

Proposed Rules

Federal Register

Vol. 72, No. 11

Thursday, January 18, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN: 3206-AL08

Suitability

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: In support of its mission to ensure the Federal Government has an effective civilian workforce, the Office of Personnel Management (OPM) is proposing to amend its regulations governing Federal employment suitability. The proposed regulations would: authorize agencies to debar from employment for up to three years those found unsuitable, extend the suitability process to those applying for or who are in positions that can be non-competitively converted to the competitive service, provide additional procedural protections for those found unsuitable for Federal employment, and clarify the scope of authority for the Merit Systems Protection Board (MSPB or Board) to review actions taken under the regulations. OPM is also proposing changes to make the regulations more readable.

DATES: Comments must be received on or before March 19, 2007.

ADDRESSES: Send or deliver written comments to Ana A. Mazzi, Deputy Associate Director for Workforce Relations and Accountability Policy, Office of Personnel Management, 1900 E Street NW., Room 7H28, Washington, DC 20415; by FAX to 202-606-2613; or by e-mail to CWRAP@opm.gov.

FOR FURTHER INFORMATION CONTACT: Gary D. Wahlert by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at CWRAP@opm.gov.

SUPPLEMENTARY INFORMATION: OPM proposes to amend the regulations in part 731 of title 5, Code of Federal Regulations (CFR), to modify and more precisely define and clarify the regulations' coverage, the procedural

requirements for taking suitability actions, the respective authorities of OPM and agencies, and Merit Systems Protection Board (MSPB or Board) review of suitability actions. OPM also proposes various revisions to make the regulations more readable.

Coverage

OPM proposes to amend §§ 731.101, 731.103, 731.104, 731.106, 731.204, and 731.206 to provide that part 731 also applies to persons who can be noncompetitively converted to the competitive service because of service in their excepted service positions. The regulations currently cover only persons in the competitive service and the Senior Executive Service. Expansion of the regulation's scope to include suitability determinations of persons applying for, entering or employed in, the excepted service when that appointment can lead to their noncompetitive conversion to the competitive service is consistent with OPM's suitability authority. The process for employing such persons in the competitive service is a continuous one beginning with initial appointment to the excepted service and ending in (noncompetitive) conversion to the competitive service. Because these persons can (and most do) enter into the competitive service as a result of their excepted service appointment, albeit through a longer process than others appointed directly, they should be treated in the same manner as those appointed directly, including the same review of their suitability for employment. Already, under part 302 of this chapter, persons in the excepted service are subject to investigations and disqualifying factors similar to those found in part 731 (but without procedural protections). OPM proposes to refer to positions in the competitive service, positions in the excepted service as described in this paragraph, and positions in the Senior Executive Service collectively throughout part 731 as "covered positions."

OPM proposes to add definitions of *suitability action* and *suitability determination* to § 731.101 to help the reader better understand the coverage of part 731.

OPM also proposes that persons in intermittent, seasonal, per diem and temporary positions, with less than 180 days aggregate service, are not subject to

the investigative requirements of this part as stated in current § 731.104. OPM believes this change is necessary to maintain consistency between this part, which concerns suitability, and part 732 of this chapter, which governs positions of national security. OPM also proposes to clarify the definition of *material* in § 731.101 by saying that a statement may be material whether or not OPM or an agency relies upon it. The added language is not intended to change, but rather to reinforce, the meaning of the current definition in that a "material" statement does not actually have to influence or affect an official decision by OPM or an agency.

In addition, OPM proposes to amend paragraph (a) of § 731.101 to state explicitly that suitability determinations are separate and distinct from objections or passover requests concerning preference eligibles (and OPM decisions on those requests) made according to the provisions of § 3318 of title 5, United States Code (U.S.C.), and 5 CFR 332.406. Paragraph (b) of § 731.203 is likewise modified to state clearly that objections and passover issues are not covered by part 731 even if a non-selection for a Federal position is based on a reason provided in § 731.202. OPM also proposes to remove "denial of appointment" as a suitability action, as currently defined in § 731.203. Altogether, these proposed changes confirm that a non-selection for a specific position based on reasons set forth in this part is not a suitability action and that an agency objection to or request to pass over a preference eligible applicant for consideration for a particular position is not a suitability action.

