

**AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 302, AS REPORTED  
OFFERED BY MR. HICE OF GEORGIA**

Strike all after the enacting clause and insert the following:

**1 SECTION 1. SHORT TITLE.**

2       This Act may be cited as the “Creating Schedule F  
3 in the Excepted Service Act”.

**4 SEC. 2. FINDINGS.**

5       Congress finds the following:

6           (1) To effectively carry out the broad array of  
7 activities assigned to the executive branch under law,  
8 the President and his appointees must rely on men  
9 and women in the Federal service employed in posi-  
10 tions of a confidential, policy-determining, policy-  
11 making, or policy-advocating character. Faithful exe-  
12 cution of the law requires that the President have  
13 appropriate management oversight regarding this se-  
14 lect cadre of professionals.

15           (2) The Federal Government benefits from ca-  
16 reer professionals in positions that are not normally  
17 subject to change as a result of a Presidential tran-  
18 sition but who discharge significant duties and exer-

1       cise significant discretion in formulating and imple-  
2       menting executive branch policy and programs under  
3       the laws of the United States. The heads of execu-  
4       tive departments and agencies (agencies) and the  
5       American people also entrust these career profes-  
6       sionals with non-public information that must be  
7       kept confidential.

8               (3) With the exception of attorneys in the Fed-  
9       eral service who are appointed pursuant to schedule  
10      A of the excepted service and members of the Senior  
11      Executive Service, appointments to these positions  
12      are generally made through the competitive service.  
13      Given the importance of the functions they dis-  
14      charge, employees in such positions must display ap-  
15      propriate temperament, acumen, impartiality, and  
16      sound judgment.

17              (4) Due to these requirements, agencies should  
18      have a greater degree of appointment flexibility with  
19      respect to these employees than is afforded by the  
20      existing competitive service process.

21              (5) Further, effective performance management  
22      of employees in confidential, policy-determining, pol-  
23      icy-making, or policy-advocating positions is of the  
24      utmost importance. Unfortunately, the Government's  
25      current performance management is inadequate, as

1 recognized by Federal workers themselves. For in-  
2 stance, the 2016 Merit Principles Survey reveals  
3 that less than a quarter of Federal employees believe  
4 their agency addresses poor performers effectively.

5 (6) Separating employees who cannot or will  
6 not meet required performance standards is impor-  
7 tant, and it is particularly important with regard to  
8 employees in confidential, policy-determining, policy-  
9 making, or policy-advocating positions. High per-  
10 formance by such employees can meaningfully en-  
11 hance agency operations, while poor performance  
12 can significantly hinder them. Senior agency officials  
13 report that poor performance by career employees in  
14 policy-relevant positions has resulted in long delays  
15 and substandard-quality work for important agency  
16 projects, such as drafting and issuing regulations.

17 (7) Conditions of good administration make  
18 necessary an exception to the competitive hiring  
19 rules and examinations for career positions in the  
20 Federal service of a confidential, policy-determining,  
21 policy-making, or policy-advocating character. These  
22 conditions include the need to provide agency heads  
23 with additional flexibility to assess prospective ap-  
24 pointees without the limitations imposed by competi-  
25 tive service selection procedures. Placing these posi-

1        tions in the excepted service will mitigate undue lim-  
2        itations on their selection. This action will also give  
3        agencies greater ability and discretion to assess crit-  
4        ical qualities in applicants to fill these positions,  
5        such as work ethic, judgment, and ability to meet  
6        the particular needs of the agency. These are all  
7        qualities individuals should have before wielding the  
8        authority inherent in their prospective positions, and  
9        agencies should be able to assess candidates without  
10       proceeding through complicated and elaborate com-  
11       petitive service processes or rating procedures that  
12       do not necessarily reflect their particular needs.

13            (8) Conditions of good administration similarly  
14       make necessary excepting such positions from the  
15       adverse action procedures set forth in chapter 75 of  
16       title 5, United States Code. Chapter 75 of title 5,  
17       United States Code, requires agencies to comply  
18       with extensive procedures before taking adverse ac-  
19       tion against an employee. These requirements can  
20       make removing poorly performing employees dif-  
21       ficult. Only a quarter of Federal supervisors are con-  
22       fident that they could remove a poor performer. Ca-  
23       reer employees in confidential, policy-determining,  
24       policy-making, and policy-advocating positions wield  
25       significant influence over Government operations

1 and effectiveness. Agencies need the flexibility to ex-  
2 peditiously remove poorly performing employees  
3 from these positions without facing extensive delays  
4 or litigation.

5 **SEC. 3. SCHEDULE F OF THE EXCEPTED SERVICE.**

6 (a) IN GENERAL.—Appointments of individuals to  
7 positions of a confidential, policy-determining, policy-mak-  
8 ing, or policy-advocating character that are not normally  
9 subject to change as a result of a Presidential transition  
10 shall be made under schedule F of the excepted service,  
11 as established by subsection (b).

