



6325-39

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 337**

**RIN: 3206-AN65**

**Examining System**

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is issuing a proposed regulation to revise its direct-hire authority (DHA) regulations. The revision is necessary to implement Executive Order (EO) 13833 titled, “Enhancing the Effectiveness of Agency Chief Information Officers” which requires OPM to issue proposed regulations delegating to the head of a covered agency authority necessary to determine whether there is a severe shortage of candidates or a critical hiring need for information technology (IT) positions under certain conditions, sufficient to justify a DHA. The intended effect of this change is to enhance the Government’s ability to recruit needed IT professionals.

**DATES:** OPM must receive comments on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

• Mail: Ms. Kimberly A. Holden, Deputy Associate Director for Talent Acquisition and Workforce Shaping, U.S. Office of Personnel Management, Room 6500-AJ, 1900 E Street, NW, Washington, DC 20415-9700; e-mail at [employ@opm.gov](mailto:employ@opm.gov); or fax at (202) 606-4430.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Darlene Phelps at (202) 606-0960, by fax at (202) 606-4430, TDD at (202) 418-3134, or by e-mail at [Darlene.Phelps@opm.gov](mailto:Darlene.Phelps@opm.gov).

**SUPPLEMENTARY INFORMATION:** On May 15, 2018, the President signed EO 13833, titled, “Enhancing the Effectiveness of Agency Chief Information Officers” (83 FR 23345). The EO is aimed at modernizing the Federal Government’s information technology infrastructure and improving the delivery of digital services and the management, acquisition, and oversight of Federal IT. Section 9 of the EO directs OPM to propose regulations pursuant to which OPM may delegate to the heads of certain agencies (other than the Secretary of Defense) authority to determine, under regulations prescribed by OPM, whether a severe shortage of candidates (or, for the U.S. Department of Veterans Affairs (VA) a severe shortage of highly qualified candidates) or a critical hiring need exists for positions in the Information Technology Management (IT) Series, general schedule (GS)-2210 or equivalent, for purposes of an entitlement to a direct hire authority (DHA). The agencies covered by the EO are those listed in 31 U.S.C. 901(b), or independent regulatory agencies defined in 44 U.S.C. 3502(5).

OPM is proposing to amend its regulations to delegate to the heads of covered agencies the authority to determine whether a severe shortage of candidates (VA need only determine the

existence of a severe shortage of highly qualified candidates) or a critical hiring need exists for IT positions. The current rules do not provide for a delegation of authority in relation to direct hire authorities; only OPM may make these determinations. When determining the existence of a severe shortage of qualified candidates for IT positions, an agency exercising such a delegation would be required to justify its determination using the supporting evidence prescribed in section 337.204(b) of title 5, Code of Federal Regulations (CFR). When determining the presence of a critical hiring need, an agency exercising such a delegation would be required to justify its determination in accordance with the criteria prescribed in 5 CFR 337.205(b). OPM has further developed these criteria in Direct Hire templates available at <https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/templates.pdf>. Agency heads would be expected to make use of these templates in making their findings. The supporting evidence used for either determination would be required to be kept in a file for documentation and auditing purposes in accordance with 5 CFR 337.206.

Under the current DHA provisions at 5 USC 3304(a)(3) and 5 CFR part 337 subpart B, OPM determines the existence of a severe shortage of candidates or a critical hiring need and may grant DHA to one or more agencies pursuant to this determination. Thus OPM is responsible for making both a determination that the DHA is warranted and for granting the actual DHA. While EO 13833 authorizes OPM to submit a proposed regulation that would sever these actions for IT positions (in other words, permit the heads of agencies to make the determination, but preserve OPM's responsibility for granting DHA based on an agency's determination), OPM is choosing to delegate to agency heads its authority to actually issue the DHA under 5 U.S.C. 1104(a)(2) in the circumstances specified. OPM will, however, maintain oversight of the use of this authority as provided in 5 U.S.C. 1104(b). Therefore, after the

determination is made, the deciding agency is required to provide the determination and a description of the supporting evidence to OPM. OPM may request access to the underlying documentation at any time, and may require corrective action in accordance with 5 U.S.C. 1104(c) and section 337.206 of the regulation.

