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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206–AL08

Suitability

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: In support of its mission to ensure the Federal Government has an effective civilian workforce, the Office of Personnel Management (OPM) is issuing final regulations governing Federal employment suitability. The final regulations 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) to review actions taken under the regulations. The changes also make the regulations more readable.

DATES: *Effective Date:* The rule is effective June 16, 2008.

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SUPPLEMENTARY INFORMATION:

Introduction

On January 18, 2007, OPM published at 72 FR 2203 (2007) proposed amendments to 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 proposed various revisions to make the regulations more readable. The public comment period on the proposed amendments ended on March 19, 2007. OPM received comments from five Federal agencies or departments and from three unions. Of the agency comments, three were received from security offices, two from human resources offices, and one from a legal office. OPM has carefully considered the comments received.

Coverage

OPM proposed to amend the regulations 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. OPM noted that the 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 this limited group of 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 investigation and disqualifying factors similar to those found in part 731. OPM believes that procedural protections should be extended to this limited group of persons in the excepted service.

One commenter had doubts about OPM's statutory authority to extend suitability to persons in the excepted service, notwithstanding OPM's statement that to do so would be consistent with OPM's suitability authority. OPM has carefully reviewed its authority under statute and Executive Order (E.O.) and again has concluded it does have the required authority.

Under rules II and V of E.O. 10577, as amended, OPM has the authority to regulate standards of fitness for entry in the competitive service, to investigate suitability for the competitive service, and to establish investigative requirements for competitive service appointments. Section 1103(a)(5)(A) of title 5, U.S. Code, requires OPM to execute, administer, and enforce these rules. The law does not contemplate that the suitability standards and other requirements for appointment to a competitive service position would not apply because of the means by which an applicant initially enters service.

While the positions at issue here do not begin in the competitive service, they end up in the competitive service if converted. The triggering events for this method of entering the competitive service are the persons' appointments to the excepted service. Because of the continuity of this method, from appointments in the excepted service to conversions to the competitive service, OPM concludes that OPM's suitability authority applies to these persons and applies as soon as they are appointed to the excepted service position. Accordingly, there is no requirement that the positions must have been converted before the incumbents are subject to investigation and determinations as to fitness for Federal employment. Thus, OPM declines to adopt a commenter's recommendation that the regulations be revised to state that suitability determinations for persons in these positions can only take place upon ''application to a competitive appointment'' or when the conversion is ''imminent.''

Several commenters asked for examples of positions in the excepted service from which persons may be noncompetitively converted to the competitive service. While this is not a complete list of positions, some are under the Federal Career Intern Program, the Veterans Recruitment Appointment Program, the Student Career Experience Program, and the Presidential Management Fellows Program.

One commenter asked what authority would permit the removal of an excepted service employee for suitability reasons such as misconduct

prior to appointment. As we stated in our proposed rule, the revised regulations clarify that they apply to persons who can be noncompetitively converted to service because of employment in an excepted service position. The purpose of these positions is to lead to a competitive appointment and, therefore, should be treated in the same way for suitability purposes as those who are appointed directly into the competitive service.

One commenter wondered what the advantage would be of having an excepted service position if it is covered by the suitability rules. OPM's proposal identified just a limited category of excepted service employees that would be covered by part 731, i.e., those whose excepted service appointment can lead to their noncompetitive conversion to the competitive service. All other excepted service positions are not covered by the suitability rules. However, other excepted service positions are subject to qualification standards which may include disqualifying factors under 5 CFR part 302. At any rate, most persons in excepted service positions already have other employee protections, whether or not they are covered by suitability rules.

OPM proposed to add definitions of *suitability action* and *suitability determination* to § 731.101 to help the reader better understand the coverage of part 731. One commenter suggested that the definition of ''suitability action'' be reworded so that it would be parallel to the definition of ''suitability determination'' and thus clarify the distinction between the two. OPM notes that the construction of the definitions differs because the processes differ. One (suitability actions) concerns the type of actions taken, such as debarment or removal, once a person is determined to be unsuitable and the other (suitability determinations) concerns the process of initially deciding whether a person is suitable. OPM believes that its initial proposed language better draws that distinction and the suggestion is not adopted.

