



February 7, 2024

Hon. Robin Carnahan  
Administrator, General Services Administration  
1800 F Street, N.W.  
Washington, DC 20405

Re: Petition for Rulemaking to Protecting Against Agency Relocations that Undermine Agency Missions

Dear Administrator Carnahan:

Governing for Impact<sup>1</sup> respectfully petitions the General Services Administration (GSA), pursuant to 5 U.S.C. § 553(e), to amend the agency’s real property regulations at 41 C.F.R., Subtitle C, Ch. 101, in order to protect against relocations of government agency operations in ways that could undermine agency capacity to fulfill their missions under law.

GSA currently regulates decisions about the location of administrative agencies and their subunits in a number of respects.<sup>2</sup> Federal law allows the GSA Administrator to “assign or reassign space for an executive agency in any Federal Government-owned or leased building” based on “a determination by the Administrator that the assignment or reassignment is advantageous to the Government in terms of economy, efficiency, or national security.”<sup>3</sup> Notwithstanding this threshold requirement for decisions to approve the movement of agency functions, a notable technique for subverting the effectiveness of administrative agencies has been moving offices away from D.C. to induce attrition in expert career staff.

This petition requests that GSA issue a new regulation that would tighten the decision-making protocol for approving agency relocation decisions. Such a regulation should detail the appropriate elements of an evidence-based assessment of the costs and benefits associated with any potential decision to undertake a significant relocation of agency operations. This new rule should also prescribe a mandatory consultation process that would help ensure that significant decisions about agency relocation would be made more transparently and more inclusively.

## **Background**

A technique for disabling administrative agencies in the past has been moving offices away from D.C. to induce attrition in expert career staff. Well-publicized examples included moving the Department of the Interior’s Bureau of Land Management’s (“BLM”) headquarters from Washington, D.C., to Grand Junction, Colorado<sup>4</sup> and the United States Department of Agriculture’s

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<sup>1</sup> Governing for Impact works to ensure that the federal government acts more effectively for everyday Americans. *See* [www.governingforimpact.org](http://www.governingforimpact.org).

<sup>2</sup> 40 U.S.C. § 584(a)(1).

<sup>3</sup> 40 U.S.C. § 584(a)(2)(C).

<sup>4</sup> Anne-Marie Fennell & Frank Rusco, U.S. Gov’t Accountability Off., GAO-20-397r, Bureau of Land Management: Agency’s Reorganization Efforts Did Not Substantially Address Key Practices for Effective Reforms 5 (2020), <https://www.gao.gov/assets/gao-20-397r.pdf> (hereafter, GAO BLM Report).

(“USDA’s”) relocation of two of its research agencies — the Economic Research Service and the National Institute of Food and Agriculture — from Washington, D.C., to Kansas City, Missouri in the summer of 2019.<sup>5</sup> Such moves can not only threaten agency effectiveness in the long run, but they inevitably cause short-run disruption as employees have to make quick decisions on potential relocation. Negative impacts on both morale and productivity surely follow. With regard to the BLM, the GAO reported: “[O]f the 311 [career] positions moving west, 132 were vacant before the BLM reorganization was announced in July 2019, resulting in 179 staff who needed to relocate. Of these 179 staff, 90 accepted their reassignments; 81 either declined the reassignment or separated from their position between July 2019 and January 23, 2020, creating additional vacancies; and eight staff fell into other categories.”<sup>6</sup> In other words, pending the hiring of replacements, BLM would have only roughly half of its experienced staff available to carry on the agency’s work upon relocation.

Both the BLM and USDA decisions elicited critical assessments by the Government Accountability Office (“GAO”). Regarding the BLM moves, GAO found: “In developing its plan, BLM has not substantially followed key practices for effective agency reforms relevant to relocating employees.”<sup>7</sup> In assessing the USDA’s moves, GAO wrote: “Weaknesses in USDA’s use of evidence and evidence-building approach, including insufficient transparency and stakeholder involvement, limited the ability of USDA leadership to ensure it was making an appropriately informed decision on relocating the two research agencies. As a result, this decision may have had avoidable adverse effects on ERS and NIFA’s operations in the years immediately following relocation.”

The GAO report concerning the BLM relocations makes no mention of GSA involvement in agency decision making. The report on the USDA indicates GSA staff involvement in assessing potential building sites for the sub-agencies designated for relocation, but it is not clear whether the GSA Administrator made any determinations regarding the impact of the moves on “economy, efficiency, or national security.” (It may be that the Administrator has exercised his or her statutory discretion to delegate the Director’s authority regarding such determinations to other officials within GSA or to the head or heads of other executive departments.<sup>8</sup>) In any event, it seems clear that GSA oversight in its current form proved an insufficient barrier to relocation decisions that ill-served the missions of the agencies involved.