Procedures

OPM is proposing to clarify in § 731.106 the level of investigation OPM or the agency may conduct when suitability issues are developed prior to a required investigation. OPM or the agency may conduct the level of investigation sufficient to resolve the issues and to support a suitability action. If the individual is later appointed, the minimum level of investigation must be conducted consistent with the requirements in § 731.106.

OPM is also proposing two changes that provide additional procedural protections for persons who may be

subject to an unfavorable suitability determination or action. First, when an agency makes a decision under part 731, or changes a tentative favorable placement decision to an unfavorable decision based on an OPM report of investigation or upon an agency investigation conducted under OPM-delegated authority, OPM would require that the agency notify the person of the specific reasons for the decision and give the person the opportunity to explain or refute the information. The current regulations do not require agencies to provide this notice and opportunity to respond.

Second, OPM is proposing to clarify that when an agency proposes to find a person unsuitable, the person may elect to have a representative of the person's choice as long as he or she makes a written designation of representation. Persons subject to investigation under part 732 of this chapter currently have this opportunity, and OPM believes that it is appropriate to extend this option to persons subject to investigation under part 731 as well.

OPM is proposing to amend § 731.303 to discontinue the current practice of allowing only *employees* to give oral answers to proposed suitability actions by OPM. This would simplify and streamline the suitability process with OPM's procedures mirroring those used by agencies with delegated authority. This will ensure that all persons are guaranteed the same rights to answer proposed suitability actions regardless of their status as applicants, appointees, or employees under the rule.

Authorities

OPM is proposing to expand the debarment authority that an agency currently possesses. Specifically, OPM proposes to permit an agency to debar from employment with that agency any person it finds unsuitable for up to three years, as opposed to a period of one year as provided in the current regulations. OPM is proposing this change to give agencies the same flexibility when deciding the appropriate length of debarment that OPM has. In addition, OPM is clarifying the regulations to indicate more clearly that an agency or OPM, when warranted, may make a subsequent suitability determination and impose an additional debarment period for the same conduct on which a previous suitability action was based. Simply put, a negative suitability action does not wipe the slate clean. It is an adjudication concerning an individual's suitability for Federal service during a particular time period, not expiation for wrongdoing. Thus, an additional debarment period may be appropriate

where the conduct was of a heinous nature, where the conduct represents a pattern of misconduct, or where a nexus exists between the conduct and the responsibilities associated with the current position. An agency or OPM making determinations in these circumstances would follow all procedural requirements of Part 731, including affording the affected persons the right to answer the agency or OPM and to appeal any negative suitability determinations to the Merit Systems Protection Board.

In § 731.103, OPM is proposing to eliminate the requirement that agencies with delegated authority seek prior approval from OPM before taking action under other authorities, such as part 315, part 359, or part 752 of this chapter, in cases involving evidence of material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment. Agencies, however, would still be required to notify OPM if they have taken, or plan to take, such action.

OPM is proposing modifications to § 731.202 to clarify that OPM or agencies with delegated authority to make suitability determinations and take suitability actions have the authority to rely on the additional suitability considerations contained in paragraph (c) of § 731.202 at their sole discretion. Factors not relied upon by OPM or agencies in individual cases may not be considered by the MSPB.

Finally, OPM is proposing in paragraph (c) of § 731.103 that agencies must exercise their delegated authorities in accordance with OPM regulations and issuances concerning procedures, policy guidance, criteria, standards, supplemental guidance, and quality control procedures established by OPM. OPM is also proposing to clarify in paragraph (d) of § 731.103 that agencies may choose to begin preliminary suitability reviews for all applicants at any time during the hiring process.

Merit Systems Protection Board Review

There is no statutory right to appeal a negative suitability determination. OPM, however, accorded applicants, appointees, and employees the right to appeal a negative suitability action taken by OPM, or an agency with delegated authority from OPM, under the procedures set forth in this part. This right of appeal applies only to an action taken under the procedures set forth in part 731. It does not extend to any other employment action that an agency takes outside of the procedures set forth in part 731 unless Congress or OPM has explicitly accorded a right of redress. In other words, what is not

covered by part 731 may not be reviewed by the MSPB. For example, OPM has provided no right to appeal an agency's decision to object to or request to pass over a candidate under part 332 of this chapter, regardless of the basis for the agency's request. That is, even if an agency objects to or requests to pass over an applicant based upon an applicant's fitness or character, the applicant does not have a right of appeal under part 731. Likewise, an agency's reason(s) for not hiring someone is not an appropriate basis to determine whether a person may appeal the agency's action. Rather, the procedures an agency decides to use determine whether an agency's action may be appealed.