OPM proposed at § 731.104(c) 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 part 731. With respect to seasonal employees, one commenter wondered whether the 180 days aggregate service meant 180 days per year or an aggregate of 180 days in all their employment. OPM's response is that the 180 days means 180 days per year. OPM has modified § 731.104(c) accordingly. OPM also has modified the punctuation in this section to clarify that the phrase ''with less than 180 days aggregate service per year'' applies to each of the types of positions noted: intermittent, seasonal, per diem and temporary positions.

Another commenter expressed concern that the rule would allow such persons access to facilities and information without investigation for six months because agencies would not be able to investigate them under the revised rule. That was not the intent. Rather, OPM's intent is to more fully identify those types of positions for which incumbents are not subject to investigation as mandated by part 731. As the proposed rule states, an agency ''must conduct such checks as it deems appropriate to ensure the suitability of the person.'' To accomplish such checks, some agencies may choose to investigate these persons in the same manner as it would those actually covered by part 731, but they are not required to do so. The checks required by § 731.104(c) need not rise to the level required for an investigation under part 731. Likewise, the coverage requirements for suitability purposes of these persons do not prevent agencies from conducting other pre-employment checks, such as an investigation for eligibility for an identity credential under Homeland Security Presidential Directive No.12—a concern expressed by another commenter. Moreover, E.O. 10450 authorizes investigations for all civilian officers and employees, including, under some circumstances, those in intermittent, temporary, or seasonal positions. Finally, as explained in the proposed regulations, 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 proposed 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. OPM noted that the added language was 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. This is not a new concept since the former regulations at § 731.105(c) stated: ''A statement may be a material statement even if an agency does not rely upon it.''

Two commenters recommended that the definition be modified. One of these commenters stated that the proposed definition would undercut the commonly accepted legal meaning of ''material'' by setting the threshold for what may be material too low. The other commenter suggested that the definition be modified to state that, in order for it to be material, a statement must ''likely'' influence a decision rather than just be ''capable of'' influencing a decision. OPM believes that in many cases, a statement that is capable of influencing a decision is also likely to be relied on by OPM or an agency. However, as OPM explained in the proposed rule, a ''material'' statement ''does not actually have to influence or affect an official decision by OPM or an agency.'' In some situations, such as those involving false experience or educational claims, whether the experience or education was likely to influence a decision on the person's eligibility for employment may have no relationship to the materiality of the false statement, i.e., whether the false statement 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. In such situations, OPM would be concerned with the individual's lack of honesty in the employment process. Accordingly, OPM has not adopted the suggestions.

Another commenter wondered how the definition of ''material'' relates to the statement in the proposed rule's supplementary information discussion that ''Factors not relied upon by OPM or agencies in individual cases may not be considered by MSPB.'' OPM notes that this statement referred to the specific suitability factors provided in § 731.202(b) and the additional considerations provided in § 731.202(c), not statements that may or may not be material under the definition of this part and may or may not be used by the agency or OPM.

While there is no statutory right to appeal actions taken under the procedures set forth in part 731, OPM has provided for such appeals by regulation. This appeal right does not extend to any other employment action that an agency takes outside of the procedures set forth in part 731. In this regard, OPM proposed changes to the regulations that would reaffirm and clarify that there is no right to appeal an agency's decision to object to or request to pass over an employment candidate under part 332 of this chapter, regardless of the basis for the agency's request, including an applicant's fitness or character as discussed in OPM's Delegated Examining Operations Handbook. OPM also proposed changes that would clarify that 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 as a suitability action. OPM also proposed a concurrent change

that would remove ''denial of appointment'' as a suitability action under this part. In other words, non-selection for a position is not an appealable suitability action.

