations impacting PEER's clients.

PEER urges OPM to respond to the following numbered comments:

1. **Unacceptable "at will" category of federal employees leading to cronyism and corruption.** The Proposed Rule would create an unacceptable new federal employment category, Schedule Policy/Career ("P/C"), that would strip protections from tens of thousands of civil servants, making them "at-will" employees equivalent to political appointees. It violates the letter and spirit of the laws that created the professional, non-partisan civil service that has served the nation well during times of war and societal turbulence, as well as during less stressful periods. President Trump's proposal would return us to the 19th Century concept of patronage in a "spoils system," under which each new elected President can sweep out the vast bulk of professional civil servants and give their positions out as favors, based on his or her whim, such as nepotism and cronyism, rather than on merit. This is a formula for corruption; it also is unlawful under the Civil

Service Reform Act of 1978 and exceeds the President's authority. It will lead to the incredibly destructive loss (via firings and premature resignations) of experienced Federal civil servants, and the replacement of these employees with under-qualified people selected to follow the wishes of the President. This outcome is reflected in the OPM Memorandum/directive dated May 29, 2025, entitled "Merit Hiring Plan."[1] At page 10, it requires essay question responses for federal job applicants, including a response to the following question: "How would you help advance the President's Executive Orders and policy priorities in this role? Identify one or two relevant Executive Orders or policy initiatives that are significant to you, and explain how you would help implement them if hired." This type of questioning is a recipe for sycophancy, not merit.

2. **Poorly-performing Federal government.** Schedule P/C, as described in the Proposed Rule and OPM's directives related to the schedule and rule, threaten a rapid descent to a poorly performing Federal government reminiscent of the late 1800s, during which Americans got so broadly disgusted that they worked in a bipartisan fashion to create the professional civil service. Over decades, merit-based selection and retention of employees have produced a stable and successful civil service that effectively carries out the ordinary and continuous work of the federal government and effectuates the President's policies and Congress' programs regardless of political party. To ensure accountability to the President, new administrations appoint approximately 4,000 noncareer employees to direct their agendas' implementation. These appointees direct and work in concert with career civil servants, whose expertise, experience, and skills allow them to effectively carry out policy direction while completing the nonpartisan work of government. The new Schedule P/C will lead to vast numbers of terminations and early retirements of career employees. Without these talented career employees' expertise, new administrations will be significantly limited in their ability to implement their agendas, and the operations of the federal government—everything from Social Security to National Parks—would grind to a much slower pace. And the government's vast investment in training such specialists will be squandered, especially since no similarly qualified replacements are likely to be readily available or motivated to work for a more capricious and much less secure employer.

3. **Increased likelihood of retaliation leading to poor results.** Statutory adverse action rights—the rights of civil servants to challenge removals from service, suspensions, or demotions—allow civil servants to serve the nation without fear of political reprisal and agencies to rely on their continued service. This is essential to the effective functioning of agencies; without adverse action protections, civil servants like scientists, forecasters, and statisticians, who are not in policy roles will be potentially transferred into such positions where they very likely will credibly fear retaliation if they deliver potentially bad news, whether it be agricultural production statistics, severe weather forecasts, economic trends, or the myriad other types of information that Federal civil servants now deliver. This will leave the nation unprepared to respond and adapt to foreseeable unfavorable events.

4. **Fictional need for accountability.** A key premise of the Proposed Rule is that, under the first Trump Administration, there were cases of civil servants refusing to carry out or

[1] https://www.opm.gov/policy-data-oversight/latest-memos/merit-hiring-plan/.

otherwise subverting President Trump's orders. In fact, there is very little evidence to show that this was the case for professional civil servants, although there was documented subversion by his own appointees and White House staff, particularly in the matters that led up to his two impeachments by the U.S. House of Representatives. This subversion was related to patently unlawful actions frequently proposed by President Trump. But, the vast majority of the professional civil service continued, as it has over multiple presidential changeovers, to implement the Federal laws as directed by their supervisors. Numerous internal and external oversight avenues exist already to ensure that Federal employees comply with the laws that they are implementing. There is not a solid showing in the Proposed Rule of the need for enhanced "accountability" to the President - that is largely a paranoid fiction aimed to serve President Trump's clear desire for greater power and less accountability for his own misdeeds.