The Board recognized this clear distinction in *Vislisel v. OPM*, 29 M.S.P.R. 679 (1986). There, the Board observed that a sustained objection is an agency-initiated procedure separate and apart from a suitability determination under part 731. *Id.* at 682. In *Edwards v. Department of Justice*, 87 M.S.P.R. 518 (2001), the Board abandoned its approach in *Vislisel*, holding that, in deciding whether an action was an appealable suitability determination, "what matters is the substance of the action, not the form." *Id.* at 522. This is an incorrect reading of the authority that OPM conferred upon the Board.

It is well-settled that the Board possesses jurisdiction only to the extent that Congress or OPM specifically confers jurisdiction upon it by statute and regulation. Moreover, an agency is free to utilize any applicable statutory or regulatory mechanism available if it wishes to take an employment action against an applicant, appointee, or employee. For example, an agency that is dissatisfied with an employee's performance may elect to take action under chapter 43 or 75 of title 5, United States Code, or under part 315 or 359 of this chapter of OPM's regulations if the person is serving a probationary period. Although the action an agency elects to use is based on the individual's poor performance, the agency is not limited to the procedures contained in chapter 43. *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985). An agency may elect the statutory or regulatory scheme under which it takes an action, and it is bound to follow the procedures and standards of proof found in the scheme it chooses to use. Similarly, when adjudicating an appeal of an agency action, the Board must assess the agency's action under the procedures elected by the agency and may not hold the agency to standards relating to a legal authority that the agency did not invoke. The Board may

not create an appeal right where neither Congress nor OPM has expressly granted it. *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994).

These proposed regulations reaffirm and clarify that there is a distinction between objections or passovers and suitability actions and that OPM has not authorized an appeal to MSPB for objections or passovers.

Finally, while continuing to authorize suitability appeals, OPM is proposing to clarify the scope of jurisdiction conferred on MSPB. The proposed rule would eliminate the requirement that MSPB remand a case to OPM or an agency if fewer than all the charges are sustained and replace it with a requirement that the Board affirm the suitability determination and the suitability action when one or more charges are sustained. The specter of two simultaneous reviews in the same case by MSPB and OPM or an agency has led to confusion and uncertainty about the relationship of the two reviews, e.g., whether one takes precedence over the other and whether the outcome of one moots the review of the other. The proposed rule eliminates that confusion.

Readability

In addition to the above substantive changes, OPM proposes to rewrite the regulations in part 731 to make them more readable. Under this rewriting effort, OPM is proposing a number of grammatical and stylistic changes to the regulations to clarify their intended meaning. One example applied throughout the regulations, is a proposal to use "person" consistently (instead of "individual") to describe those affected by the regulations. Another example is that the word "shall" is replaced in most cases by the word "must" to clearly state requirements. The current regulations use the terms interchangeably. OPM also is proposing to highlight the words "applicant," "appointee," and "employee" to emphasize their unique meanings when applied at various locations in the regulations.

Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed the proposed rule in accordance with Executive Order 12866.

Regulatory Flexibility Act

I certify that these regulations will not have significant economic impact on a substantial number of small entities because they will affect Federal agencies, employees, and applicants only.

List of Subjects in 5 CFR Part 731

Administrative practices and procedures, Government employees. U.S. Office of Personnel Management.

Linda M. Springer,
Director.

Accordingly, OPM is proposing to revise 5 CFR part 731 as follows:

PART 731—SUITABILITY

Subpart A—Scope

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- 731.103 Delegation to agencies.
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- 731.105 Authority to take suitability actions.
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Subpart B—Suitability Determinations and Actions

- 731.201 Standard.
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- 731.203 Suitability actions by OPM and other agencies.
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Subpart D—Agency Suitability Action Procedures

- 731.401 Scope.
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Subpart E—Appeal to the Merit Systems Protection Board

- 731.501 Appeal to the Merit Systems Protection Board.

