Proposed Rules

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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 Parts 315, 432, and 752

RIN 3206–AO23

Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. The proposed rule would rescind certain regulatory changes made effective on November 16, 2020 and implements new statutory requirements for procedural and appeal rights for dual status National Guard technicians for certain adverse actions. OPM believes the proposed revisions would support implementation of an Executive Order to empower agencies to rebuild the career Federal workforce and protect the civil service rights of their employees, while preserving appropriate mechanisms for pursuing personnel actions where warranted.

DATES: Comments must be received on or before February 3, 2022.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, via the Federal eRulemaking Portal: *https://www.regulations.gov.* Follow the instructions for sending comments.

Instructions: All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Comments received after the close of comment period will be marked ''late,'' and OPM is not required to consider them in formulating a final decision. Before acting on this proposal, OPM will consider and respond to all comments within the scope of the regulations that we receive on or before the closing date for comments. Changes to this proposal may be made in light of the comments we receive.

FOR FURTHER INFORMATION CONTACT: Timothy Curry by email at *employeeaccountability@opm.gov* or by telephone at (202) 606–2930.

SUPPLEMENTARY INFORMATION: On October 16, 2020, the Office of Personnel Management (OPM) published a final rule governing probation on initial appointment to a competitive position, performance-based reduction in grade and removal actions, and adverse actions. 85 FR 65940 (Oct. 16, 2020). The final rule implemented a provision of Public Law 115–91 concerning the inclusion of appeals rights information in proposal notices for personnel actions, and amended the regulations in parts 315, 432, and 752 of title 5, Code of Federal Regulations to incorporate certain requirements of Executive Order (E.O.) 13839, other statutory changes, and technical revisions.

On January 22, 2021, President Biden issued E.O. 14003 on ''Protecting the Federal Workforce'' which, among other things, revoked E.O. 13839 and directed agencies to ''as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions'' implementing various E.O.s, including E.O. 13839, ''as appropriate and consistent with applicable law.'' E.O. 14003 states that ''[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the career Federal workforce. It is also the policy of the United States to encourage employee organizing and collective bargaining. The Federal Government should serve as a model employer.''

After consideration and review, OPM has concluded that portions of the final rule which became effective on November 16, 2020, and which implemented certain requirements of E.O. 13839, are inconsistent with the current policy of the United States to protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining. Therefore, in accordance with E.O. 14003, OPM proposes to rescind portions of the final rule published at 85 FR 65940 (October 16, 2020). The elements of the final rule that OPM proposes to rescind are described in detail below, together with the policy explanation in each instance. OPM is proposing these regulations under its congressionally granted authority to regulate the parts that it proposes to revise in accordance with 5 U.S.C. 3321, 4305, 4315, 7504, 7514, and 7543, and subject to the notice-and-comment process set forth in the Administrative Procedure Act, and mindful of the President's expressed policy direction. Furthermore, pursuant to Public Law 114–328 (Dec. 23, 2016), OPM proposes to revise its regulations on coverage for performance-based actions and appealable adverse actions in accordance with statutory changes that extend title 5 rights to dual status National Guard technicians under certain conditions. Elements of the November 16, 2020, regulatory amendments that were due to statutory changes will remain in effect, such as procedures for disciplinary action against supervisors who retaliate against whistleblowers (5 U.S.C. 7515) and the inclusion of appeals rights information in proposal notices for adverse actions (Pub. L. 115–91, section 1097(b)(2)(A)).

OPM invites the public to comment on any aspect of the proposed changes, including whether members of the public believe that any matters proposed for rescission instead should be retained in OPM's regulations, consistent with OPM's statutory and regulatory authorities. Ultimately, the purpose of the revisions is to implement applicable statutory mandates and provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other behavior contrary to the efficiency of the service by Federal employees when they arise,

consistent with the policies of E.O. 14003.

