

the placement fee from the new appointing agency.

**§362.407 Withdrawal and readmission.**

(a) *Withdrawal.* (1) A Fellow may withdraw from the Program at any time. Such withdrawal will be treated as a resignation from the Federal service; however, any obligations established upon admission and appointment (for example, as a result of accepting a recruitment incentive under part 575 of this chapter) still apply.

(2) A Fellow who held a permanent appointment in the competitive service in an agency immediately before entering the Program, and who withdraws from the Program for reasons that are not related to misconduct, poor performance, or suitability, may, at the employing agency's discretion, be placed in a permanent competitive service position, as appropriate, in that agency. The employing agency's determination in this regard is not subject to appeal.

(3) An agency must notify OPM when a Fellow withdraws from the Program.

(b) *Readmission.* (1) If a Fellow withdraws from the Program for reasons that are related to misconduct, poor performance, or suitability, as determined by the agency, he or she will not be readmitted to the Program at any time.

(2) If a Fellow withdraws from the Program for reasons that are not related to misconduct, poor performance, or suitability, he or she may petition the employing original agency for readmission and reappointment to the Program. Such a petition must be in writing and include appropriate justification. The agency may approve or deny the request for readmission. An agency must submit written notification of approved readmission requests to OPM. The individual's status in the Program upon readmission and reappointment must be addressed as part of the agency's submission. The Director may overrule the agency's decision to readmit and reappoint, and the Director's decision is not subject to appeal.

**§362.408 Termination and reduction in force.**

(a) *Termination.* (1) An agency may terminate a Fellow for reasons related to misconduct, poor performance, or suitability.

(2) As a condition of employment, a Fellow's appointment expires at the end of the 2-year Program period, plus any agency-approved extension, unless the Participant is selected for non-competitive conversion. If an agency does not convert a Fellow at the end of the Program, as provided in §362.409 of this part, or extend the individual's initial appointment under §362.404, the appointment expires when certification for Program completion is denied or when the Director denies the agency's request for an extension.

(3) The agency must provide written notification to OPM when a Fellow is terminated for any reason.

(b) *Reduction in force.* Fellows are in the excepted service Tenure Group II for purposes of §351.502 of this chapter.

**§362.409 Conversion to the competitive service.**

(a) A Fellow must complete the Program within the time limits prescribed in §362.404 of this part, including any agency-approved extension. At the conclusion of that period, the Fellow may be converted, as provided in paragraph (b) of this section.

(b) An agency may convert, without a break in service, an ERB-certified Fellow to a competitive service term or permanent appointment.

**PART 370—INFORMATION TECHNOLOGY EXCHANGE PROGRAM**

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## § 370.101

## 5 CFR Ch. I (1–1–13 Edition)

### § 370.101 Purpose.

(a) The purpose of this part is to implement sections 209(b)(6) and (c) of the E-Government Act of 2002 (Pub. L. 107–347), which authorize the Office of Personnel Management to establish an Information Technology Exchange Program. This statute authorizes the temporary detail of information technology employees between the Federal Government and private sector organizations. The statute also gives Federal agencies the authority to accept private sector information technology employees detailed under the Information Technology Exchange Program.

(b) Agency heads, or their designees, may approve details as a mechanism for improving the Federal workforce's competency in using information technology to deliver Government information and services. Details under this part allow Federal employees to serve with private sector organizations for a limited time period without loss of employee rights and benefits. Agencies may not make details under this part to circumvent personnel ceilings, or as a substitute for other more appropriate personnel decisions or actions. Approved details must meet the strategic program goals of the agency. The benefits to the Federal agency and the private sector organization are the primary considerations in initiating details; not the desires or personal needs of an individual employee.

### § 370.102 Definitions.

In this part: *Agency* means an Executive agency as defined in 5 U.S.C. 105, with the exception of the Government Accountability Office.

*Core Competencies* are those IT competencies identified by the Federal Chief Information Officer (CIO) Council as a baseline for use by Federal agencies in complying with the Clinger-Cohen Act, Public Law 104–106, to determine the training and development needs of the Federal IT workforce.

*Detail* means: (1) The assignment or loan of an employee of an agency to a private sector organization without a change of position from the agency that employs the individual (5 U.S.C. 3701(2)(A)), or

(2) The assignment or loan of a private sector organization employee to

an agency without a change of position from the private sector organization that employs the individual (5 U.S.C. 3701(2)(B)).

*Exceptional employee* means an employee who is rated at the highest levels of the applicable performance appraisal system or, in the case of an employee under an appraisal system that does not have a summary rating level above “fully successful” or equivalent, is rated at the highest summary level used by the performance appraisal system and demonstrates sustained quality performance significantly above that expected in the type of position involved, as determined under performance-related criteria established by the agency.