Subpart F—Savings Provision

- 731.601 Savings provision.

Authority: 5 U.S.C. 1302, 3301, 7301, 7701; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 12731, 3 CFR, 1990 Comp., p.306., 5 CFR, parts 1, 2 and 5.

Subpart A—Scope

§ 731.101 Purpose.

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability and for taking suitability actions regarding employment in positions in the competitive service, in positions in the excepted service where the incumbents can be noncompetitively converted to the competitive service, and under career appointments to positions in the Senior Executive

Service (hereinafter in this part, these three types of positions are referred to collectively as "covered positions") pursuant to 5 U.S.C. 3301, E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218) and 5 CFR 1.1, 2.1(a) and 5.2. Section 3301 of title 5, United States Code, directs consideration of "age, health, character, knowledge, and ability for the employment sought." E.O. 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine "suitability" for competitive Federal employment. This part concerns only determinations of "suitability," that is, those determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service. Determinations made and actions taken under this part are distinct from objections or passover requests concerning preference eligibles, and OPM's decisions on such requests, made under 5 U.S.C. 3318 and 5 CFR 332.406, as well as determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR, 1949–1953 Comp., p. 936), E.O. 12968, or similar authorities.

(b) *Definitions.* In this part:

Applicant means a person who is being considered or has been considered for employment.

Appointee means a person who has entered on duty and is in the 1st year of a subject to investigation appointment (as defined in § 731.103).

Days mean calendar days unless otherwise specified in this part.

Employee means a person who has completed the first year of a subject to investigation appointment.

Material means, in reference to a statement, one that is capable of influencing, affects, or has a natural tendency to affect, an official decision even if OPM or an agency does not rely upon it.

Suitability action means an outcome described in § 731.203 and may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

Suitability determination means a decision by OPM or an agency with delegated authority that a person is suitable or is not suitable for employment in the Federal Government or a specific Federal agency.

§ 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice

published by the agency conducting the investigation.

(b) Under OMB Circular No. A-130 Revised, issued November 20, 2000, agencies are to implement and maintain a program to ensure that adequate protection is provided for all automated information systems. Agency personnel screening programs may be based on procedures developed by OPM. The Computer Security Act of 1987 (Pub. L. 100-235) provides additional requirements for Federal automated information systems.

(c) OPM may set forth policies, procedures, criteria, standards, quality control procedures, and supplementary guidance for the implementation of this part in OPM issuances.

§ 731.103 Delegation to agencies.

(a) Subject to the limitations and requirements of paragraph (g) of this section, OPM delegates to the heads of agencies authority for making suitability determinations and taking suitability actions (including limited, agency-specific debarments under § 731.205) in cases involving *applicants* for and *appointees* to covered positions in the agency.

(b) When an agency, acting under delegated authority from OPM, determines that a Governmentwide debarment by OPM under § 731.204(a) may be an appropriate action, it must refer the case to OPM for debarment consideration. Agencies must make these referrals prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s), through subject contact or investigation, to determine if a Governmentwide debarment appears warranted.

(c) Agencies exercising authority under this part by delegation from OPM must implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to OPM issuances as described in § 731.102(c).

(d) Agencies may begin to determine an applicant's suitability at any time during the hiring process. Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost effective to first ensure that the applicant is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection. However, in certain circumstances, such as filling law enforcement positions, an agency may choose to initiate a preliminary suitability review at the time of application. Whether or not a person is

likely to be eligible for selection, OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment and OPM will take a suitability action where warranted.

(e) When an agency, exercising authority under this part by delegation from OPM, makes a suitability determination or changes a tentative favorable placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency must:

(1) Ensure that the records used in making the determination are accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the person in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, the regulations in this part, and OPM issuances as described in § 731.102(c) have been observed;

(3) Consider all available information in reaching its final decision on a suitability determination or suitability action, except information furnished by a non-corroborated confidential source, which may be used only for limited purposes, such as information used to develop a lead or in interrogatories to a subject, if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency suitability determination or action as required by OPM issuances as described in § 731.102(c).

(f) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(c).