The proposed new regulation would give the Administrator — and the senior officials of other agencies — a firmer basis for determining whether agency relocations will serve the public interest. The process it envisions is consistent with GAO recommendations concerning the appropriate processes for assessing proposed agency reform efforts in general.<sup>9</sup>

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<sup>5</sup> General Accountability Office, EVIDENCE-BASED POLICY MAKING USDA’s Decision to Relocate Research Agencies to Kansas City Was Not Fully Consistent with an Evidence-Based Approach (Report # GAO-22-104540, Apr. 2022), <https://www.gao.gov/assets/gao-22-104540.pdf> (Hereafter, GAO Report on USDA Sub-Agency Relocations.)

<sup>6</sup> GAO BLM Report, supra note 2, at 4.

<sup>7</sup> GAO BLM Report, supra note 2, at 12.

<sup>8</sup> 40 U.S.C. § 121(d)(1).

<sup>9</sup> GAO, Government Reorganization: Key Questions to Assess Agency Reform Efforts (GAO-18-427) (Jun. 13, 2018), <https://www.gao.gov/assets/gao-18-427.pdf>.

## Current State

The GSA Administrator is entitled to issue regulations to carry out his or her responsibilities regarding the management of federal property and administrative services.<sup>10</sup> Pursuant to that authority, GSA has promulgated a series of regulations, now codified under Title 41 of the Code of Federal Regulations, that already provide general standards that could be applied to agency relocation decisions. These rules typically are issued in question-and-answer form. For example (with the potentially relevant language italicized):

### **§ 102-74.10 What is the basic facility management policy?**

Executive agencies must manage, operate and maintain Government-owned and leased buildings in a manner that provides for quality space and services consistent with their operational needs and *accomplishes overall Government objectives*. The management, operation and maintenance of buildings and building systems must -

- (a) Be cost effective and energy efficient;
- (b) *Be adequate to meet the agencies' missions;*
- (c) Meet nationally recognized standards; and
- (d) Be at an appropriate level to maintain and preserve the physical plant assets, consistent with available funding.

### **§ 102-79.10. What basic assignment and utilization of space policy governs an Executive agency?**

Executive agencies must provide a quality workplace environment *that supports program operations*, preserves the value of real property assets, meets the needs of the occupant agencies, and provides child care and physical fitness facilities in the workplace when adequately justified. *An Executive agency must promote maximum utilization of Federal workspace, consistent with mission requirements, to maximize its value to the Government.*

### **§ 102-79.15 What objectives must an Executive agency strive to meet in providing assignment and utilization of space services?**

Executive agencies must provide assignment and utilization services that will maximize the value of Federal real property resources and *improve the productivity of the workers housed therein*.

### **§ 102-83.10 What basic location of space policy governs an Executive agency?**

Each Executive agency is responsible for identifying its geographic service area and the delineated area within which it wishes to locate specific activities, *consistent with its mission and program requirements*, and in accordance with all applicable statutes, regulations and policies.

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<sup>10</sup> 40 U.S.C. § 121(c)(1).

**§ 102-83.30 In addition to its mission and program requirements, are there any other issues that Federal agencies must consider in identifying the delineated area<sup>11</sup>?**

Yes, Federal agencies must also consider real estate, labor, and other operational costs and applicable local incentives, when identifying the delineated area.

GSA regulations contemplate that agencies may depart from its real property policies in certain circumstances. But agencies may do so only after complying with a GSA-prescribed approval process.

**§ 102-71.35 Are agencies allowed to deviate from GSA's real property policies?**

Yes, see §§ 102-2.60 through 102-2.110 of this chapter to request a deviation from the requirements of these real property policies.

The request process is spelled out as follows:

**§ 102-2.80 What steps must an agency take to deviate from the FMR?**

(a) Consult informally with appropriate GSA program personnel to learn more about how your agency can work within the FMR's requirements instead of deviating from them. The consultation process may also highlight reasons why an agency would not be permitted to deviate from the FMR; e.g., statutory constraints.

(b) Formally request a deviation, if consultations indicate that your agency needs one. The head of your agency or a designated official should write to GSA's Regulatory Secretariat to the attention of a GSA official in the program office that is likely to consider the deviation. (See the FMR bulletin that lists contacts in GSA's program offices and § 102-2.90.) The written request must fully explain the reasons for the deviation, including the benefits that the agency expects to achieve.

GSA regulations specify that “deviation from the FMR should occur infrequently.”<sup>12</sup>

Yet, despite the number of GSA regulations that reference suitability for agency mission as a consideration in the location, assignment, and management of space, the importance of mission as a consideration in agency location is not set forth as straightforwardly as would be ideal.

Nor do existing regulations make clear what consultation process is appropriately followed as an agency assesses or reassesses its location in relation to the mission it performs. This is a missed opportunity, especially given the enactment of the Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act),<sup>13</sup> which anticipates an increasingly rigorous evidence-based approach for the assessment of agency programs. In evaluating the USDA's planning for the relocation of two research agencies, which took place prior to adoption of the Evidence Act, the Government

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<sup>11</sup> A “[d]elineated area means the specific boundaries within which space will be obtained to satisfy an agency space requirement.” 41 C.F.R. § 102-83.20.

<sup>12</sup> 41 C.F.R. § 102-2.65.