5. **Whistleblowing and the public interest will suffer.** The lack of whistleblower protections for those moved into Schedule P/C would be a blow to PEER because we represent many of them. The uprooting of waste, fraud, and abuse, as well as prohibited personnel practices being carried out within agencies, which employee whistleblowing can forestall, would suffer dramatically. The public interest would plainly suffer from that outcome, as would PEER and its core mission. Numerous government contacts have already come to PEER expressing concern about the whistleblowing-harming aspects of Schedule P/C and other aspects of it.

6. **Hidden information.** The Proposed Rule is fatally cloaked in ambiguity. And the agencies to which the Proposed Rule would apply have been unwilling to disclose even roughly how many of their staff are likely to be moved to the new Schedule. This fact has proved unacceptable to key members of Congress, as indicated in the quote from an article about Schedule P/C. [2]

> *The agency's reluctance to share information is raising hackles on Capitol Hill. At a Wednesday hearing of the Senate Interior-Environment Appropriations Subcommittee, Chair Lisa Murkowski (R-Alaska) chided EPA Administrator Lee Zeldin to be more forthcoming.*
>
> > *"When we see implementation of significant changes without working or seriously communicating with us, your partners in Congress," Murkowski said, "it just makes it harder for us to do the job of supporting your mission."*

The agencies' unwillingness to share information via responses to Freedom of Information Act requests or Congressional inquiries indicates that what OPM and OMB are proposing is backfiring as far as support from Congress and others.

[2] Reilly, S. and K. Bogardus, 2025. EPA withholds records on jobs losing civil service safeguards. *Greenwire,* May 16. Available at: https://subscriber.politicopro.com/article/eenews/2025/05/16/epa-withholds-records-on-jobs-losing-civil-service-safeguards-00353400 .

7. **Accounting for legal vulnerability.** Additionally, it is certain that there will be extensive litigation challenging the legality of the final new scheme, if it is similar to the Proposed Rule. OPM should take into account the extensive internal agency chaos that will be generated during the pendency of the litigation. OPM can glean insights from the ongoing litigation over probationary employee firings and the Reduction in Force implementations across agencies, both of which have led to a spate of lawsuits, which have resulted in thousands of Court or MSPB-ordered reinstatements. Several of those cases still remain unresolved, many months after initial filing. It is inconsistent with this Administration's goal of efficient running of the Federal government to put out proposals with such deep legal defects. Indeed, the Proposed Rule specifically acknowledges: "*extended litigation do[es] not promote the efficiency of the federal service*." Page17206. No Final Schedule P/C Rule should issue at all, but if one does issue, it should assess the negative impact that its legal vulnerabilities will have on government efficiency and on the federal workforce. The final rule will be subject to serious litigation, and the legal issues that arise will not be resolved for many months or even years to come. In the meantime, agencies and their workers will be left in limbo.

8. **Lesson from NOAA's mistake.** Internal fear and confusion already reigned in NOAA in April of this year when there was a mistaken - and later withdrawn - announcement from NOAA leadership indicating that the new Schedule would be implemented there soon.[3] Several staffers contacted PEER seeking advice, indicating that they were, for example, in telecommunications IT and satellite technology positions that did not touch policy, yet they would be moved to the new Schedule. The announcement threw them - and many other employees - into unnecessary dismay and caused major distractions in their work to cope with these rumors mistakenly caused by NOAA leadership. OPM should assess the fact that the same problems will arise through multiple agencies at much greater scales if the Proposed Rule moves forward in, or resembling, its current form. The NOAA incident provides a "lesson learned" on the danger of overzealously moving civil servants to a new classification, but the Proposed Rule gives no indication that OPM has learned the lesson.

