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EMPLOYMENT IN THE EXCEPTED SERVICE

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DAO 202-302

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SECTION 1. PURPOSE.

.01 This Order establishes policies and procedures of the Department of Commerce (the Department) on employment in positions excepted from the competitive service as identified in 5 Code of Federal Regulations (CFR), Parts 213 and 302.

.02 This revision updates Department policies for compliance with current rules and regulations, and removes references to the obsolete Federal Personnel Manual. In addition, the revision adds provisions for the Schedule D appointing authority; updates the Equal Opportunity Employment statement; adds policy for applying veterans' preference; adds policy for priority reemployment candidates; changes the trial period for excepted service positions from one (1) year to two (2) years, except when regulations require a shorter period; and requires that individuals appointed for the first time on a non-temporary basis to a supervisory or managerial position in the excepted service serve a supervisory or managerial probationary period.

SECTION 2. COVERAGE.

.01 This policy covers positions in the Department excluded from the competitive service by statute, Executive order, or Office of Personnel Management (OPM) action. OPM exclusions are covered under Civil Service Rule VI (5 CFR, Part 6) and are divided into Schedules A, B, C, and D.

.02 Excepted service positions are defined as those civil service positions that are not in the competitive service or the Senior Executive Service (SES) (5 United States Code (U.S.C.) 2103). An excepted service position is specifically excepted from the competitive service by or pursuant to statute, by the President, or by OPM, and therefore may be filled without competitive examining procedures. An excepted position may or may not be covered by the Classification Act and other civil service laws. Some positions, such as attorney positions, are always in the excepted service regardless of the incumbent. Other positions are in the excepted service only when filled by individuals who are given excepted service appointments, such as persons with disabilities under 5 CFR 213.3102 (u), and non-citizens filled under 5 CFR 213.3102(bb).

a. Schedule A. Schedule A appointments are authorized by OPM when competitive examining procedures are not practicable and when the position is not of a confidential or policy-determining character, and is not in the SES (5 CFR 213.3101). Examples of such positions are: attorneys; law clerk trainees; interviewers and enumerators in the Census Bureau field service; international trade advisors in the International Trade Administration; Wage Mariners on vessels of the National Oceanic and Atmospheric Administration; certain positions at isolated localities; and all others listed under 5 CFR 213.3102.

b. Schedule B. Schedule B appointments are authorized by OPM, subject to the OPM' "General Schedule Qualification Standards," for the occupation and grade/band level when it is determined that competitive examining procedures are not practicable and when the position is not of a confidential or policy-determining character and is not in the SES (5 CFR 213.3201). Examples of such positions are: Community Service Specialists in the Census Bureau; and Telecommunications Policy Analysts in the National Telecommunications and Information Administration.

c. Schedule C. Schedule C appointments require advance approval from OPM and are of a policy-determining character or involve a close and confidential working relationship with the heads or deputy heads of bureaus/operating units and similar key appointed officials, including some confidential or special assistants, and secretaries. Temporary transitional Schedule C appointments can be made for a period of one hundred twenty (120) days with one extension of an additional one hundred twenty (120) days, during the one-year (1) period immediately following a change in presidential administration or when a new department or agency head enters on duty. OPM must be notified within five (5) working days that an appointment has been made to a transitional Schedule C position and notified within three (3) working days when the position has been vacated (5 CFR 213.3302).

d. Schedule D. Schedule D appointments are authorized by OPM, subject to the basic qualification standards established by OPM for the occupation and grade/band level. This appointment is for positions other than those of a confidential or policy determining character for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs (5 CFR 213.3401). The Pathways Programs (Presidential Management Fellows, Recent Graduates, and Student Internship) are under this authority.

e. Expert and Consultant Appointments. Expert and consultant appointments under 5 U.S.C. 3109 are excepted from competitive examination, position classification, and the General Schedule pay rates, 5 CFR, Part 304.

SECTION 3. EXCLUSIONS.

.01 All positions within the Office of Inspector General (OIG) are excluded from this Order as the OIG does not derive its human resources management authority from the Department (see Department Administrative Order 202-250, "Delegations of Authority for Human Resources Management"). Pursuant to Section 6(a)(7) of the Inspector General Act of 1978, as amended, 5 U.S.C. App., the Inspector General is entitled to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the OIG subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such Title relating to classification and General Schedule Pay rates.

.02 All positions within the Foreign Service and the SES (both excepted from the competitive service by statute) are excluded from this Order, as policies and procedures for these positions are set forth in other directives. The Foreign Service is covered in Department Administrative Order (DAO) 202-900, "Foreign Service Personnel Management," and in the Foreign Affairs Manual issued by the Department of State. The SES is covered in the Department's "Executive Personnel Policy Manual."

SECTION 4. GENERAL PROVISIONS.

.01 Equal Employment Opportunity.

The Department's policy is to provide equal opportunity in employment for all persons, without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age, disability, genetic information, marital status, political affiliation, sexual orientation, labor organization affiliation or non-affiliation, status of a parent, any other factor(s) stated in the Secretary's Policy Statement on Equal Employment Opportunity, or any other non-merit based factor. This policy applies to the excepted service as it does to the competitive service.