<sup>13</sup> Pub. L. No. 115-435, 132 Stat. 5529, <https://www.congress.gov/115/plaws/publ435/PLAW-115publ435.pdf>.

Accountability Office was specifically critical of how that process fell short of a sound evidence-based approach.<sup>14</sup> Specifically, in GAO's view:

- USDA excluded critical costs and economic effects from its analysis of savings to taxpayers and therefore did not fully inform decision-makers about all the potential effects of the relocation.
- USDA's economic analysis and evidence building failed to include descriptions and justifications of at least some key analytical choices and assumptions.
- USDA neglected to assess how plausible adjustments to each important analytical choice and assumption affected its estimates of the economic effects and the results of the comparison of alternatives.
- USDA estimated the savings to taxpayers using existing employment levels at USDA with the implicit assumption of zero move-related attrition and did not perform any analysis to demonstrate how sensitive its estimate of savings was to different levels of attrition.
- USDA's evidence-building process did not effectively involve critical stakeholders, including employees and employee unions.<sup>15</sup>

This list of shortcomings identified by GAO appears even weightier under the Evidence Act. That Act now calls for agencies to develop "a systematic plan for identifying and addressing policy questions relevant to the programs, policies, and regulations of the agency," and to do so with focused attention on the evidence and analytical approaches to carry out such a plan.<sup>16</sup> GAO's criticisms provide a helpful guide to what should be required for an evidence-based assessment of possible agency relocation plans.

More precise GSA regulations concerning agency relocations could have a doubly beneficial effect. At the front end, their existence should catalyze a decisional process that will head off relocation decisions either intentionally or inadvertently inconsistent with agency mission effectiveness. After the fact, such regulations could also facilitate meaningful judicial review as a check against arbitrary agency decisions regarding relocation. The D.C. Circuit has held that even agency decisions embodying expert policy judgment in allocating agency resources can be reviewed in federal court if there exist "judicially manageable standards" for review. Such standards may be rooted in "formal and informal policy statements and regulations as well as in statutes."<sup>17</sup>

### **Proposed Action**

To foster more rigorous decision making regarding significant agency relocation decisions, the GSA Administrator could exercise authority under 40 U.S.C. § 121(c)(1), which allows regulation to carry out Subtitle I of Title 40 of the U.S. Code, pertaining to "Federal Property and Administrative Services." The new regulation would presumably become part of Chapter 101 of Title 41 of the

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<sup>14</sup> See GAO Report on USDA Sub-Agency Relocations, *supra* note 2.

<sup>15</sup> *Id.* at 21-24.

<sup>16</sup> 5 U.S.C. § 312.

<sup>17</sup> *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020) (holding reviewable to a Trump-era EPA directive that would have prohibited any EPA grant recipient from serving on any of the agency's advisory committees, finding the directive failed to address serious issues implicated in the agency's change of position and that EPA impermissibly neglected to follow Office of Government Ethics regulations that establish a required procedure for issuing agency-specific ethics rules).

Code of Federal Regulations, which comprises the “Federal Property Management Regulations.” The new regulation could easily follow the question-and-answer format GSA typically follows:

**What are an agency head’s responsibilities concerning decisions whether to undertake significant relocations of agency operations?**

(a) The head of each agency shall be responsible for making an evidence-based assessment of the costs and benefits associated with any potential decision to undertake a significant relocation of agency operations. A report of that assessment shall be published online and in the Federal Register no fewer than 60 business days before any significant relocation activity (beyond planning and preliminary analysis) is initiated. A potential relocation shall be considered “significant” if the new facility would no longer be within a reasonable daily commuting distance for a substantial number of the agency’s existing executive, professional, and administrative workforce.

(b) The assessment required by paragraph (a) shall include:

- (1) A statement of all the significant potential effects of the relocation, including critical costs and economic effects, as well as impacts on the agency’s performance of its legally authorized mission, including, as relevant, research responsibilities, rulemaking capacity, and civil enforcement activity (including inspections, administrative adjudication, and litigation), plus any other responsibilities assigned to the agency by law;
- (2) A description and justification of the analytical choices and assumptions followed in the course of assembling the evidence-based assessment;
- (3) An explanation of how plausible adjustments to each important analytical choice and assumption would affect the agency’s estimates of the economic effects from relocation and the results of any comparison of alternatives the agency undertakes, including the alternative of not relocating; and
- (4) An analysis of the likely impact of relocation on employee attrition and of how sensitive the agency’s estimate of savings would be to different levels of attrition. This analysis should document the agency’s ability to hire employees in the new location with skills comparable to or superior to those who decline to move.

(c) In conducting the assessment required by paragraph (a), the agency shall involve the Office of Personnel Management and critical stakeholders, including employees and employee unions, as well as key beneficiaries of agency programs, in thorough deliberations regarding the implications of agency relocation. The published report shall indicate the names of individuals and organizations consulted and shall describe the processes through which they were consulted.

Governing for Impact welcomes the opportunity to discuss this proposal further or to answer any questions GSA may have.

Sincerely,

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