



## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 335

### RIN 3206-AN77

#### Promotion and Internal Placement

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing regulations to give agencies the discretion to reinstate certain former Federal employees without competition to positions at any grade level for which the individual is qualified.

Agencies will have greater flexibility in recruiting back to Government service former Federal employees who have developed enhanced or higher-level skill-sets than they had when they left government. Individuals seeking to rejoin the Federal workforce may do so more easily and at grade levels commensurate with the skills and experience they actually possess (and be compensated at such grade levels).

**DATES:** Comments must be received on or before [INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by any of the following methods:

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

- E-mail: employ@opm.gov. Include the docket number or RIN in the subject line of the message.

*Instructions:* All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked “late,” and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider all comments we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** Michelle Glynn, Telephone: 202-606-1571, Fax: 202-606-2329, TDD: 202-418-3134, or email: michelle.glynn@opm.gov.

**SUPPLEMENTARY INFORMATION:**

**Summary of the Proposed Changes**

The U.S. Office of Personnel Management (OPM) is exercising its authority under 5 U.S.C. 3301 and 3302 in proposing to revise part 335, title 5, Code of Federal Regulations (CFR), to change the criteria for how an agency may reinstate certain former Federal employees to a position in the competitive service. Under current rules, an agency may reinstate an individual, without competition, only to a position at a grade level that is no higher than the grade level of a position the individual held on a

permanent basis in the competitive service. Reinstatement to a higher-graded position, or to a position with greater promotion potential, requires competition under 5 CFR part 335 *Promotion and Internal Placement*.

Oftentimes, when an individual leaves Federal service, he or she acquires skills and/or experience that may qualify the individual for a position at a higher grade level than the one the individual held prior to leaving government. The proposed rules place these reinstatement actions under *discretionary actions* at 5 CFR 335.103(c)(3). The proposed rules allow an agency to reinstate a former career or career-conditional employee without competition, and regardless of the promotion potential, to a position at a grade level higher than that previously held by that individual to provide greater flexibility to agencies when they need to reinstate a former Federal employee. The proposed changes will benefit both agencies as well as individuals seeking to reenter the Federal workforce as the proposed rules seeks to encourage individuals who have gained additional skills and experiences to reenter the Federal workforce at grade levels equal to the grade levels they actually qualify for, not for grade levels they previously qualified for. Any restriction on the promotion potential of the position may be a disincentive to attracting needed talent with the desired skills and/or experience. . In order to qualify for this type of reinstatement the individual must meet the following criteria:

- 1) Been voluntarily separated from his or her most recent career or career-conditional appointment for at least 1 year, and
- 2) Received a rating of record for his or her most recent career or career-conditional position of at least Fully Successful (or equivalent).

OPM is proposing that individuals who voluntarily separate must wait 1 year to be eligible for a higher-graded position under this authority in order to provide consistency with the general qualification requirements for advancement to a higher grade. OPM's government-wide qualification standards require that competitive service employees have 1 year of specialized experience before being promoted to the next highest grade level. The proposed 1-year requirement will prevent situations in which employees seeking a promotion quit and get reinstated to a higher-graded position (in essence a promotion) prior to meeting the specialized experience requirement. Thus, the proposed rules benefit both Federal agencies and former Federal employees seeking reemployment with the government at a level commensurate with each individual's actual skill and/or experience level, while preserving a measure of fairness with respect to current employees.

OPM is proposing that individuals who did not receive a rating of record for his or her most recent career or career-conditional position of at least Fully Successful (or equivalent) are not eligible for reinstatement without competition under this rule because if the individual was not performing to expectations at the time s/he left Federal service, that rationale for liberalizing the rules for re-entry would not be present, and we would want agencies to put the candidate through a more rigorous process to accurately evaluate current capabilities before hiring the individual again. An individual whose most recent evaluation was less than Fully Successful would have been headed for potential demotion or termination if s/he had remained.

For individuals who resigned and did not wait 1 year or more before applying for reinstatement, or for individuals who did not receive a rating of record for his or her most

recent career or career-conditional position of at least Fully Successful (or equivalent), the proposed rule will require competition for higher graded positions, or positions with greater promotion potential. However, the individuals remain eligible for reinstatement without competition for positions with no higher grade or with no more promotion potential than a position previously held by the individual on a permanent basis in the competitive service.

The specific proposed changes are as follows:

OPM is proposing to modify current § 335.103(c)(1)(vi), by requiring competition under this part for an individual seeking reinstatement, within 1 calendar year from the date of his or her separation, to a position at a higher grade level or promotion potential than previously held, or for an individual who did not receive a rating of record of Fully Successful (or equivalent).

New paragraph §335.103(c)(3)(viii) creates as a discretionary action that is not subject to competitive procedures reinstatement to a position at a higher grade level or promotion potential than previously held provided the individual resigned 1 year or more prior to the date he or she applies for reinstatement, and that the individual received a rating of record for his or her most recent career or career-conditional position of at least Fully Successful (or equivalent).

OPM is proposing these changes under Civil Service Rules II and VII, codified at 5 CFR parts 2 and 7, to establish and administer a system that provides for career appointments for former employees eligible for career appointment upon reinstatement.

### **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 and has been reviewed by OMB..

**Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs**

This proposed rule is not expected to be subject to the requirements of E.O. 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, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**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**

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

**List of Subjects in 5 CFR Part 335**

Government employees.

Office of Personnel Management

Alexys Stanley,  
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Accordingly, OPM proposed to amend 5 CFR part 335 as follows:

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**PART 335 – PROMOTION AND INTERNAL PLACEMENT**

1. The authority citation for part 335 continues to read as follows:

**Authority:** 5 U.S.C. 2301, 2302, 3301, 3302, 3330; E.O. 10577, E.O. 11478, 3 CFR 1966-1970, Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152, 3 CFR 19554-58 Comp., p.218; 5 U.S.C. 3304(f), and Pub. L. 106-117.

**Subpart A –General Provisions**

2. In § 335.103, revise paragraph (c)(1)(vi) and add paragraph (c)(3)(viii) to read as follows:

**§ 335.103 Agency promotion programs.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(vi) Reinstatement to a permanent or temporary position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service if the individual did not wait 1 year or more after separating from Federal employment before applying for reinstatement, or did not receive a rating of record for his or her most recent career or career-conditional position of at least Fully Successful (or equivalent).

\* \* \* \* \*

(viii) Reinstatement in accordance with 5 CFR part 315 to any position in the competitive service for which the individual is qualified at a higher grade level or with more promotion potential than a career or career-conditional position previously held by the

individual; provided,- the individual has been voluntarily separated for at least 1 year before being reinstated, and the individual must have received a rating of record for his or her most recent career or career-conditional position of at least Fully Successful (or equivalent).

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