The proposed rules contemplate that, after an agency head has authorized DHA under these rules, the agency could use this authority to hire needed individuals for initial appointments lasting longer than 1 year, but not to exceed 4 years. The hiring agency, at its discretion, could extend the initial appointment up to an additional 4 years. No individual hired under these provisions could serve in excess of 8 years at the same agency. No individual hired under these provisions could be transferred to positions that are not IT positions. An agency would be required to use this authority in accordance with the provisions of 5 CFR part 337 subpart B and in the same manner it would for filling other positions under DHA. Generally speaking, this would entail providing applicants with public notice consistent with the provisions of 5 CFR 337.203, assessing applicants to determine whether they have the level of proficiency required to perform the duties of the position being filled, and giving selection priority to qualified applicants eligible under the agency's Reemployment Priority List (RPL), Career Transition Assistance Plan (CTAP), and the Interagency Career Transition Assistance Plan (ICTAP) in accordance with 5 CFR part 330 subparts B, F, and G before selecting other qualified applicants. An agency would not be able to assess applicants in order to make more meaningful or relative distinctions as to the quality of the applicant pool; *i.e.*, an agency could not rate and rank applicants and select them based on a numerical rating or categorize and select them in terms of "good, better, best" or similar quality designations. Applicants who met the required proficiency level would be deemed to be equally qualified for these purposes. Each agency would then be

expected to select qualified applicants in the order in which their applications were received and processed.

OPM is revising its regulations to:

a. Add new subsections, 337.204(d), and 337.205(b) titled, “Information Technology Positions” to propose implementing rules with respect to covered agencies, agency authority, conditions for using these provisions, and duration of appointments.

### **E.O. 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

### **E.O. 13563 and E.O. 12866, Regulatory Review**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” under Executive Order 12866.

### **Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs**

This proposed rule is not expected to be subject to the requirements of EO 13771 (82 FR 9339, February 3, 2017) because this proposed rule is expected to be related to agency organization, management, or personnel

**E.O. 13132, Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

**E.O. 12988, Civil Justice Reform**

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

**Congressional Review Act**

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

**Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

**List of Subjects in 5 CFR Part 337**

Government employees.

U.S. Office of Personnel Management

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Alexys Stanley,  
Regulatory Affairs Analyst.

Accordingly, we propose to amend 5 CFR part 337 as follows:

**PART 337-EXAMINING SYSTEM**

1. Revise the authority citation for part 337 to read as follows:

Authority: 5 U.S.C. 1104(a), 1302, 2302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980; 116 Stat. 2135, 2290; 117 Stat 1392, 1665; and E.O. 13833.

**Subpart B-Direct Hire Authority**

2. Add paragraph (d) to § 337.204 to read as follows:

**§ 337.204 Severe shortage of candidates.**

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(d) *Information Technology (IT) positions.* (1) The head of a covered agency, as defined in paragraph (d)(2) of this section, may determine whether a severe shortage of candidates exists at that agency for any position in the information technology management series, general schedule (GS)-2210 or equivalent. In making such a determination, a covered agency must

adhere to and use the supporting evidence prescribed in 5 CFR 337.204(b)(1)-(8). For purposes of paragraph (b)(5) of this section, the U.S. Department of Veterans Affairs (VA) need only determine whether a severe shortage of highly qualified candidates exists. In addition, a covered agency must maintain a file of the supporting evidence for documentation and reporting purposes. Upon determination of such a finding, an agency head may approve a direct hire authority for covered positions within the agency.

(2) *Covered agency.* A covered agency is an entity listed in 31 U.S.C. 901(b) (except the Department of Defense), or an independent regulatory agency defined in 44 U.S.C. 3502(5).

(3) *Notification to the U.S. Office of Personnel Management (OPM).* Once the head of a covered agency affirmatively determines the presence of a severe shortage and the direct hire authority is approved by the agency head, he or she must notify OPM within 10 business days. Such notification must include a description of the supporting evidence relied upon in making the determination.

(4) *Using this authority.* A covered agency must adhere to all provisions of subpart B of this part.

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years, if the direct hire authority remains in effect.

(ii) No individual may serve more than 8 years on an appointment made under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.



3. Add paragraph (c) to § 337.205 to read as follows:

**§ 337.205 Critical hiring needs.**

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(c) *Information Technology (IT) positions.* (1) The head of a covered agency, as defined in paragraph (c)(2) of this section, may determine whether a critical hiring need exists for any position in the information technology management series, general schedule (GS)-2210 or equivalent. In making such a determination, a covered agency must adhere to and use the supporting evidence criteria prescribed in paragraphs (b)(1)-(4) of this section. In addition, a covered agency must maintain a file of the supporting evidence for documentation and reporting purposes. Upon determination of such a finding, an agency head may approve a direct hire authority for covered positions within the agency.

(2) *Covered agency.* A covered agency is an entity listed in 31 U.S.C. 901(b) (excluding the Department of Defense), or an independent regulatory agency defined in 44 U.S.C. 3502(5).

(3) *Notification to the U.S. Office of Personnel Management (OPM).* Once the head of a covered agency affirmatively determines the presence of a critical hiring need and the direct hire authority is approved by the agency head, he or she must notify OPM within 10 business days. Such notification must include a description of the supporting evidence relied upon in making the determination.

(4) *Using this authority.* A covered agency must adhere to all provisions of subpart B of this part.

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years, if the direct hire authority remains in effect.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years.

(ii) No individual may serve more than 8 years on an appointment made under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.

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