5 CFR Part 315, Subpart H—Probation on Initial Appointment to a Competitive Position

The regulations at subpart H of 5 CFR part 315 provide information regarding agency action during a probationary period. Under its authority at 5 U.S.C. 3321, OPM proposes to rescind its November 16, 2020, amendment to regulations at § 315.803(a) for two reasons. First, E.O. 14003 directs OPM to rescind any regulations effectuated by E.O. 13839, as appropriate and consistent with applicable law. Second, OPM has concluded that the amendment to the regulations at § 315.803(a) placed unnecessary requirements on agencies regarding how agencies addressed probationary period matters. OPM believes these requirements prevented agencies from implementing policies most suitable for each respective agency based on their unique circumstances. The November 2020 amendment requires agencies to notify supervisors at least three months prior to expiration of the probationary period that an employee's probationary period is ending, and then again one month prior to expiration of the probationary period, and to advise a supervisor to make an affirmative decision regarding the employee's fitness for continued employment or otherwise take appropriate action. While agencies are encouraged to notify supervisors that an employee's probationary period is ending, OPM believes the frequency and timing of notifications should be left up to the discretion of each agency.

OPM guidance has stated previously that the probationary period is the last and crucial step in the examination process. The probationary period is intended to give the agency an opportunity to assess, on the job, an employee's overall fitness and qualifications for continued employment and permit the termination, without chapter 75 procedures, of an employee whose performance or conduct does not meet acceptable standards to deliver on the mission. Thus, it provides an opportunity for supervisors to address problems expeditiously, with minimum burden to the agency, and avoid long-term problems inhibiting effective service to the American people. Employees may be terminated from employment during the probationary period for reasons including demonstrated inability to perform the duties of the position, lack of cooperativeness, or other unacceptable conduct or poor performance. As a matter of good administration, agencies should ensure that their practices make effective use of the probationary period. While OPM is proposing to rescind a government-wide requirement to notify supervisors when an employee's probationary period is ending, agencies would not be precluded from providing such notifications under their own authorities and are strongly encouraged to do so.

5 CFR Part 432—Performance-Based Reduction in Grade and Removal Actions

Part 432 applies to reduction in grade and removal of covered employees based on performance at the unacceptable level. Chapter 43 provides a straightforward, though not exclusive, process for agencies to use in taking action based on unacceptable performance.

Section 432.102 Coverage

Section 432.102 identifies actions and employees covered by this part. The proposed rule at § 432.102 updates coverage to align with the National Defense Authorization Act (NDAA) for Fiscal Year 2017, Public Law 114–328 (Dec. 23, 2016). Specifically, section 512(a)(1)(C) of the 2017 NDAA provides appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions. Section 512(c) repealed 5 U.S.C. 7511(b)(5), which excluded National Guard technicians from the definition of ''employee.''

The repeal of 5 U.S.C. 7511(b)(5) and the coverage of National Guard technicians under 5 U.S.C. 7511, 7512, and 7513 required that OPM review 5 U.S.C. 4303. Section 4303(e) provides that any employee who is a preference eligible, in the competitive service, or in the excepted service and covered by subchapter II of chapter 75, and who has been reduced in grade or removed under this section is entitled to appeal the action to the MSPB under section 7701.

Accordingly, MSPB appeal rights must be extended to National Guard technicians who are defined in section 4303(e). OPM proposes to revise paragraphs (b) and (f) of § 432.102 to reflect that certain performance-based actions against dual status National Guard technicians are no longer excluded. Specifically, OPM proposes to add as an exclusion an action against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code. In addition, the proposed rule removes the exclusion at § 432.102(f)(12): ''A technician in the National Guard described in 5 U.S.C. 8337(h)(1), employed under section 709(b) of title 32.'' The impact of the repeal of 5 U.S.C. 7511(b)(5) on adverse actions taken under chapter 75 will be further discussed below in the supplemental information for § 752.401.

Section 432.104 Addressing Unacceptable Performance

This section provides requirements in chapter 43 of title 5 of the United States Code for addressing unacceptable performance. While the regulatory amendments to part 432 made effective November 16, 2020, are within OPM's existing authority under 5 U.S.C. 4303 and 4305, E.O. 13839 was the catalyst for the changes. OPM proposes to amend the regulation at § 432.104 to remove the following language: ''The requirement described in 5 U.S.C. 4302(c)(5) refers only to that formal assistance provided during the period wherein an employee is provided with an opportunity to demonstrate acceptable performance, as referenced in 5 U.S.C. 4302(c)(6). The nature of assistance provided is in the sole and exclusive discretion of the agency. No additional performance assistance period or similar informal period shall be provided prior to or in addition to the opportunity period provided under this section.'' OPM will re-insert at § 432.104 a statement that was in the regulation prior to the November 2020 amendment: ''As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.''