While one commenter thought the proposed changes concerning objections and pass overs cleared up much confusion, other commenters thought the changes could be clearer. One commenter noted that objections and pass overs may be different from suitability determinations, but that permitting an agency to ''label'' its action as one or the other elevates ''form over substance.'' The commenter believed this would allow agencies to make *de facto* suitability determinations without following procedural requirements. The commenter recommended that agencies not be allowed to ''label'' their actions. OPM declines to limit agencies' authority in this manner. Agencies typically identify the authority under which they take actions and this in turn informs MSPB of the appropriate review authority, if any, to be used in the event those actions are appealed. A common example occurs when agencies identify the authority for or ''label'' the actions taken under 5 U.S.C. chapters 43 and 75. Performance-based actions may be taken under either authority, but agencies choose which authority to use and MSPB then knows which review standard to apply.

Another commenter recommended that, instead of ''pass over of a preference eligible,'' the regulations refer to ''pass over of an applicant.'' OPM is not adopting this recommendation because it would conflict with statutory and regulatory language describing pass overs. Upon closer examination of the regulation referred to by the commenter (5 CFR 332.406), it is apparent that the proposed rule at part 731 could be modified to refer precisely to pass over requests and objections. That is, part 332 discusses objections to eligibles and pass overs of preference eligibles as two categories of actions. Therefore, OPM has clarified the regulations to refer to ''objections to eligibles'' in §§ 731.101(a) and 731.203(b) rather than simply ''objections.'' The same commenter also recommended that the reference to decisions by OPM concerning pass over requests be changed to reflect agency delegated authority by referring to decisions by OPM and agencies. OPM agrees this change would properly describe who makes these types of decisions and has modified § 731.101(a) accordingly. Finally, another commenter stated it was their understanding that OPM's current position is that ''objections/pass overs may be based either on qualifications or suitability—and that non-selections for suitability reasons are NOT suitability actions and are not covered by Part 731.'' OPM confirms those understandings.

One commenter stated that OPM should eliminate employees and appointees who have successfully completed twelve months of Federal service from coverage of the suitability regulations. The commenter stated that this change would eliminate the ''collision'' between OPM suitability regulations and the statutes that govern employees who have completed their probationary periods. The commenter also argued that this change would preserve agencies' discretion to take adverse actions and avoid the hardship when OPM initiates action to remove a long-term employee for suitability reasons when the agency may want to keep that employee. OPM declines to make these changes to the regulations for a number of reasons. As an initial matter, there is no collision of employee rights upon completion of a probationary period and OPM's suitability regulations. Suitability actions for persons who have become employees as defined by this part can be initiated only by OPM, and the bases for judging a person unsuitable and removing that person after the first year of employment are limited to material intentional false statement, deception or fraud in examination or appointment; refusal to furnish testimony; or a statutory or regulatory bar to employment. The commenter's recommendation would eliminate OPM's ability to take appropriate suitability actions merely because the individual has been employed for 12 months. However, mere completion of 12 months of service cannot shield a person from the consequences of, for example, making material, intentional false statements in order to obtain a position with the Federal Government. This would undermine the integrity of the Federal employment process.

Procedures

A number of commenters expressed support for the proposed additional procedural protections for persons who may be subject to an unfavorable suitability determination or action. One commenter asked what role a representative would have under these protections. OPM expects the role would be similar to that of a representative in other administrative actions, i.e., that a properly-designated representative would have the authority to act on behalf of the person he or she represents, including corresponding on behalf of the person and being responsible for meeting deadlines.

A commenter suggested that representatives designated under the regulations be allowed reasonable official time to review materials and prepare responses to proposed actions. While the regulations do not require the grant of official time, they do not preclude the agency from authorizing official time for a representative. This is consistent with other OPM Governmentwide regulations, at 5 CFR parts 432 and 752, that also do not provide official time for representatives. Therefore, the suggestion to include an official time provision for representatives in the regulations is not adopted.

Authorities

The final rule permits 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. While OPM changed this rule to give agencies the same flexibility when deciding the appropriate length of debarment as OPM, one commenter suggested that objective criteria be published as to when debarment would be appropriate beyond one year. OPM intends to provide this type of information as part of its guidance issuances referenced in § 731.102(c).