12 (b) REGULATIONS.—The Director of the Office of  
13 Personnel Management shall—

14 (1) amend section 6.2 of title 5, Code of Fed-  
15 eral Regulations, to read as follows:

16 “OPM shall list positions that it excepts from the  
17 competitive service in Schedules A, B, C, D, E, and F,  
18 which schedules shall constitute parts of this rule, as fol-  
19 lows:

20 “Schedule A. Positions other than those of a con-  
21 fidential or policy-determining character for which it is not  
22 practicable to examine shall be listed in Schedule A.

23 “Schedule B. Positions other than those of a con-  
24 fidential or policy-determining character for which it is not  
25 practicable to hold a competitive examination shall be list-

1 ed in Schedule B. Appointments to these positions shall  
2 be subject to such noncompetitive examination as may be  
3 prescribed by OPM.

4 “Schedule C. Positions of a confidential or policy-de-  
5 termining character normally subject to change as a result  
6 of a Presidential transition shall be listed in Schedule C.

7 “Schedule D. Positions other than those of a con-  
8 fidential or policy-determining character for which the  
9 competitive service requirements make impracticable the  
10 adequate recruitment of sufficient numbers of students at-  
11 tending qualifying educational institutions or individuals  
12 who have recently completed qualifying educational pro-  
13 grams. These positions, which are temporarily placed in  
14 the excepted service to enable more effective recruitment  
15 from all segments of society by using means of recruiting  
16 and assessing candidates that diverge from the rules gen-  
17 erally applicable to the competitive service, shall be listed  
18 in Schedule D.

19 “Schedule E. Position of administrative law judge ap-  
20 pointed under 5 U.S.C. 3105. Conditions of good adminis-  
21 tration warrant that the position of administrative law  
22 judge be placed in the excepted service and that appoint-  
23 ment to this position not be subject to the requirements  
24 of 5 CFR, part 302, including examination and rating re-

1 requirements, though each agency shall follow the principle  
2 of veteran preference as far as administratively feasible.

3 “Schedule F. Positions of a confidential, policy-deter-  
4 mining, policy-making, or policy-advocating character not  
5 normally subject to change as a result of a Presidential  
6 transition shall be listed in Schedule F. In appointing an  
7 individual to a position in Schedule F, each agency shall  
8 follow the principle of veteran preference as far as admin-  
9 istratively feasible”;

10 (2) amend section 6.4 of title 5, Code of Fed-  
11 eral Regulations, to read as follows:

12 “Except as required by statute, the Civil Service Rules  
13 and Regulations shall not apply to removals from positions  
14 listed in Schedules A, C, D, E, or F, or from positions  
15 excepted from the competitive service by statute. The Civil  
16 Service Rules and Regulations shall apply to removals  
17 from positions listed in Schedule B of persons who have  
18 competitive status.”;

19 (3) adopt such regulations as the Director de-  
20 termines may be necessary to implement this Act,  
21 including, as appropriate, amendments to or rescis-  
22 sions of regulations that are inconsistent with, or  
23 that would impede the implementation of, this Act,  
24 giving particular attention to—

1 (A) section 302.101 of title 5, Code of  
2 Federal Regulations;

3 (B) subpart D of part 212 of such title;  
4 and

5 (C) subparts A and C of part 213 of such  
6 title; and

7 (4) provide guidance on conducting a swift, or-  
8 derly transition from the existing appointment proc-  
9 esses to the schedule F process established by this  
10 Act.

11 **SEC. 4. EXECUTIVE AGENCY ACTIONS.**

12 (a) REVIEW.—

13 (1) IN GENERAL.—Each Executive agency head  
14 shall conduct, not later than 90 days after the date  
15 of enactment of this Act, a preliminary review of the  
16 positions in the Executive agency that are covered  
17 by subchapter II of chapter 75 of title 5, United  
18 States Code, and shall conduct a complete review of  
19 the positions in the agency not later than 210 days  
20 after the date of enactment of this Act. Thereafter,  
21 each agency head shall conduct a review of such po-  
22 sitions that are covered by subchapter II of chapter  
23 75 of title 5, United States Code, on at least an an-  
24 nual basis.

25 (2) PETITIONS.—



1           (A) IN GENERAL.—Following a review  
2           under paragraph (1), each agency head shall,  
3           for positions not excepted from the competitive  
4           service by statute, petition the Director to place  
5           in schedule F any such competitive service,  
6           schedule A, schedule B, or schedule D positions  
7           in the Executive agency that the agency head  
8           determines to be of a confidential, policy-deter-  
9           mining, policy-making, or policy-advocating  
10          character and that are not normally subject to  
11          change as a result of a Presidential transition.