.02 Appointing Authorities.

a. Requests to establish, modify, extend, or abolish Schedule A, B, C, and D appointing authorities must be made to OPM through the Department's Director for Human Resources Management (Director, OHRM). OPM requirements are found in 5 CFR, Part 213.

b. Civil Service Rule VI (5 CFR 6.1(c); 6.6), requires OPM to publish a notice of its decision granting authority to make appointments to an excepted position under the appropriate schedule in the Federal Register (i.e. all Schedule A, B, C, and D appointing authorities) or the revocation of an authority.

.03 Appointments.

Appointing authorities requiring prior approval from OPM are identified in the Federal Register. Departmental approvals are required as detailed in this Order. Appointing officers may make excepted service appointments without prior approval except as noted below; however, the Director, OHRM, or OPM may modify or set additional prior approval requirements at any time.

- a. Employment of attorney positions, with certain exceptions, and other positions involving the performance of a professional legal duty or necessitating professional legal training, require prior approval of the General Counsel. DAO 202-300, "Employment (General)" Section 7, discusses this requirement and provides general information and Department policies on the employment of individuals who perform professional legal duties.
- b. Employment of experts and consultants under 5 CFR, Part 304 requires prior approval of the Director, OHRM. When additional Departmental clearances are necessary, the Director, OHRM requests them.
- c. Positions on the staffs of temporary organizations such as temporary commissions, committees, boards, or other organizations under 5 CFR 213.3199 require prior approval of the Director, OHRM. Appointments under this authority are to positions at the GS-15 level and below or equivalent.
- d. All Schedule C appointments must have prior approval of OPM except when a position is filled by a temporary transitional Schedule C appointment under circumstances as described in section 2.02(c) of this Order. Requests for prior approval must be submitted to OPM through the Director, OHRM, and in association with the White House Liaison.
- e. OPM may authorize the filling of excepted positions under competitive procedures in particular situations and in the interest of the Department. Requests for such actions must be submitted to OPM through the Director, OHRM.

.04 Position Changes.

An excepted service employee may be promoted, demoted, or reassigned to another excepted position in the Department, subject to any applicable regulations or requirements of law. For each change, the conditions of the new appointing authority must be met.

.05 Movement Between the Competitive and Excepted Service.

a. An employee serving under a non-temporary appointment in the competitive service may not be moved to the excepted service unless the following conditions are met:

1. The employee has been informed in writing how his/her rights, tenure, and benefits are affected by the change; and
2. The employee submits a written signed statement indicating an understanding of the above and that he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service. The notice to the employee and his/her response may be on the same document. The acknowledgment statement must be maintained on the left side of the Official Personnel Folder (OPF).

b. Details.

1. Employees serving under Schedule A or B appointments may be detailed to a competitive service position, subject to OPM's general restrictions on details. The detail requires prior approval of the Director, OHRM. Guidance on details is provided in DAO 202-334, "Details."
 2. Employees serving under Schedule C or statutory appointing authorities may be similarly detailed with prior approval of the Director, OHRM, and in association with the White House Liaison.
- c. Noncompetitive Appointments. Under certain special authorities, excepted service employees may receive noncompetitive appointments to the competitive service as described in 5 CFR 213.

.06 Time-in-Grade and Time-in-Band.

a. Promotions to positions in the excepted service will be subject to the same time-in-grade and time-in-band restrictions as those that apply to the competitive service, except for positions specifically exempt from this requirement. Guidance on time-in-grade/band is provided in DAO 202-300, "Employment (General)."

b. Qualification standards for Wage Mariner positions may provide for separate time-in-grade requirements.

SECTION 5. ELIGIBILITY STANDARDS.

.01 Legal Requirements.

a. Unless specifically exempted by statute, Executive order, or OPM regulation, excepted service employees must meet the security, suitability, conduct, and citizenship requirements prescribed for Federal Government employment in general. The employees are also subject to the statutes on dual compensation.

.02 Citizenship.

a. The Department's general policy on employment of non-citizens is set forth in DAO 202-300, "Employment (General)," Section 6, and applies to both the competitive and excepted service.

b. The employment of non-citizens in the excepted service is also subject to Appropriations Act restrictions. Neither the Department nor OPM has authority to grant exceptions.

c. Upon OPM approval, a non-citizen hired in the absence of a qualified citizen may be given a Schedule A excepted service appointment authorized by 5 CFR 213.3102(bb). Requests must be submitted to OPM from the Servicing Human Resources Office/Enterprise Service Center (SHRO/ESC), through the Director, OHRM.

.03 Qualification Standards.

a. OPM sets qualification standards for Schedule B and Schedule D positions and certain categories of jobs. Standards for Schedule B positions are the same as those for the identical series and grades/bands in the competitive service.

b. Bureau/operating units may establish qualification standards in lieu of using OPM's "General Schedule Qualification Standards," upon approval by the SHRO/ESC. The standards must be based on bona fide occupational qualifications. Each standard must be established in writing and available for review by any interested party.