The same commenter also suggested that criteria and examples be given of when it would be appropriate to impose an additional debarment period. An additional debarment period, that is, a new debarment action based on a new suitability determination, may be warranted where there is a strong nexus between the reasons for the suitability determination and the agency mission or position duties. For example, an additional debarment period might be appropriate where a person convicted of embezzlement continues to apply for fiduciary positions and does not report the conviction on the relevant questionnaire; where a person guilty of sexual crimes applies for positions dealing with the public where contact with children reasonably is expected; where an arsonist applies for firefighter positions; and where those with lengthy criminal histories want to work in law enforcement positions. Again, OPM intends to provide such information as part of its guidance referenced in § 731.102(c). Another commenter asked how long an additional debarment period can be. An additional debarment period can be imposed only if an agency makes a new suitability determination.

If it again finds the person unsuitable, the new debarment period could be imposed for up to three years. One commenter expressed concern that an agency may improperly implement its debarment authority; however, the rule at § 731.103(f) calls for the revocation of an agency's delegation of suitability authority if its actions fail to conform to this rule or any of OPM's guidance.

In response to the comments on additional debarment periods, OPM has revised the language in sections 731.204(b) and 731.205(b) of the final rule to state more clearly that upon expiration of a debarment period, if the person formerly debarred again becomes subject to OPM's or an agency's suitability jurisdiction, *e.g.*, by applying for a position in the competitive service, a new suitability determination must be made under 5 CFR part 731 before an additional period of debarment can be imposed.

In § 731.103(g), OPM proposed 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; or refusal to furnish testimony. While agencies would still be required to notify OPM if they have taken, or plan to take, such action (and could have their delegated authority withdrawn under § 731.103(f) for failure to conform to this part or OPM issuances), one commenter suggested that oversight of agencies' use of this authority should be mandated and that the results of oversight be made public. Under its statutory oversight mandate, OPM will continue to conduct reviews of agency suitability programs and agency use of delegated authority, including whether agencies are properly using their delegated authority under this section. Reports on such reviews are provided to the agency reviewed so that necessary corrective actions may be taken.

One commenter wondered why an agency under § 731.103(g) would be required to notify OPM if it has already taken or plans to take such an action under other authorities. The answer is that OPM may determine it appropriate to debar that person from all Federal employment even though the agency has taken action to remove the person under other authority if the person, for example, provided material, intentional false statements in connection with the employment process. To further clarify the scope of the reporting requirement, OPM is providing at § 731.103(g), that agencies are required to report to OPM only in cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment; or refusal to furnish testimony as required by § 5.4 of this title. Also, corresponding changes referring back to § 731.103(g) are being inserted into §§ 731.105(e) and 731.203(f) for the same reason.

This commenter also suggested that proposed § 731.103(c) be modified to state more clearly that agencies exercising their delegated authority must do so in accordance with OPM regulations and issuances. The commenter stated that following OPM issuances would ''increase government wide uniformity and consistency in making suitability determinations and taking suitability actions.'' OPM agrees and has modified this section in the final rule accordingly.

OPM proposed 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 could not be considered by MSPB. One commenter believed that this limitation of MSPB's review ''further erodes the concept of mitigation'' and ''precludes the Board from a full and fair review of OPM and/or agency action.'' OPM strongly disagrees. Under the suitability regulations, MSPB has no authority to mitigate an agency's action in the same way it does not have authority to mitigate performance-based actions taken under chapter 43 of title 5 of the United States Code. In such cases, MSPB can only affirm or reverse the agency's action. With regard to the fullness and fairness of MSPB's review, the regulations are intended to insure a full and fair review by explicitly stating in the final regulations that MSPB must review each specification and each charge in all suitability appeals.

However, OPM has revised section 731.202(c) of the final rule to state that OPM or an agency ''must'' consider ''any'' of the additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems ''any'' of them pertinent to the individual case. This is to state more clearly that an agency need not consider all of the additional considerations, but must consider those that it deems pertinent. As the MSPB's review is limited to the agency's determination, however, the MSPB cannot consider, as aggravating or mitigating factors, additional considerations that the agency did not deem pertinent.

OPM proposed 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. One commenter concurred with the proposal, stating that the ability to begin suitability reviews in the early stages of the recruitment process would facilitate that agency's ability to make timely selections. Another commenter said that this is a change from OPM guidance in 1994 that the suitability process be initiated late in the recruitment process. In more recent guidance, however, OPM stated that agencies may begin the process ''at any time during the hiring process'' (see OPM Memorandum for Chief Human Capital Officers entitled ''Initiating Suitability Determinations'' and dated May 9, 2005). The regulations codify the most recent OPM guidance.