(g) OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment. OPM also retains jurisdiction over all suitability cases involving a refusal to furnish testimony as required by § 5.4 of this chapter. Agencies must refer these cases to OPM for adjudication for suitability action under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (5 CFR part 315, 5 CFR part 359, or 5 CFR part 752). In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction

under this part in any case it deems necessary.

§ 731.104 Appointments subject to investigation.

(a) To establish a person's suitability for employment, appointments to covered positions identified in § 731.101 require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations. Certain appointments do not require investigation. Except when required because of position risk level (high, moderate, or low) changes, a person in a covered position, who has undergone a suitability investigation, need not undergo another one simply because the person has been:

- (1) Promoted;
- (2) Demoted;
- (3) Reassigned;
- (4) Converted from career-conditional to career tenure;
- (5) Appointed or converted to an appointment in a covered position if the person has been serving continuously with the agency for at least 1 year in one or more positions under an appointment subject to investigation; or
- (6) Transferred, provided the person has served continuously for at least 1 year in a position subject to investigation.

(b) (1) Either OPM or an agency with delegated suitability authority may investigate and take a suitability action against an applicant, appointee, or employee in accordance with § 731.105. There is no time limit on the authority of OPM or an agency with delegated suitability authority to conduct the required investigation of an applicant who has been appointed to a position. An employee does not have to serve a new probationary or trial period merely because his or her appointment is subject to investigation under this section. An employee's probationary or trial period is not extended because his or her appointment is subject to investigation under this section.

(2) The subject to investigation condition also does not eliminate the need to conduct investigations required under § 731.106 for public trust positions when the required investigation commensurate with the risk level of the position has not yet been conducted.

(3) Suitability determinations must be made for all appointments that are subject to investigation.

(c) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days in either a single continuous appointment or series of appointments, do not require

a background investigation as described in § 731.106(c)(1). The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability of the person.

§ 731.105 Authority to take suitability actions.

(a) Neither OPM nor an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, a position that is not subject to investigation under § 731.104(a)(1) through (6).

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on any of the criteria of § 731.202;

(c) Except as limited by § 731.103(g), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202;

(d) OPM may take a suitability action under this part against an *employee* based on the criteria of § 731.202(b)(3), (4), or (8).

(e) An agency may not take a suitability action against an *employee*. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. Agencies must notify OPM if it wants to take, or has taken, action under these authorities.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk Designation.* Agency heads must designate every covered position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service. OPM will provide an example of a risk designation system for agency use in an OPM issuance as described in § 731.102(c).

(b) *Public Trust Positions.* Positions at the high or moderate risk levels would normally be designated as "Public Trust" positions. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.*

(1) Persons receiving an appointment made subject to investigation under this

part must undergo a background investigation. OPM is authorized to establish minimum investigative requirements correlating to risk levels. Investigations should be initiated before appointment but no later than 14 calendar days after placement in the position.

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter, detail the various sensitivity levels and investigation types. Detailed procedures for determining investigative requirements for all positions based upon risk and sensitivity will be established in an OPM issuance as described in § 731.102(c).

(3) If suitability issues develop prior to the required investigation, OPM or the agency may conduct an investigation sufficient to resolve the issues and support a suitability determination or action, if warranted. If the person is appointed, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Risk level changes.* If a person moves to a higher risk level position, or if the risk level of his or her position itself is changed, the person may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the move or the new designation is final.

(e) *Completed investigations.* Any suitability investigation completed by an agency under provisions of paragraph (d) of this section must result in a suitability determination by the employing agency. The subject's employment status (i.e., applicant, appointee, or employee as defined in § 731.101) will determine the applicable agency authority and procedures to be followed in any action taken.

Subpart B—Suitability Determinations and Actions

§ 731.201 Standard.

The standard for a suitability action defined in § 731.203 and taken against an applicant, appointee, or employee is that the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria for making suitability determinations.

(a) *General.* OPM, or an agency to which OPM has delegated authority,

must base its suitability determination on the presence or absence of one or more of the specific factors (charges) in paragraph (b) of this section.

