

character; or (2) their position is excluded from the competitive service by a President based on a determination that such exclusion is necessary and warranted by conditions of good administration.

NTEU's proposal would extend to this category of excepted service employees the same fundamental protections reflected in Congress's statute proscribing prohibited personnel practices. CFTC may lawfully extend these same protections to additional groups of employees.

NTEU'S PROPOSAL AND STATEMENT OF GROUNDS

I. NTEU's Proposed Regulatory Language.

NTEU proposes a new Part 191, Chapter 1, to 17 C.F.R.:

Part 191 Prohibited Personnel Practices

191.01 This Part applies to "covered employees," which are defined as any employee occupying or applying for a position which is

(a) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(2b) excluded from the competitive service by a President based on a determination by the President that such exclusion is necessary and warranted by conditions of good administration.

191.02 This agency shall not take a personnel action based on a prohibited personnel practice against covered employees. "Personnel action" means the actions defined in 5 U.S.C. § 2302(a)(2)(A).

"Prohibited personnel practice" means the practices defined in 5 U.S.C. § 2302(b)(1)-(14) and includes the definition of "disclosure" in 5 U.S.C.

§§ 2302(a)(2)(D), § 2302(f), and the definition of “veterans’ preference requirement” in 5 U.S.C. § 2302(e).

191.03 The head of this agency shall be responsible for informing covered employees of their rights under this section in the same manner as such information is extended to employees covered by 5 U.S.C. § 2302(c)(2)-(5), including providing such information to new employees in covered positions within 180 days after such employee’s appointment.

191.04 This section shall not be construed to extinguish or lessen any right or remedy available to any employee or applicant for employment in the civil service under the laws identified at 5 U.S.C. § 2302(d) and regulations promulgated pursuant to those laws.

191.05 An employee (or bargaining unit representative acting on the employee’s behalf, if applicable) may raise a claim alleging a violation of this section through the negotiated grievance procedure, if applicable, or with the agency by filing a claim with the agency’s Division of Administration but not both. A claim must identify the parties, identify any relevant personnel action(s), and describe generally the practice or activities at issue.

The agency shall have the opportunity to respond to the allegations of the employee (or bargaining unit representative acting on the employee’s behalf, if applicable). If the claim is proceeding through a negotiated grievance procedure, the applicable grievance procedures shall apply. If a claim is proceeding through the Division of Administration, that division shall investigate and issue a decision regarding the allegations within 60 days.

191.06 Employees (or bargaining unit representative acting on the employee’s behalf, if applicable), raising a claim that the agency is taking a personnel action for the reasons described at 5 U.S.C. § 2302(b)(8) or (b)(9) may also seek a stay of the personnel action while the underlying claim is resolved. The request for a stay must include allegations of how this section has been violated. The request for a stay may be made to an arbitrator (if the claim is raised through the negotiated grievance procedure) or to the agency’s Division of

Administration. If the request for a stay is raised to the agency's Division of Administration, the appropriate agency official must respond to the stay request within five business days. If the request for a stay is raised through the negotiated grievance procedure, the relevant contractual provisions related to stay requests will govern.

II. NTEU's Proposal is Lawful.

A. NTEU's proposed regulation lawfully extends protection against prohibited personnel practices. Federal statute provides those protections, as relevant here, to competitive service employees, to career appointees in the Senior Executive Service and to many excepted service employees. 5 U.S.C. § 2302(a)(2)(B).

NTEU's proposal covers two categories of excepted service employees who do *not* have statutory protections against prohibited personnel practices: those whose position (a) is of a confidential, policy-determining, policy-making, or policy-advocating character, or (b) is excluded from the competitive service by a President based on a determination that such exclusion is necessary and warranted by conditions of good administration. *See id.* § 2302(a)(2)(B)(i)-(ii).

Nothing restricts CFTC from extending protection against prohibited personnel practices to additional groups of employees. CFTC has broad authority to promulgate regulations, as long as it acts

reasonably and does not contravene a clear statutory directive. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).

Indeed, the last administration explicitly ordered the expansion of prohibited personnel practice protections to the very category of excepted service employees that NTEU’s proposal covers. President Trump created a new schedule of excepted service employees in Executive Order No. 13957 (Schedule F), which was later rescinded by Executive Order No. 14003. Employees in the new Schedule F would not have had the statutory protections of 5 U.S.C. § 2302. *See* 5 U.S.C. § 2302(a)(2)(B). But the President specifically directed agencies to “establish rules to prohibit the same personnel practices prohibited by section 2302(b) of title 5, United States Code, with respect to any employee or applicant for employment in Schedule F of the excepted service.” Exec. Order No. 13957, Sec. 6. And at least some agencies began drafting prohibited personnel practice regulations consistent with the Order before it was rescinded.¹

¹ *See* GAO, *Civil Service: Agency Responses and Perspectives on Former Executive Order to Create a New Schedule F Category of Federal Positions* (Sept. 28, 2022) at 13, www.gao.gov/assets/gao-22-105504.pdf (discussing OMB’s development of “rules related to prohibited personnel practices for Schedule F employees”).

Some federal agencies, moreover, have already promulgated the types of regulations that NTEU proposes here. The General Accounting Office is an example. Section 2302 does not apply to GAO, 5 U.S.C. § 2302(a)(2)(C), but that agency has promulgated its own prohibited personnel practice regulations. GAO's regulations broadly protect *any* employee or applicant for employment, including excepted service employees. 4 C.F.R. § 2.5.

NTEU's proposal is consistent with the 2019 NTEU-CFTC Collective Bargaining Agreement. The agreement states that “[e]mployees have the right to be free from prohibited personnel practices.” Article 31, Section 1.B. And it explicitly incorporates “the rights and protections established in 5 U.S.C. § 2301(b), Merit Systems Principles, and 5 U.S.C. § 2302(b), Prohibited Personnel Practices,” into the employee rights Article. *See* Article 3, Section 4. *See also* CFTC, No Fear Act, <https://www.cftc.gov/WebPolicy/EEONoFearAct/index.htm> (stating “merit system principles provide that no personnel action in the Federal government may be based on” an employee’s marital status, political affiliation, sexual orientation, or “[c]onduct not adversely affecting job performance”).

B. NTEU’s proposal allows an employee covered by the regulation to request a stay of a proposed personnel action if the action is alleged to be reprisal for whistleblowing or reprisal for exercising one’s rights. This aspect of NTEU’s proposal tracks existing law, 5 U.S.C § 1221(a), which allows most employees to request stays if they have been subject to either of two prohibited personnel practices, namely 5 U.S.C. § 2302(b)(8) (reprisal for whistleblowing) or § 2303(b)(9) (reprisal for exercising one’s rights).

III. NTEU’s Proposal is Sound Policy.

Government officials should not discriminate. They should not take reprisals against employees who blow the whistle on fraud or who exercise their lawful rights. Supervisors should judge employees on merit and not on political considerations. NTEU’s proposed regulation would codify these important principles. And it would enhance merit system principles for employees covered by the regulation, in accord with President Biden’s position that “[t]he Federal Government should serve as a model employer.” Exec. Order No. 14003.

CONCLUSION

For the foregoing reasons, CFTC should adopt NTEU's proposal and amend its regulations.

Respectfully submitted,

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