Merit Systems Protection Board Review

In the proposed rule, OPM discussed the basis for concluding that the procedures an agency decides to use to take an action, e.g., objecting to an eligible under 5 CFR part 332 or taking a suitability action under this part, 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) when it 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. OPM noted that this is an incorrect reading of the authority that OPM conferred upon the Board and proposed to adjust the suitability regulations accordingly. Consequently, OPM concluded that, 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). OPM proposed changes to the regulations to reflect this conclusion.

One commenter stated that OPM's proposed changes would administratively overrule *Edwards* and

that change would be tampering with what is now settled MSPB precedent. While agreeing that the proposed change would overrule *Edwards*, OPM is not ''tampering'' with MSPB precedent. Rather, OPM is correcting case law that is clearly erroneous and well beyond the intent of Congress—which is that MSPB's jurisdiction is limited to actions appealable under ''any law, rule, or regulation'' as provided by 5 U.S.C. 7701(a). OPM strongly disagrees that this stands on its head the decision in *Lovshin* v. *Navy*, 767 F.2d, 8326 (Fed. Cir. 1985), which provides an agency may choose whether to use 5 U.S.C. chapter 43 or 5 U.S.C. chapter 75 to take a performance-based action. Just as in *Lovshin*, when the choice is between using suitability authority or some other authority, whatever action taken under the chosen authority is subject to review.

Another commenter agreed with the notion that MSPB cannot hold an agency to standards relating to a legal authority the agency did not invoke and concluded that an agency's action ''should rise or fall on how that agency characterizes the action, not how MSPB *could* characterize the agency's action.'' OPM agrees and notes that this is precisely our rationale for clarifying the authority of MSPB.

Finally, OPM strongly disagrees with one commenter's claim that OPM is ''setting up a system that it and agencies will be free to manipulate without a check by MSPB.'' OPM has carefully structured a system that protects the rights of persons by providing for MSPB review of agency actions. Whatever action an agency chooses to take, there is a process for ensuring the rights of those affected are protected.

OPM proposed to eliminate the provision under the current regulations that requires MSPB to remand a case to OPM or an agency if fewer than all the charges in an appeal are sustained. While one commenter concurred, stating that eliminating the remand would be important, several other commenters objected to the proposal, stating, among other things, that the change would be capricious, and that it and other changes proposed would transform MSPB into a ''rubber stamp'' without meaningful review authority. Several commenters were concerned that eliminating the remand and requiring MSPB to sustain only one charge in order to uphold an agency's suitability action might preclude MSPB from considering, or at least not obligate MSPB to consider, all charges and specifications once one charge is sustained and might lead to multiple proceedings. One commenter suggested that the regulations require MSPB to consider all charges and specifications. Another commenter noted that, in 2000, when OPM first proposed that an agency's suitability action must be affirmed by MSPB even if some of the charges are not sustained, OPM ''answered its critics by also providing for remands by MSPB.''

OPM carefully considered these comments and concluded that some changes to the final regulations at § 731.501 are appropriate. For example, while OPM would expect MSPB to review all matters raised in any appeal before it, we have modified the final rule to state explicitly that MSPB must review all charges and all specifications in each appeal. In addition and upon further reflection, OPM concludes that the remand process can be retained in a manner that would help eliminate confusion under the current regulations. Accordingly, OPM has modified the final rule so that remand decisions, as suggested by a commenter, are held in abeyance pending a final decision by MSPB or the courts as appropriate. This should help eliminate the current confusion about when a person can file a petition for review of an initial decision by MSPB and eliminates the current confusion generated when an agency is simultaneously reviewing a case on remand while MSPB is considering a petition for review. The expected reduction in confusion and the assurance that all charges and specifications will be considered should help encourage confidence in the appeal process.