12          (B) PETITION EXPLANATION.—Any peti-  
13          tion submitted under subparagraph (A) shall  
14          include a written explanation documenting the  
15          basis for the agency head's determination that  
16          such position should be placed in schedule F.

17          (3) DETERMINATIONS.—

18          (A) IN GENERAL.—Following a review  
19          under paragraph (1), each agency head shall,  
20          for positions excepted from the competitive  
21          service by statute, determine which such posi-  
22          tions are of a confidential, policy-determining,  
23          policy-making, or policy-advocating character  
24          and are not normally subject to change as a re-  
25          sult of a Presidential transition.

1           (B) DETERMINATION EFFECT.—A position  
2           which the agency head determines under sub-  
3           paragraph (A) to be of a confidential, policy-de-  
4           termining, policy-making, or policy-advocating  
5           character and not normally subject to change as  
6           a result of a Presidential transition shall be  
7           considered a schedule F position for the pur-  
8           poses of Executive agency actions under sub-  
9           sections (d) and (f).

10           (C) PUBLICATION.—An agency head shall  
11           publish each determination made under sub-  
12           paragraph (A) in the Federal Register.

13           (b) APPLICABILITY.—The requirements set forth in  
14           subsection (a) shall apply to currently existing positions  
15           and newly created positions.

16           (c) ADDITIONAL CONSIDERATION.—When con-  
17           ducting the review required by subsection (a), each agency  
18           head should give particular consideration to the appro-  
19           priateness of either petitioning the Director to place in  
20           schedule F or including in the determination published in  
21           the Federal Register, as applicable, positions of which the  
22           duties include any of the following:

23           (1) Substantive participation in the advocacy  
24           for or development or formulation of policy, espe-  
25           cially—

1 (A) substantive participation in the devel-  
2 opment or drafting of regulations and guidance;  
3 or

4 (B) substantive policy-related work in an  
5 Executive agency or Executive agency compo-  
6 nent that primarily focuses on policy.

7 (2) The supervision of attorneys.

8 (3) Substantial discretion to determine the  
9 manner in which the Executive agency exercises  
10 functions committed to the agency by law.

11 (4) Viewing, circulating, or otherwise working  
12 with proposed regulations, guidance, executive or-  
13 ders, or other non-public policy proposals or delib-  
14 erations generally covered by deliberative process  
15 privilege and either—

16 (A) directly reporting to or regularly work-  
17 ing with an individual appointed by either the  
18 President or an agency head who is paid at a  
19 rate not less than that earned by employees at  
20 Grade 13 of the General Schedule; or

21 (B) working in the Executive agency or  
22 Executive agency component executive secre-  
23 tariat (or equivalent).

1           (5) Conducting, on the Executive agency's be-  
2           half, collective bargaining negotiations under chapter  
3           71 of title 5, United States Code.

4           (d) PETITION DECISION.—The Director shall  
5 promptly determine whether to grant any petition under  
6 subsection (a). Not later than December 31 of each year,  
7 the Director shall report to the President, through the Di-  
8 rector of the Office of Management and Budget and the  
9 Assistant to the President for Domestic Policy, concerning  
10 the number of petitions granted and denied for that year  
11 for each Executive agency.

12          (e) COLLECTIVE BARGAINING EXCLUSIONS.—Each  
13 agency head shall, as necessary and appropriate, expedi-  
14 tiously petition the Federal Labor Relations Authority to  
15 determine whether any schedule F position must be ex-  
16 cluded from a collective bargaining unit under section  
17 7112(b) of title 5, United States Code, paying particular  
18 attention to the question of whether incumbents in such  
19 positions are required or authorized to formulate, deter-  
20 mine, or influence the policies of the agency.

21          (f) PROHIBITED PERSONNEL PRACTICES.—Agency  
22 heads shall establish rules to prohibit the personnel prac-  
23 tices prohibited by section 2302(b) of title 5, United  
24 States Code, with respect to any employee or applicant  
25 for employment in schedule F of the excepted service.

1 **SEC. 5. DEFINITIONS.**

2 In this Act:

3 (1) **AGENCY HEAD.**—The term “agency head”  
4 means the head of an Executive agency.

5 (2) **DIRECTOR.**—The term “Director” means  
6 the Director of the Office of Personnel Management.

7 (3) **EXECUTIVE AGENCY.**—The term “Executive  
8 agency” has the meaning given such term in section  
9 105 of title 5, United States Code, but excluding the  
10 Government Accountability Office.

11 (4) **NORMALLY SUBJECT TO CHANGE AS A RE-**  
12 **SULT OF A PRESIDENTIAL TRANSITION.**—The term  
13 “normally subject to change as a result of a Presi-  
14 dential transition” refers to positions whose occu-  
15 pants are, as a matter of practice, expected to resign  
16 upon a Presidential transition, including all positions  
17 whose appointment requires the assent of the White  
18 House Office of Presidential Personnel.