9. **"Adverse Action" under Schedule P/C**. The Proposed Rule fails to adequately address whether movement of individual employees into Schedule P/C could be appealed under 5 USC Chapter 75 by them to the MSPB as an "adverse action." This lack of legal analysis leaves a gaping hole in the effect of Schedule P/C. Such movements should be made appealable.

10. **Fatal vagueness**. The Proposed Rule's description at page 17188 of positions likely to be moved to Schedule P/C is the crux of the inadequacy of the Proposed Rule. The descriptions are so vague and broad that they essentially give the Trump Administration and future administrations *carte blanche* to reclassify vast numbers of civil servants as

[3] Katz, E., and E. Wagner. 2025. Some agencies are notifying employees of their 'Schedule F' status. *Government Executive*. Apr. 3, Available at: https://www.govexec.com/management/2025/04/some-agencies-are-notifying-employees-their-schedule-f-status/404271/ .

Schedule P/C and do so for employees who, for the past decades and across many administrations, were not considered to be in policy positions. For example, the Proposed Rule states that a position should be reclassified to the new Schedule if it involves: "directing the work of an organizational unit; being held accountable for the success of one or more specific programs or projects, or monitoring progress towards organization goals." Those are impossibly vague criteria that could take into account virtually anyone who is not a clerical or other low-level employee. Estimates vary, but it appears that roughly 50,000 are likely to be designated as "at will." Far greater detail is necessary from OPM to determine which positions would be switched to Schedule P/C.

11. **Harm to Federal grantmaking.** Also at page 17188, the Proposed Rule states that agency employees who draft grant announcements or evaluate grant applications should be moved to Schedule P/C. It incorrectly states: "Grantmaking is an important form of policy making." Many experts familiar with NSF, NIH, and other grants are deeply worried that removing the professional nature of grantmaking and turning it into a task for policy staff would severely undercut the likelihood of grants of all kinds being made on scientific and other appropriate considerations rather than on political concerns. Removing merit system protections for grantmaking staff who are experts in their fields and placing them into vulnerable positions would be incredibly harmful. It would contribute to the ongoing major decline in America's world-leading scientific programs funded by Federal grants. Indeed, that is already underway with the vast cuts to scientific grants and others across the board by this Administration. Politicizing the grantmaking positions would worsen that decline.

12. **More direct solutions.** The research cited at pages 17189-90 on the difficulties of the merit system implementation does not mean that merit protections should be removed for a vast new range of civil servants. There are other, better solutions to address this stated problem. Those solutions include improved hiring and performance review systems, as well as better-funded, faster, adjudicatory processes in the MSPB and other civil service forums. And rather than rulemaking, as OPM proposes here, the Administration's first required step should be to go to Congress on the "major question" of how to improve performance, accountability, and responsiveness within the CSRA framework. The Proposed Rule, at page 17215, only superficially answers how it might comply with the Major Questions Doctrine announced by the Supreme Court in *West Virginia* v. *Environmental Protection Agency,* 597 U.S. 697 (2022), which tells agencies they need ''clear congressional authorization'' before asserting novel sweeping powers. That is, agency rulemaking cannot re-interpret statutes to greatly broaden their prior meaning beyond what Congress intended. Yet, OPM's Proposed Rule fails the test of showing clear congressional authorization to fundamentally re-define and expand the class of federal employees that are not entitled to long-established merit-system protections that both Congress and all prior administrations (except for Trump 1) have supported.

