

To: Office of Personnel Management

Re: Docket ID: OPM-2025-0004, RIN: 3206-AO80

Title: *Improving Performance, Accountability and Responsiveness in the Civil Service*

Dear Director Ahuja:

I submit this comment in strong opposition to the above-referenced proposed rule. The proposal to establish a new “Schedule Policy/Career” in the excepted service violates multiple provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., and fails to satisfy the minimum standards for lawful rulemaking. The APA imposes essential procedural and substantive constraints on federal agencies, and this proposal falls short on both fronts.

1. Failure to Provide a Reasoned Explanation for Policy Reversal

Under *FCC v. Fox Television Stations*, 556 U.S. 502 (2009), an agency must provide a “reasoned explanation” when reversing existing policy, especially when the prior policy relied on factual findings or legal interpretations. The April 2024 final rule concluded—based on record evidence—that classifying policy roles as at-will would undermine recruitment, retention, and the apolitical nature of the civil service. It affirmed the importance of preserving Title 5 protections for all career employees.

In contrast, the current proposal simply asserts a preference for increased accountability and dismisses prior findings as less aligned with Executive Order 14171. This reversal lacks:

- New empirical evidence or data to support the change;
- A meaningful engagement with the rationale behind the prior rule;
- An acknowledgment of the serious reliance interests of employees affected by the 2024 rule.

The Supreme Court in *Fox* emphasized that when an agency changes course, it must show that the new policy is permissible, that there are good reasons for it, and that the agency believes it to be better. That standard has not been met here.

2. Arbitrary and Capricious Decision making (5 U.S.C. § 706(2)(A))

An agency action is arbitrary and capricious if it:

- Relies on factors which Congress did not intend it to consider,
- Fails to consider an important aspect of the problem,
- Offers an explanation that runs counter to the evidence before the agency, or
- Is so implausible that it could not be ascribed to a difference in view or agency expertise.

The proposed rule suffers from several of these flaws:

- It fails to define “policy-influencing” positions with any precision, leaving excessive discretion to agencies and the President to remove protections from an undefined group of employees.
- It does not analyze the operational, legal, or constitutional consequences of eliminating procedural protections from a broad segment of the workforce.
- It offers only speculative benefits while dismissing potential harms—such as chilled speech, politicization of expert roles, and decreased retention—without meaningful analysis.
- It treats career civil servants as at-will employees without assessing how that decision aligns with merit system principles codified in 5 U.S.C. § 2301.

This shallow and conclusory reasoning renders the rule vulnerable to invalidation under APA standards.

3. Failure to Provide a Sufficient Opportunity for Public Comment (5 U.S.C. § 553)

The APA requires agencies to provide interested parties with a meaningful opportunity to comment on proposed rules. Executive Order 12866 further recommends a 60-day comment period for significant regulatory actions to ensure robust public participation.

Despite this being a significant rule with constitutional and workforce-wide implications, OPM has only offered a 30-day comment period. No justification is provided for this abbreviated timeline, even though the rule reverses a final policy adopted just one year ago and affects due process rights for tens of thousands of federal employees.

The limited timeframe has impaired the ability of stakeholders—including employees, unions, legal experts, and agency officials—to fully evaluate the proposal’s impact and respond with detailed comments and evidence.

4. Improper Delegation of Regulatory Authority to the President

The APA requires that rules be issued by the agency with authority under law—not unilaterally by the President. This rule proposes that the President—not OPM—will determine which positions are placed in Schedule Policy/Career via executive order.

This is not a lawful delegation of agency rulemaking. The President is not an agency under the APA and is not authorized to make final, binding determinations in place of the agency in the absence of statutory authorization. By outsourcing key classification decisions to the President,

OPM improperly circumvents the APA's procedural safeguards and insulates decisions from judicial review.

Conclusion

This proposed rule violates the APA by:

- Failing to provide a reasoned explanation for reversing prior policy;
- Engaging in arbitrary and capricious decision-making;
- Curtailing the public's opportunity to participate in the rulemaking process;
- Improperly transferring rulemaking authority to the President.

I respectfully urge OPM to withdraw this proposal and reconsider any changes to the civil service system through lawful, transparent, and evidence-based processes in accordance with the APA.