(b) *Specific factors.* In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action:

- (1) Misconduct or negligence in employment;
- (2) Criminal or dishonest conduct;
- (3) Material, intentional false statement, or deception or fraud in examination or appointment;
- (4) Refusal to furnish testimony as required by § 5.4 of this chapter;
- (5) Alcohol abuse of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others;
- (6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;
- (7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and
- (8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) *Additional considerations.* OPM and agencies may consider the following additional considerations to the extent OPM or the relevant agency, in their sole discretion, deems them pertinent to the individual case:

- (1) The nature of the position for which the person is applying or in which the person is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or presence of rehabilitation or efforts toward rehabilitation.

§ 731.203 Suitability actions by OPM and other agencies.

(a) For purposes of this part, a suitability action is an action resulting in one or more of the following:

- (1) Cancellation of eligibility;
- (2) Removal;
- (3) Cancellation of reinstatement eligibility; and
- (4) Debarment.

(b) A non-selection or cancellation of eligibility for a specific position based

on an objection or passover of a preference eligible under 5 CFR 332.406 is *not* a suitability action even if the non-selection is based on reasons set forth in § 731.202.

(c) A suitability action may be taken against an applicant or an appointee when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(g).

(d) OPM may require that an appointee or an employee be removed on the basis of a material, intentional false statement, deception or fraud in examination or appointment; refusal to furnish testimony as required by § 5.4 of this chapter; or a statutory or regulatory bar which prevents the person's lawful employment.

(e) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception or fraud in examination or appointment.

(f) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 752, 359, or 315 of this chapter. Where behavior covered by this part may also form the basis for a part 752, 359, or 315 of this chapter action, agencies may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. Agencies must notify OPM if it wants to take, or has taken, action under these authorities.

(g) Agencies do not need approval from OPM before taking unfavorable suitability actions. However, they are required to report to OPM all unfavorable suitability actions taken under this part within 30 days after they take the action. Also, all actions based on an OPM investigation must be reported to OPM as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

§ 731.204 Debarment by OPM.

(a) When OPM finds a person unsuitable for any reason listed in § 731.202, OPM, in its discretion, may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that person examination for, and appointment to, covered positions.

(b) Upon the expiration of a period of debarment, OPM may redetermine a person's suitability for appointment in accordance with the procedures of this part. An additional debarment period may be imposed for the same conduct

on which the previous suitability action was based, when warranted.

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

§ 731.205 Debarment by agencies.

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that person examination for, and appointment to, either all or specific covered positions within that agency.

(b) Upon the expiration of a period of agency debarment, the agency may redetermine a person's suitability for appointment at that agency in accordance with the procedures of this part. An additional debarment period may be imposed for the same conduct on which the previous suitability action was based, when warranted.

(c) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if a person applies for, or is inappropriately appointed to, a position at that agency during the debarment period. This responsibility does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

Subpart C—OPM Suitability Action Procedures

§ 731.301 Scope.

This subpart covers OPM-initiated suitability actions against an *applicant*, *appointee*, or *employee*.

§ 731.302 Notice of proposed action.

(a) OPM will notify the applicant, appointee, or employee (hereinafter, the "respondent") in writing of the proposed action, the charges against the respondent, and the availability of review, upon request, of the materials relied upon. The notice will set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice will further inform the respondent of the time limit for the answer as well as the address to which an answer must be made.

(b) The notice will inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

(c) OPM will serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

(d) If the respondent encumbers a position covered by this part on the date the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

(e) OPM will send a copy of the notice to any employing agency that is involved.

§ 731.303 Answer.

(a) *Respondent's answer.* A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

(b) *Agency's answer.* An employing agency may also answer the notice of proposed action. The time limit for filing such an answer is 30 days from the date of the notice. In reaching a decision, OPM will consider any answer the agency makes.

§ 731.304 Decision.

The decision regarding the final suitability action will be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. OPM will also notify the respondent's employing agency of its decision. If the decision requires removal, the employing agency must remove the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision.

Subpart D—Agency Suitability Action Procedures

§ 731.401 Scope.

This subpart covers agency-initiated suitability actions against an *applicant* or *appointee*.

§ 731.402 Notice of proposed action.

(a) The agency must notify the applicant or appointee (hereinafter, the "respondent") in writing of the proposed action, the charges against the respondent, and the availability for review, upon request, of the materials relied upon. The notice must set forth the specific reasons for the proposed action and state that the respondent has the right to answer the notice in writing. The notice must further inform the respondent of the time limit for the answer as well as the address to which such answer must be delivered.