OPM believes that the amendment to the regulations at § 432.104 placed unnecessary restrictions and limitations on agencies regarding decisions on when performance assistance is provided to employees. These restrictions and limitations removed previous flexibilities enjoyed by agencies in how to address performance issues with their employees under chapter 43. By placing these restrictions on agencies, OPM believes it was not supporting agencies and supervisors in determining the most effective assistance for struggling employees.

OPM proposes to revert to the language in § 432.104 prior to the November 2020 amendments regarding the agency's obligation to provide assistance to an employee who has demonstrated unacceptable performance. The proposed language restates the statutory requirement described in 5 U.S.C. 4302(c)(5) that agencies are obligated to provide

performance assistance during the opportunity period. OPM would emphasize that the employee has a right to a reasonable opportunity to improve, which includes assistance from the agency in improving unacceptable performance.

OPM encourages efficient use of chapter 43 procedures and effective delivery of agency mission while providing employees sufficient opportunity to demonstrate acceptable performance as required by law. Additionally, OPM advises agencies to act promptly and effectively to address and resolve poor performance. Supervisors should draw upon their skills and expertise to determine the most effective assistance for a struggling employee and work in concert with the technical advice received from their agency's human resources staff.

Section 432.105 Proposing and Taking Action Based on Unacceptable Performance

This section specifies the procedures for proposing and taking action based on unacceptable performance once an employee has been afforded an opportunity to demonstrate acceptable performance. The regulatory amendments to § 432.105(a)(1) that became effective November 16, 2020, were made for consistency with and promotion of the principles of E.O. 13839. For consistency with and promotion of the principles of E.O. 14003 and in accordance with its authority under 5 U.S.C. 4302, OPM proposes to revise the regulation at § 432.105(a)(1).

The proposed regulatory change to § 432.105(a)(1) removes the language: ''For the purposes of this section, the agency's obligation to provide assistance, under 5 U.S.C. 4302(c)(5), may be discharged through measures, such as supervisory assistance, taken prior to the beginning of the opportunity period in addition to measures taken during the opportunity period. The agency must take at least some measures to provide assistance during the opportunity period in order to both comply with section 4302(c)(5) and provide an opportunity to demonstrate acceptable performance under 4302(c)(6).''

OPM believes that the amendment to the regulations at § 432.105(a)(1) placed too much emphasis on supervisory assistance taken prior to the beginning of the opportunity period and placed too little emphasis on supervisory assistance taken during the opportunity period and could result in some agencies relying too much on supervisory assistance outside of the opportunity period to support any performance-based action taken against an employee.

Agencies are reminded that they must provide assistance during the opportunity period in accordance with section 5 U.S.C. 4302(c)(5). OPM has long encouraged agencies to act promptly to address performance concerns as soon as they arise. Supervisors should continually monitor performance, provide ongoing feedback, and assist employees who exhibit performance issues. Agencies should also remain mindful that third parties (for example, arbitrators and judges) place a strong emphasis on a supervisor's effort to assist the employee in improving his or her performance. Evidence that the supervisor engaged an employee in discussion, counseling, training, or the like prior to the opportunity period may assist the agency in developing a stronger case before a third party that the employee was given a reasonable opportunity to demonstrate acceptable performance before a performance-based action is taken.