*Information technology (IT) management* means the planning, organizing, staffing, directing, integrating, or controlling of information technology as defined by Office of Management and Budget Circular A–130 which states, the term “information technology” means any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an executive agency. For purposes of the preceding sentence, equipment is used by an executive agency if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency which requires the use of such equipment, or requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product. The term “information technology” includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources. The term “information technology” does not include any equipment that is acquired by a Federal contractor incidental to a Federal contract. The term “information technology” does not include national security systems as defined in the Clinger-Cohen Act of 1996 (40 U.S.C. 1452).

*OPM* means the Office of Personnel Management.

*Private sector organization* means a profit-making business entity that is registered in the Central Contractor Registration Database (<http://www.ccr.gov>) as required for the conduct of business with the Government.

*Small business concern* means a business concern that satisfies the definitions and standards specified by the Administrator of the Small Business Administration (SBA), under section 3(a)(2) of the Small Business Act, codified at 13 CFR 121. Federal agencies can find more information through the “Frequently Asked Questions” page on the SBA’s Web site at <http://www.sba.gov>, which addresses small business size standards.

#### § 370.103 Eligibility.

(a) To be eligible for a detail under this part, an individual must:

- (1) Work in the field of information technology management;
- (2) Be considered an exceptional employee by the individual’s current employer; and
- (3) Be expected by the individual’s current employer to assume increased information technology management responsibilities in the future.

(b) To be eligible for a detail under this part, a Federal employee, in addition to meeting the requirements of paragraph (a) of this section, must be serving in a position at the GS-11 level or above (or equivalent), under a career or career-conditional appointment or an appointment of equivalent tenure in the excepted service. For purposes of this part, positions of equivalent tenure in the excepted service are limited to permanent appointments. In addition, only career members of the Senior Executive Service are eligible to be detailed under this part.

(c) To be eligible to participate in the Information Technology Exchange Program, a private sector organization must be registered in the Central Contractor Registration Database located at <http://www.ccr.gov>, except as permitted by the Federal Acquisition Regulation (48 CFR 4.1102).

(d) To be eligible for a detail to a Federal agency under this part, a private sector employee, in addition to meeting the requirements of paragraph (a) of this section, must meet citizen-

ship requirements for Federal employment in accordance with 5 CFR 7.3 and 338.101, as well as any other statutory limitation.

#### § 370.104 Length of details.

(a) Details may be for a period of between 3 months and 1 year, and may be extended in 3-month increments for a total of not more than 1 additional year, in accordance with 5 U.S.C. 3702(d).

(b) Agencies may not approve or extend details after December 17, 2007. An individual serving on a detail prior to this date may continue to do so as long as the detail began or was extended on or before December 17, 2007.

(c) For the life of the ITEP, a Federal agency may not send on assignment an employee who has served on a detail under this part for more than 6 years during his or her Federal career. OPM may waive this provision upon request of the agency head, or his or her designee.

#### § 370.105 Written agreements.

Before the detail begins, the agency and private sector organization must enter into a written agreement with the individual(s) detailed. The written agreement must be a three-party agreement between the Federal agency (agency head or designee), the individual (private sector or Federal), and the private sector organization. The written agreement must include, but is not limited to, the following elements:

(a) The duties to be performed, duration, and terms under which extensions to the detail may be granted;

(b) An individual development plan describing the core IT competencies and technical skills that the detailee will be expected to enhance or acquire;

(c) Whether the individual will be supervised by a Federal or private sector employee; and a description of the supervision;

(d) The requirement for Federal employees to return to their employing agency upon completion of the detail for a period equal to the length of the detail including any extensions; and

(e) The obligations and responsibilities of all parties as described in 5 U.S.C. 3702 through 3704.

## § 370.106

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### § 370.106 Terms and conditions.

(a) A Federal employee detailed under this part:

(1) Remains a Federal employee without loss of employee rights and benefits attached to that status. These include, but are not limited to:

- (i) Consideration for promotion;
- (ii) Leave accrual;
- (iii) Continuation of retirement benefits and health, life, and long-term care insurance benefits; and
- (iv) Pay increases the employee otherwise would have received if he or she had not been detailed;

(2) Remains covered for purposes of the Federal Tort Claims Act, and for purposes of injury compensation as described in 5 U.S.C. chapter 81; and

(3) Is subject to any action that may impact the employee's position while he or she is detailed.

