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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 337

RIN: 3206-AN65

Examining System

AGENCY: Office of Personnel Management

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final regulation to implement changes to part 337 of OPM's regulations, which govern direct hire authority. Executive Order (EO) 13833, "Enhancing the Effectiveness of Agency Chief Information Officers" 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 criteria established by OPM. OPM published the proposed regulations, has considered proposed comments, and has now determined to adopt a final rule making this change. The intended effect of this change is to enable Chief Information Officers to hire urgently needed IT professionals more quickly.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Darlene Phelps by telephone on (202) 606-0960, by fax (202) 606-4430, by TTY at (202) 418-3134, or by email at Darlene.phelps@opm.gov.

SUPPLEMENTARY INFORMATION: On October 29, 2018, OPM issued proposed regulations at 83 FR 209, as contemplated by EO 13833, "Enhancing the Effectiveness of Agency Chief Information Officers." Section 9 of the EO directed OPM to propose regulations

pursuant to which OPM could 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 series, general schedule (GS)-2210, for purposes of demonstrating a need for a Direct Hire Authority. 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 received seven sets of comments in response to the proposed rule. A discussion of these comments follows.

Discussion of Comments

One individual expressed general support for the proposed rule, and opined that the risk and cost of potential cronyism is an acceptable opportunity cost of a direct hire authority. As a general matter, Congress has determined that in cases where a severe shortage or critical hiring need exists, direct hire authority is justified as a legitimate exception from the normal rules of competitive hiring. The use of the authority is subject to Merit System Principles, which include requirements that selection and advancement be determined solely on the basis of relative ability, knowledge and skills, regardless of the hiring authority used to fill a position. Further, OPM contends that the opportunity cost for cronyism, favoritism, and nepotism is not only the highest cost that a Government can pay, but is fundamentally at odds with Civil Service law. In accordance with statute, OPM's regulations prescribe the criteria that must be met in order to authorize direct hire authority, consistent with Congressional intent. In addition, OPM will take the following steps to help ensure this DHA is used appropriately by Federal agencies: 1) OPM will update its guidance on DHA at <https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/> with an emphasis to hiring managers and human resources

personnel that when using DHA agencies are required to employ an objective selection process, such as selecting qualified candidates (including individuals entitled to veterans' preference) as they are found; 2) OPM will provide agencies with interactive sessions on how to use DHA, aimed at hiring managers and human resources personnel, through a variety of media; 3) OPM will review and monitor agencies' use of this authority, including hiring patterns, etc.

Furthermore, the proposed regulation requires agencies to notify OPM when an agency head authorizes DHA and to provide to us the justification on which the approval was based. OPM is retaining this requirement in the final rule so that OPM will know which agencies are using this DHA, and can provide oversight to ensure that it is being used appropriately.

Another individual commented on the severity of the wildfire season in 2018. OPM is not addressing this comment as it not within the scope of the proposed regulation.

A representative from an internet-based professional networking service suggested the final rule should encourage agencies to use this hiring flexibility. OPM is not adopting this suggestion. Each agency must decide independently whether its particular circumstances justify the need for a DHA in accordance with the statutory and regulatory criteria required for an approval.

The same individual suggested the internet-based professional networking service could help agencies determine when to implement DHA, based on the presence of competitors for the same skill-sets for which the agency is recruiting. OPM is not accepting this comment both because it is, in part, beyond the scope of this regulation and because it proceeds from a faulty premise as to the applicable standards that govern when a direct hire authority is appropriate. In using this delegation of authority, agencies must apply the provisions of 5 CFR part 337, 5 CFR part 330 subparts F and G. In doing so, agencies may rely upon a variety of data sources to

gauge, in part, the availability of skill-sets to determine the presence of a severe shortage of candidates in accordance with 5 CFR 337.204. We also note that agencies must provide public notice of any vacancy to be filled through a direct hire authority, in accordance with 5 U.S.C. 3304(a)(3)(A) and 5 CFR 330.104.

Another individual commented that agencies may find recruitment of skilled IT professionals using this authority difficult if the hiring agency cannot match the level of salary and benefits offered by private sector employers. The commenter also suggested that OPM take steps to encourage agencies to use this authority to their advantage. The first comment is, essentially, an observation and thus does not require a response. OPM is not adopting the second suggestion. As noted above, each agency must decide independently whether its particular circumstances meet the statutory and regulatory criteria and thus justify using this delegation of authority. OPM provides guidance to agencies on DHA at: <https://www.opm.gov/policy-data-oversight/hiring-information/direct-hire-authority/>.

One commenter expressed concern that this authority will be used by agencies to avoid applying veterans' preference when filling IT jobs. This commenter stated, "Direct hire authority is often nothing more than a work around for statutory veterans' preference rights. At a minimum, there should be an objective and impartial review of the facts supporting a direct hire authority, and having each agency be its own judge and jury, as OPM is proposing, is fraught with problems. In my agency, we get many qualified applicants for IT jobs, so there is no shortage of good candidates. We are going to get a lot of pressure to do direct hire just to avoid having to hire well qualified veterans. This is bad for veterans and bad for civil service. Maybe agencies should have to show their veterans hiring numbers are good before they can use the direct hire."