Readability

Commenters supported the changes in the regulations intended to make them more readable, with one commenter stating that the proposed changes do not appear to affect the substance of the regulations. OPM determined however that one proposed change did affect the substance of the regulations with respect to periodic reinvestigations. Specifically, in the proposed regulation, OPM inadvertently deleted section 731.106(d), which provided that agencies relying on authorities such as the Computer Security Act and OMB Circular A–130 Revised may require employees in certain public trust positions to undergo periodic reinvestigation. Accordingly, that section has been reinserted into this final regulation. Sections 731.106(d) and (e) have been redesignated as sections 731.106(e) and (f).

Miscellaneous Comments

One commenter wanted to know how OPM would notify agencies about persons debarred by OPM. In that commenter's experience, the agency had never been notified about any debarment in the last ten years. The process for notifying agencies is beyond the scope of this rule and will not be addressed further.

One commenter believes that, because the proposed regulations state that OPM or an agency with delegated authority cannot take a suitability action against a person who is not covered by the regulations, the regulations imply that an agency may take a suitability action against any person who is covered and may do so at any time. That is an incorrect inference. While OPM can take a suitability action against a person who is an applicant, appointee, or employee, as those terms are defined in this part, an agency may take a suitability action only against an applicant or appointee. An agency may not take a suitability action against an employee. Moreover, the basis on which OPM may take a suitability action against an employee is limited to charges of material, intentional false statement or deception or fraud in examination or appointment; refusal to furnish testimony as required by § 5.4 of this title; or statutory or regulatory bar.

One commenter discussed establishing an internal agency process for interfacing with OPM concerning that agency's actions, particularly debarment actions. Agencies' internal processes are outside the scope of the proposed amendments to the regulations and are not further addressed here.

A commenter stated that a person who is a member of a collective bargaining unit covered by a valid collective bargaining agreement should have the discretion to file a grievance under the parties' negotiated grievance procedure or to appeal to MSPB. This commenter also believes that the scope of review ought to extend to the ''propriety of the agency's action.'' These topics are outside the scope of the proposed regulations and therefore have not been considered.

Another commenter requested a number of revisions to the proposed rule in order to avoid inconsistencies with laws enforced by the Equal Employment Opportunity Commission (EEOC). The commenter believes certain proposed changes to the rules provide agencies with the sole discretion over whether and how to consider a person's misconduct in ways that could conflict with Title VII of the Civil Rights Act of 1964. The commenter also believes that agencies' authority to debar persons for three years at a time as proposed could

conflict with section 501 of the Rehabilitation Act.

With regard to the Title VII concern, the commenter stated that to the extent a suitability determination could be made solely based on a person's conviction or arrest record, it would violate settled law under Title VII disallowing a categorical bar from employment of all individuals with arrest or conviction records, because such a bar has a disparate impact on certain classes of people. OPM notes that the suitability rules do not provide for categorical bars from employment on the basis of a conviction or arrest record. The specific factors listed in the regulations, such as criminal or dishonest conduct, are to be considered in conjunction with any of the additional considerations the agency deems pertinent, and in light of the standard in § 731.201 that the action cannot be taken unless it will ''protect the integrity or promote the efficiency of the service.'' Further, as discussed previously, a negative suitability determination can only be made in accordance with the procedural requirements of the suitability rules, including affording a person the right to answer any charges. Finally, if the person is determined to be unsuitable, he or she may seek administrative review by MSPB and ultimately judicial review. As with any appeal to the Board, the person may raise affirmative defenses, including allegations that the action appealed is discriminatory. OPM disagrees with the suggestion that the Board would be prevented from considering affirmative defenses like these simply because an agency would not be required under the proposed rule to link a determination of unsuitability with a particular position in the Government.