13. **Harm to Administrative Judges.** It should be obvious that allowing the President to appoint and to fire all federal Administrative Judges "at will" would mean that they will not rule against his administration, because doing so would foreseeably lead to their own removal. Adjudication has been recognized as distinct from policymaking over hundreds

of years of Western legal tradition. Yet at page 17213, the Proposed Rule indicates that "*over 700 non-ALJ adjudicators"* could be moved to Schedule P/C, although OPM's analysis on that page is poorly written, opaque, and confusing. The Final Rule must address the distinction between adjudication and policymaking and grapple with the dangers of having all Administrative Judges becoming "at will." Were that the case, then the U.S. administrative law decisionmaking system would begin to resemble the Russian system, in which such decisions toe the line of the administration's policy positions. OPM should address how that would, in effect, be a terribly undesirable outcome from the perspective of impartial justice.

14. **Unconvincing anecdotes on uncooperative staff.** The anecdotes on pages 17192-93 about past uncooperative Federal staffers are classic "cherry picking" They simply represent a few anonymous and sensationalized press accounts. The Proposed Rule provides no sound empirical basis demonstrating systemic refusal of professional staff to carry out lawful directions. There also is a fundamental inconsistency in this line of argument because much of the Proposed Rule is premised on the idea that Federal employees are largely incompetent and ineffective, but then it also claims that the employees were competent and effective in subverting the first Trump Administration as justification for the Proposed Rule. OPM cannot have it both ways.

15. **False allegations of corruption.** At page 17203, OPM's fundamental justification for its sweeping Proposed Rule is that the rule "will enable [the President] to expeditiously remove **insubordinate**, **corrupt** or **underperforming** employees." The Proposed Rule does not give a real example of a corrupt Federal employee, at least as corruption is normally understood. The Proposed Rule uses the terms "corrupt" or "corruption" 18 times. But the only example it gives of corruption is from an FDIC investigation that found extensive misconduct, but not corruption. At page 17190, the Proposed Rule refers to a 2024 law firm-prepared report titled *Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation*.[4] That report refers to rampant misconduct, such as supervisors obtaining sexual favors through pressuring subordinate employees. However, the 175-plus page report does not even once use the words "corrupt" or "corruption". **Thus, OPM invented its allegation of corruption at FDIC in order to support its flawed Proposed Rule.** In any Final Rule, OPM is duty-bound to withdraw its essentially defamatory statement about FDIC and to stop justifying Schedule P/C on the basis of corralling "corrupt" Federal employees when it has pointed to none. There are several effective means to investigate and criminally punish truly corrupt employees, such as through Inspectors General, local U.S. Attorneys, and the Justice Department. It is entirely inappropriate to misleadingly assert that the merit system needs to be drastically cut back to tackle the extremely few cases of actual corruption when they are investigated through other law enforcement avenues in any event.

16. **Inadequate analysis.** The Proposed Rule may very well be right that the merit and performance evaluation systems can be improved in certain ways, but that fact does not

[4] Available at: Report for the Special Review Committee of the Board of Directors of the Federal Deposit Insurance Corporation.

justify moving tens of thousands of people from civil service protected positions into nakedly vulnerable positions serving at the whim of President Trump. A Final Rule would have to give a much more nuanced and well-supported analysis of the so-called problem of "insubordinate, corrupt or underperforming employees" than the cursory, facile analysis in the Proposed Rule.

17. **Unconstitutional and illegal actions.** Remarkably, the anecdotes about Federal staffers' "insubordination" fails to account for the numerous illegal proposals of both the first and second Trump Administrations, and the dilemmas presented to professional staff who are sworn to uphold the Constitution yet were regularly directed by the President and his political appointees to undertake activities that were contrary to the Constitution and/or statutory law. The best illustration of this dilemma: the vast number of times in which the President has been enjoined by Federal courts to rein in his blatantly illegal activities. The Final Rule should acknowledge that it is acceptable for Federal staffers to advise the President to change course when the President proposes plainly unconstitutional or illegal measures. The whistleblower protections that would be removed by the Proposed Rule currently give employees protection from retaliation for refusing to obey illegal orders. That flaw in the proposal must be remedied.

Thank you for your attention to each of the above comments.

Sincerely,

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