(b) The notice must inform the respondent that he or she may be represented by a representative of the respondent's choice and that if the respondent wishes to have such a representative, the respondent must designate the representative in writing.

(c) The agency must serve the notice of proposed action upon the respondent by mail or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

(d) If the respondent is employed in a position covered by this part on the date the notice is served, the respondent is entitled to be retained in a pay status during the notice period.

§ 731.403 Answer.

A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the answer. To be timely, a written answer must be submitted no more than 30 days after the date of the notice of proposed action.

§ 731.404 Decision.

The decision regarding the final action must be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. If the decision requires removal, the employing agency must remove the appointee from the rolls within 5 work days of the agency's decision.

Subpart E—Appeal to the Merit Systems Protection Board

§ 731.501 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* When OPM or an agency acting under delegated authority under this part takes a suitability action against a person, that person may appeal the action to the Merit Systems Protection Board (hereinafter "Board"). If the Board finds that at least one of the charges brought by OPM or an agency against the person is supported by a preponderance of the evidence, regardless of whether all specifications are sustained, it must affirm the suitability determination and the suitability action.

(b) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of this title.

Subpart F—Savings Provision

§ 731.601 Savings provision.

No provision of the regulations in this part is to be applied in such a way as to affect any administrative proceeding

pending on [DATE OF THE EFFECTIVE DATE OF THE FINAL RULE]. An administrative proceeding is deemed to be pending from the date of the agency or OPM "notice of proposed action" described in §§ 731.302 and 731.402.

[FR Doc. E7-592 Filed 1-17-07; 8:45 am]

BILLING CODE 6326-39-P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket Number DHS-2007-0003]

Privacy Act of 1974: Implementation of Exemptions; Redress and Response Records System

AGENCY: Privacy Office, Office of the Secretary, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is amending its regulations to exempt portions of a new system of records from certain provisions of the Privacy Act. Specifically, the Department proposes to exempt portions of the Redress and Response Records System from one or more provisions of the Privacy Act because of criminal, civil and administrative enforcement requirements.

DATES: Comments must be received on or before February 20, 2007.

ADDRESSES: You may submit comments, identified by Docket Number DHS-2007-0003 by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Facsimile:* 866-466-5370.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528; telephone 571-227-3813; facsimile: 866-466-5370.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS), elsewhere in this edition of the **Federal Register**, published a Privacy Act system of records notice describing records in the DHS Redress and Response Records System. This system maintains records

for the DHS Traveler Redress Inquiry Program (TRIP), which is the traveler redress mechanism being established by DHS in connection with the Rice-Chertoff Initiative, as well as in accordance with other policy and law. DHS TRIP will facilitate the public's ability to provide appropriate information to DHS for redress requests when they believe they have been denied entry, refused boarding for transportation, or identified for additional screening by DHS components or programs at their operational locations. Such locations include airports, seaports, train stations and land borders. DHS TRIP will create a cohesive process to address these redress requests across DHS.

DHS TRIP will serve as a mechanism to share redress-related information and facilitate communication of redress results across DHS components. It will also facilitate efficient adjudication of redress requests. Once the information intake is complete, DHS TRIP will facilitate the transfer of or access to this information for the DHS components or other agencies redress process, which will address the redress request.

This system contains records pertaining to various categories of individuals, including: individuals seeking redress or individuals on whose behalf redress is sought from DHS; individuals applying for redress on behalf of another individual; and DHS employees and contractors assigned to interact with the redress process.

No exemption shall be asserted with respect to information submitted by and collected from individuals or their representatives in the course of any redress process associated with this System of Records.

This system, however, may contain records or information recompiled from or created from information contained in other systems of records, which are exempt from certain provisions of the Privacy Act. For these records or information only, in accordance with 5 U.S.C. 552a (j)(2), (k)(1), (k)(2), and (k)(5), DHS will also claim the original exemptions for these records or information from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G) through (I), (5), and (8); (f), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information. Moreover, DHS will add these exemptions to Appendix C to 6 CFR Part 5, DHS Systems of Records Exempt from the Privacy Act. Such exempt records or information may be law enforcement or national security investigation records, law enforcement activity and encounter records, or terrorist screening records.