Another individual expressed a similar concern about the impact of this authority on veterans' preference and asked that OPM conduct rigorous reviews of agencies who use this authority. This individual commented, "I am writing concerning the proposal to grant agency heads the authority to determine which IT specialties may fall under the direct hire authority. In the last five years that I have been involved in staffing, to include a stint as the chief of our Delegated Examining Unit, it has been my experience that we usually receive large numbers of best qualified candidates for IT Specialist job announcements. When selecting officials in the agency complain about a certificate we issue, the basis for the complaint is that veterans with preference are the only applicants on the certificate. In our agency, approximately 70 percent of the IT workforce are contractors, and usually the selecting official wishes to hire one of his or her contractors that is not within reach because they are not a veteran with preference. My agency has a practice of announcing most positions for five days, yet we still average 50 to 100 or more applicants for each IT Specialist position we advertise. I fear agencies will mis-use the proposed direct hire authority to essentially make the entire IT Specialist, GS-2210 occupation direct hire. OPM will need to institute rigorous review of agencies who use the authority to ensure they do not abuse it; however, personally I think the proposed direct hire authority is an invitation to agencies to circumvent veterans' preference. As I stated above, selecting officials object to certificates with plenty of best-qualified veterans, not because of qualifications, but because of the inability to select contractors currently working in their organization."

In response to the overall concern regarding veterans' preference, OPM is strongly committed to connecting the brave men and women who serve our Nation with opportunities to continue their service in the Federal workforce. OPM will continue our close coordination with the Department of Labor and Department of Veterans Affairs as required under EO 13518,

which established the Veterans Employment Initiative. Additionally, OPM will continue our efforts across government to support agencies as they seek to hire veterans.

With respect to the first comment, OPM agrees with the need for an ‘objective and impartial review of the facts supporting a direct hire authority.’ The final rule provides this mechanism by establishing OPM as the impartial reviewer. The rule requires that when using this authority, an agency head must authorize DHA based on justification provided by the agency’s Chief Human Capital Officer (or equivalent) in accordance with the provisions and criteria specified in 5 CFR part 337. Further, once an agency head authorizes DHA using this criteria 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. In accordance with 5 CFR 337.206 OPM will monitor agencies’ use of DHA under this authority and may terminate or modify any DHA if OPM finds the basis on which such DHA was granted no longer exists, or when an agency has used an authority improperly. Regarding the commenter’s concern that an agency may authorize DHA when a lack of qualified IT applicants exists, 5 CFR 337.206 requires agencies to notify OPM when the agency finds adequate numbers of qualified candidates previously filled under DHA based on a severe shortage of candidates. OPM will make this requirement a point of emphasis in its updated guidance and technical assistance. In addition, OPM will rely on a variety of data sources to monitor how DHA’s under this authority are being utilized, to include the availability of qualified applicants as captured through USAJOBS and USASTAFFING data, nationwide labor trends on the availability of IT specialists in the general labor pool, the results of agencies’ past attempts to fill IT jobs through other hiring mechanisms, the number of pass over request made

for preference-eligible veterans initially deemed to be qualified for these DHA covered IT positions, and the number of selections of qualified preference-eligible veterans hired under this authority. In addition OPM's Merit System Accountability and Compliance reports, which are periodic reviews of agency hiring practices, will also serve provide an objective basis on which to gauge how agencies are using this DHA.

With respect to the second comment, OPM agrees that oversight by OPM is necessary. We believe that current statutory and regulatory authority exists in order for us to do so. In addition to the checks and measures described in the preceding paragraph OPM notes that any delegation of authority provided by OPM under 5 U.S.C. 1104(b)(2) requires a corresponding oversight program for use of the delegation. To facilitate this process OPM will be establishing a unique authority code for this DHA which will assist us in monitoring each agency's use of this authority

A Federal agency questioned the effectiveness of the time limitations on appointments made under this authority. The agency noted that IT modernization may be a permanent or on-going endeavor and suggested OPM provide for permanent appointments under this authority. OPM is not adopting this suggestion. We are adopting the time limits on appointments as proposed. Our rationale for doing so is to attune these rules with the hiring patterns of the twenty first century, in particular those of the IT workforce. Agencies are making greater use of time-limited employees than in the past and are expected to continue to do so. Likewise, many individuals prefer Federal employment that is characterized by a time-limited or project nature, with movement in and out of public service, rather than the traditional 30-year career model. Agencies with a need to make appointments of IT personnel on a permanent basis in response to a critical hiring need or severe shortage of candidates may continue to request DHA from OPM

pursuant to Subpart B of 5 CFR part 337. OPM retains the ability to authorize DHA to agencies, in appropriate circumstances, when presented with a well-justified request for DHA to fill positions on a permanent basis.

OPM is adopting the proposed rule without change.

Regulatory Flexibility Act

I certify that this regulation would not have a significant economic impact on a substantial number of small entities because it affects only 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 benefits, of harmonizing rules, and of promoting flexibility. This final rule is not a “significant regulatory action,” under Executive Order 12866.

Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This final rule rule is not an E.O. 13771 (82 FR 9339, February 3, 2017) action because this rule is not significant under EO 12866.

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 non-agency 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 final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Lists of Subjects in 5 CFR Part 337

Government employees.

Steve Hickman,

Regulatory Affairs Analyst.

Accordingly, OPM is revising 5 CFR part 337 of title 5, Code of Federal Regulations, 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. In § 337.204, add paragraph (d) to read as follows:

§ 337.204 Severe shortage of candidates.

* * * * *

(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. In § 337.205, add paragraph (c) to read as follows:

§ 337.205 Critical hiring needs.

* * * * *

(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) through (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 an 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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