With regard to the Rehabilitation Act (Act), the commenter stated that agencies using alcohol abuse and the illegal use of drugs in making suitability determinations would have to do so in accordance with the Act. For example, if the person has the disability of alcoholism (as opposed to simply abusing alcohol), the Act would have to be followed. The commenter also states that, under the proposed rule, if a person were debarred for a period of three years for alcohol abuse or illegal use of drugs, he or she would be prevented, in violation of the Act, from demonstrating later that he or she can perform the essential duties of a position with or without reasonable accommodation. OPM notes that current alcohol abusers and illegal drug users are not covered by the Rehabilitation Act. See 29 U.S.C. 705(20)(c). OPM also notes that the regulation does not prevent a debarred person from claiming that he or she later has become suitable upon conclusion of the debarment period. To the extent the commenter is suggesting that the Rehabilitation Act requires a shortening of the debarment period for persons who may later become covered individuals, OPM disagrees. The debarment penalty is imposed based on the contemporaneous conduct of the person at the time of the negative suitability determination, not because of any disability of the person.

However, as noted above, OPM has revised the language in sections 731.204(b) and 731.205(b) of the final rule to clarify that upon expiration of a debarment period, if the person formerly debarred again becomes subject to OPM's or an agency's suitability jurisdiction, e.g., by applying for a position in the competitive service, a new suitability determination must be made under 5 CFR part 731 before an additional period of debarment can be imposed. OPM has further revised section 731.202(b)(5) of the final rule to clarify that 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, can only be the basis of a negative suitability determination in the absence of ''evidence of substantial rehabilitation.''

The commenter suggested a number of changes to the suitability factors provided at § 731.202(b) as a means to avoid what the commenter viewed as inconsistencies with laws enforced by EEOC. These factors have been in effect for many years and have resulted in a legally-sound and uniform body of case law governing the application of the factors Governmentwide. OPM does not wish to undermine that case law by changing these factors. Therefore, with the exception of the revision to section 731.202(b)(5) noted above, OPM is not revising the specific factors in section 731.202(b).

Other suggested changes, including the limitation of agency debarment authority to one year, are also not adopted. While not adopting the suggestions, OPM strongly emphasizes to agencies that any actions taken under OPM's suitability rules must be taken in accordance with applicable laws, including those enforced by the EEOC.

Technical Amendments

OPM has made technical amendments to the Authorities for this part by deleting the following citations: ''5 U.S.C. 7701'' and ''E.O. 12731, 3 CFR, 1990 Comp., p. 306.'' These are deleted since they do not provide legal bases for 5 CFR part 731. OPM has also inserted ''as amended'' following the citation to E.O. 10577. OPM also moved the language defining ''covered position'' in section 731.101(a) to ''Definitions'' in section 731.101(b) for easy reference. Finally, in section 731.105(a), OPM deleted the citation to paragraph (a) of section 731.104 because the correct reference is to all of section 731.104.

Executive Order 12866, Regulatory Review

The Office of Management and Budget has reviewed the final 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.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is revising 5 CFR part 731 to read as follows:

PART 731—SUITABILITY

Subpart A—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; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended, 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 covered positions (as defined in paragraph (b) of this section) pursuant to 5 U.S.C. 3301, E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218), as amended, 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 to eligibles or pass overs of preference eligibles, and OPM's and agencies' 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 first year of a subject-to-investigation appointment (as defined in § 731.104).

Covered position means a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

Days means 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 covered positions 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 paragraphs (f) and (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 adhere to OPM requirements as stated in this part and OPM's issuances described in § 731.102(c). Agencies must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these OPM issuances.

(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 suitability determinations and suitability actions 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 cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment; or refusal to furnish testimony as required by § 5.4 of this title. 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 per year 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 or check under § 731.104.

(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. An agency must notify OPM to the extent required in § 731.103(g) 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) *Suitability reinvestigations.* Agencies, relying on authorities such as the Computer Security Act of 1987 and OMB Circular No. A–130 Revised (issued November 20, 2000), may require incumbents of certain public trust positions to undergo periodic reinvestigations. The appropriate level of any reinvestigation will be determined by the agency, but may be based on supplemental guidance provided by OPM.

(e) *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.

(f) *Completed investigations.* Any suitability investigation completed by an agency under provisions of paragraph (d) of this section must result in a 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, without evidence of substantial rehabilitation, 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 must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of 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 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 to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it 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 315, 359, or 752 of this chapter. Where behavior covered by this part may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(g) 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) OPM may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant, appointee, or employee subject to OPM's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(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) The agency may impose an additional period of debarment following the expiration of a period of OPM or agency debarment, but only after the person again becomes an applicant or appointee subject to the agency's suitability jurisdiction, and his or her suitability is determined in accordance with the procedures of this part. An additional debarment period may be based in whole or in part on the same conduct on which the previous suitability action was based, when warranted, or new conduct.