1. To the extent practicable, the standards should be the same as those for similar positions at the same level in the competitive service.

2. The SHRO/ESC for the bureau/operating unit is responsible for ensuring that each standard established conforms to the requirements of 5 CFR, Part 302. Any questions regarding consistency among the standards should be referred to the Director, OHRM.

3. The use of minimum educational requirements is permissible only when an appointing officer determines that the duties of a scientific, technical, or professional position cannot be performed by a person without that education. These should be consistent with similar requirements for positions in the competitive service.

4. Appointing officers may not set maximum age limits. If age is a bona fide occupational qualification for a particular position, OPM approval must be obtained through the Director, OHRM. Limitations exist on the authority to impose physical, height and weight, or minimum age requirements.

5. Qualification standards should specify the reasons for which applicants may be found unsuitable for appointment; 5 CFR 302.203 provides a partial list of disqualifying factors.

6. Qualification standards must include provisions for the waivers specified in 5 CFR 302.202.

.04 Veterans' Preference. In accordance with 5 CFR 302.101(a) and (c), the Department will follow the principle of veterans' preference as far as administratively feasible and, upon the request of a qualified and available preference eligible, shall furnish him/her with the reasons for his/her non-selection.

SECTION 6. ACCEPTING, RATING, AND ARRANGING APPLICATIONS.

.01 Appointing officers must establish written rules for the acceptance of applications. The rules, which are to be available for review by any interested party, must be applied uniformly to all qualified applicants. (5 CFR 302.301)

.02 The provisions of 5 CFR 302.302, 302.303, and 302.304 regarding examination, including consideration of preference eligibles; maintenance of employment lists; and order of selection are applicable for excepted service positions.

.03 Priority Reemployment Candidates. The Department will establish a priority reemployment list whenever any applicants rated eligible under 5 CFR 302.302 meet the conditions in 5 CFR 302.303(b)(1) through (b)(3). Candidates must be considered in accordance with 5 CFR 302.304(a) and the numbered provisions below.

a. Former employees of the Department who are preference eligibles, who have been furloughed or separated from a continuing appointment without delinquency or misconduct, and apply for reemployment. It is the Department's policy that candidates in this category are considered for positions only in the commuting area from which they were separated.

b. Former employees of the Department who are preference eligibles who, as the result of an appeal under 5 CFR, Part 752, are found by the Merit Systems Protection Board (Board) to have been unjustifiably dismissed from the Department, but who are not entitled to immediate restoration under the Board's decision. It is the Department's policy that candidates in this category are considered for positions only in the commuting area from which separated unless the Board's decision specifies a broader or different area.

c. Former employees of the Department who have been furloughed or separated due to compensable injury sustained under the provisions of 5 U.S.C., Chapter 81, subchapter I who are not entitled to immediate restoration, and who are eligible for priority consideration under this section. Candidates in this category are considered in the commuting area from which they last served and, if the Director, OHRM determines that an appropriate vacancy is unlikely to occur in that area during the candidate's period of reemployment priority, the candidate can be considered for appropriate positions in other locations.

d. Former employees of the Department who are not preference eligibles, who have been furloughed or involuntarily separated from a continuing appointment without delinquency or misconduct, and apply for reemployment. It is the Department's policy that candidates in this category are considered for positions only in the commuting area from which they were separated.

.04 Various classes of positions are exempt from the appointment procedures prescribed for the excepted service. A list of exempt positions is found in 5 CFR 302.101. However, OPM does require agencies to follow the principle of veterans' preference as far as administratively feasible in filling these positions.

.05 Applications for positions in the excepted service will be accepted, rated, and arranged according to 5 CFR, Part 302.

SECTION 7. TRIAL PERIODS.

.01 Department policy requires satisfactory completion of a two-year (2) trial period for employees in the excepted service, except for appointments where regulation requires a shorter period. The trial period has the same purpose as a probationary period in the competitive service, (i.e., management has a period to evaluate a new employee's performance and conduct and determine whether his/her continued employment is in the best interest of the Department) (see DAO 202-315, "Probationary and Trial Periods").

.02 In accordance with DAO 202-315, "Probationary and Trial Periods," Section 4.02b, individuals appointed for the first time on a non-temporary basis to a supervisory or managerial position, in the excepted service, must serve a supervisory or managerial probationary.

.03 The first level supervisor/manager must complete form CD-35, "Probationary or Trial Period Report," during the employee's last two (2) or three (3) months of the trial period and submit it to the SHRO/SSC. The completed form, for both the retention of and the non-retention of the employee, must be filed on the right side of the employee's OPF. Supervisors/managers who are considering recommending that an employee not be retained should promptly contact their SHRO/SSC at any time during the trial period for advice and guidance.

SECTION 8. EFFECT ON OTHER ORDERS.

This Order supersedes Department Administrative Order 202-302, dated December 31, 1986.

Signed by: Director for Human Resources Management and Chief Human Capital Officer

Approved by: Assistant Secretary for Administration

Office of Primary Interest: Office of Human Resources Management