(b) An individual detailed from a private sector organization under this part:

(1) Is deemed to be an employee of the Federal agency for purposes of:

(i) Title 5, United States Code, chapter 73 (Suitability, Security, and Conduct);

(ii) Title 18, United States Code, section 201 (Bribery of Public Officials and Witnesses), section 203 (Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government), section 205 (Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government), section 207 (Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches), section 208 (Acts Affecting a Personal Financial Interest), section 209 (Salary of Government Officials and Employees Payable Only by the United States), section 603 (Making Political Contributions), section 606 (Intimidation to Secure Political Contributions), section 607 (Place of Solicitation), section 643 (Accounting Generally for Public Money), section 654 (Officer or Employee of United States Converting Property of Another), section 1905 (Disclosure of Confidential Information Generally), and section 1913 (Lobbying with Appropriated Moneys);

(iii) Title 31, United States Code, section 1343 (Buying and Leasing Pas-

senger Motor Vehicles and Aircraft), section 1344 (Passenger Carrier Use), and section 1349(b), (Adverse Personnel Actions);

(iv) The Federal Tort Claims Act and any other Federal tort liability statute;

(v) The Ethics in Government Act of 1978;

(vi) Internal Revenue Code of 1986, section 1043 (Sale of Property to Comply with Conflict-of-Interest Requirements); and

(vii) Title 41, United States Code, section 423 (Prohibition on Former Official's Acceptance of Compensation From Contractor).

(2) Does not have any right or expectation for Federal employment solely on the basis of his or her detail;

(3) May not have access to any trade secrets or to any other nonpublic information which is of commercial value to the private sector organization from which he or she is detailed;

(4) Is subject to such regulations as the President may prescribe; and

(5) Is covered by 5 U.S.C. chapter 81, Compensation for Work Injuries, as provided in 5 U.S.C. 3704(c).

(c) Individuals detailed under this part may be supervised either by Federal or private sector managers. For example, a Federal employee on detail to a private sector organization may be supervised by a private sector manager. Likewise, a private sector employee on detail to an agency may be supervised by a Federal manager.

(d) As provided in 5 U.S.C. 3704(d), a private sector organization may not charge the Federal Government, as direct or indirect costs under a Federal contract, for the costs of pay or benefits paid by that private sector organization to an employee detailed to an agency under this part.

(e) Details may be terminated by the agency (agency head or designee) or private sector organization concerned for any reason at any time.

### § 370.107 Details to small business concerns.

(a) The head of each agency must take such actions as may be necessary to ensure that, of the details made to private sector organizations in each calendar year, at least 20 percent are to

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small business concerns, in accordance with 5 U.S.C. 3703(e)(1).

(b) Agencies must round up to the nearest whole number when calculating the percentage of details to small business concerns needed to meet the requirements of this section. For example, if an agency detailed 11 individuals to private sector organizations during a given year, to meet the 20 percent requirement, that agency must have made at least 3 (rounded up from 2.2) of these details to small business concerns.

(c) For purposes of this section, “year” refers to the 12-month period beginning on date of the enactment of the Act, December 17, 2002, and each succeeding 12-month period in which any assignments are made. Assignments “made” in a year are those commencing in such year, in accordance with 5 U.S.C. 3703(e)(2).

(d) Agencies that do not meet the requirements of this section are subject to the reporting requirements in 5 U.S.C. 3703(e)(3).

(e) An agency that makes fewer than five details to private sector organizations in any year is not subject to this section.

### § 370.108 Reporting requirements.

(a) Agencies using this part must prepare and submit to OPM semiannual reports in accordance with 5 U.S.C. 3706 which must include:

(1) The total number of individuals detailed to, and the total number of individuals detailed from, the agency during the report period;

(2) A brief description of each detail reported under paragraph (a)(1) of this section including:

(i) The name of the detailed individual, and the private sector organization and the agency (including the specific bureau or other agency component) to or from which such individual was detailed;

(ii) The respective positions to and from which the individual was detailed, including the duties and responsibilities and the pay grade or level associated with each; and

(iii) The duration and objectives of the individual’s detail; and

(3) Such other information as OPM considers appropriate.

(b) Reports are due to OPM no later than April 7 and October 7 of each year for the immediately preceding 6-month periods ending March 31 and September 30, respectively.

(c) Agencies that do not meet the requirements of § 370.107 must prepare and submit annual reports to Congress in accordance with 5 U.S.C. 3703(e)(3), as appropriate.

### § 370.109 Agency plans.

Before detailing agency employees or receiving private sector employees under this part, an agency must establish an Information Technology Exchange Program Plan. The plan must include, but is not limited to, the following elements:

(a) Designation of the agency officials with authority to review and approve details;

(b) Estimated number of candidates needed, both private sector and Federal employees, to address IT workforce needs within the agency;

(c) Criteria for the selection of agency employees for a detail under this part. At a minimum, each agency must:

(1) Announce the detail, including eligibility requirements, to all eligible employees;

(2) Provide for employee nomination by their organization or self-nomination, to include endorsement by their respective supervisor;

(3) Forward nominations to designated agency reviewing and approving official for final selection.

(4) Consider:

(i) The extent to which the employee’s current competencies and skills are being utilized in the agency;

(ii) The employee’s capability to improve, enhance, or learn skills and acquire competencies needed in the agency; and

(iii) The benefits to the agency which would result from selecting the employee for detail.

(d) Return rights and continuing service requirements for Federal employees returning from a detail; and

(e) Documentation and recordkeeping requirements sufficient to allow reconstruction of each action taken under this part to meet agency reporting requirements under § 370.108(a) and (b).