(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'').

(b) *Decisions by the Merit Systems Protection Board*.

(1) If the Board finds that one or more 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. The Board must consider the record as a whole and make a finding on each charge and specification in making its decision.

(2) If the Board sustains fewer than all the charges, the Board must remand the case to OPM or the agency to determine whether the suitability action taken is appropriate based on the sustained charge(s). However, the agency must hold in abeyance a decision on remand until the person has exhausted all rights to seek review of the Board's decision, including court review.

(3) Once review is final, OPM or an agency will determine whether the action taken is appropriate based on the sustained charges and this determination will be final without any further appeal to the Board.

(c) *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 June 16, 2008. 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. E8–7964 Filed 4–14–08; 8:45 am]

BILLING CODE 6326–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0304; Directorate Identifier 2008–NE–08–AD; Amendment 39–15470; AD 2008–06–52]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH (TAE) Model TAE 125–02–99 Engines

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: This document publishes in the **Federal Register** an amendment adopting emergency airworthiness directive (AD) 2008–06–52 that was sent previously to all known U.S. owners and operators of certain TAE Model TAE 125–02–99 engines. This AD requires, before further flight, replacing the high-pressure fuel line and installing a high-pressure fuel line support. This AD results from reports of in-flight engine shutdown incidents on airplanes equipped with TAE 125–02–99 engines. We are issuing this AD to prevent an in-flight engine shutdown or engine fire due to a cracked fuel line.

DATES: This AD becomes effective April 30, 2008 to all persons except those persons to whom it was made immediately effective by emergency AD 2008–06–52, issued on March 12, 2008, which contained the requirements of this amendment. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of April 30, 2008.

We must receive any comments on this AD by June 16, 2008.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, telephone: +49–37204–696–0; fax: +49–37204–696–55; e-mail: *info@centurion-engines.com*, for the service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail *jason.yang@faa.gov*; telephone (781) 238–7747; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: On March 12, 2008, the FAA issued emergency AD 2008–06–52, that applies to TAE model TAE 125–02–99 engines with a serial number from 02–02–1500 through 02–02–2279. That AD requires, before further flight, replacing the high-pressure fuel line and installing a high-pressure fuel line support. That AD resulted from reports of in-flight engine shutdown incidents on airplanes equipped with TAE 125–02–99 engines. This was found to be the result of a cracked high-pressure fuel line between the high-pressure pump and fuel rail. These cracks were caused by excessive vibration of the fuel line. This condition, if not corrected, could result in an in-flight engine shutdown or engine fire due to a cracked fuel line.

Relevant Service Information

We have reviewed and approved the technical contents of TAE Service Bulletin (SB) No. TM TAE 125–1005 P1, Revision 1, dated February 11, 2008, and SB No. TM TAE 125–1005 P1, Revision 2, dated March 6, 2008. Those SBs describe procedures for installing a new high-pressure fuel line and a high-pressure fuel line bracket.

FAA's Determination and Requirements of This AD

Since the unsafe condition described is likely to exist or develop on other engines of the same type design, we issued emergency AD 2008–06–52 to prevent an in-flight engine shutdown or engine fire due to a cracked fuel line. This AD requires, before further flight, replacing the high-pressure fuel line and installing a high-pressure fuel line support. You must use the service information described previously to perform the actions required by this AD.

FAA's Determination of the Effective Date

Since an unsafe condition exists that requires the immediate adoption of this AD, we have found that notice and opportunity for public comment before issuing this AD are impracticable, and that good cause existed to make the AD effective immediately on March 12, 2008, to all known U.S. owners and operators of certain TAE 125–02–99 engines. These conditions still exist, and we are publishing the AD in the **Federal Register** as an amendment to Section 39.13 of part 39 of the Code of Federal Regulations (14 CFR part 39) to make it effective to all persons.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. FAA–2008–0304; Directorate Identifier 2008–NE–08–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).