The supplemental information supporting the regulatory changes issued pursuant to E.O. 13839, Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Action and Adverse Actions, 85 FR 65940 (October 16, 2020), and the subsequent revocation of E.O. 13839 and consequent rescission of some those regulations in this proposed rule, require clarification and reaffirmation of an agency's obligations with regard to actions based on unacceptable performance. Section 4302(c) states, in pertinent part, that, ''Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for . . . (5) assisting employees in improving unacceptable performance; and (6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.'' Section 4303(a) and (b)(1)(A) provides that ''an agency may reduce in grade or remove an employee for unacceptable performance'' subject to ''30 days advance written notice of the proposed action which identifies—(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and (ii) the critical elements of the employee's position involved in each instance of unacceptable performance.'' Although the statute is silent regarding an agency's determination in the first instance that an employee's performance is unacceptable, OPM's regulation is pellucid. Pursuant to its authority to promulgate regulations, OPM issued 5 CFR 432.104, which it now proposes to restore. That regulation states in pertinent part: ''At any time during the performance appraisal cycle that an employee's performance *is determined* to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position.'' (Emphasis added). This language in 5 CFR 432.104 was unchanged in the final rule issued on October 16, 2020.

The comments summarized in the October 16, 2020, final rule, included concern that the amendment to 5 CFR 432.104 (which we are proposing to remove) might give some managers the ability to remove employees without factual evidence or deny them the ability to either counter the agency's assessment or correct it through a mandated improvement process. OPM responded to those concerns by saying, inter alia, that ''The amended rule does not relieve agencies of the responsibility to demonstrate that an employee was performing unacceptably—which per statute covers the period both prior to and during a formal opportunity period—before initiating an adverse action under chapter 43.'' 85 FR 65957 (Oct. 16, 2020). OPM's response was subsequently cited in *Santos* v. *Nat'l. Aeronautics and Space Admin.,* 990 F.3d 1355 (Fed. Cir. 2021), to support the court's implicit decision that an agency must prove by substantial evidence in a proceeding to challenge a performance-based removal that the employee was performing unacceptably prior to the opportunity period (*i.e.,* prior to being placed on a performance improvement plan) as a prerequisite to removing the employee for failing to demonstrate acceptable performance during the opportunity period. This is a

misreading of OPM's position. Accordingly, OPM takes this opportunity to make clear what OPM's position is so that OPM's failure to clarify its prior comments and address *Santos* when making changes to the same set of regulations will not be interpreted as OPM's endorsement of the *Santos* standard. OPM's reference to determining whether an employee is performing unacceptably concerns the requirement that an agency provide *notice* to an employee of unacceptable performance—before placing him on a PIP. OPM's comment in the supplemental information that the requirement to demonstrate that an employee was performing unacceptably ''covers'' the period prior to the opportunity period should not be read to mean that an agency must justify the decision to place an employee on a PIP. Rather, the comment refers to the statutory provision that allows, but does not require, an agency to rely on unacceptable performance within 1 year prior to the date of the proposal notice to justify the removal itself. *See* 5 U.S.C. 4303(c)(2).

Therefore, OPM wishes to clarify that the conclusion in *Santos* is contrary to OPM's comment in supplemental information on which *Santos* relies and OPM's interpretation of 5 U.S.C. 4302(c)(6). OPM does not agree that 5 U.S.C. 4302(c)(6) means that the agency must prove as part of its substantive case or as a required procedure that an employee performed unacceptably *before* he or she was placed on a PIP. Rather, the statute as interpreted by OPM's regulation at 5 CFR 432.104 provides that an agency may not take a performance-based adverse action against an employee whom the agency determined was performing unacceptably *unless* the agency first provides the employee with notice and an opportunity to improve, and the employee continues to perform unacceptably. The determination to be reviewed on appeal to the Board and its reviewing courts is the final determination of unacceptable performance following the PIP, not any interim determination leading to the PIP. This interpretation enables agencies to address performance issues early through the mechanism of a PIP without concern that the employees who ultimately are unable to demonstrate acceptable performance despite early and sustained assistance cannot be removed because the MSPB or a court might find that they were not performing unacceptably when the PIP began.

Section 432.105 addresses notice requirements when an agency proposes to take action based on an employee's unacceptable performance during or after the opportunity period once the employee has been afforded an opportunity to demonstrate acceptable performance. An agency must afford the employee a 30-day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance. An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. For the reasons listed in § 432.105(a)(4)(i)(B), an agency may further extend this advance notice period without OPM approval.

OPM proposes to revise the reason at § 432.105(a)(4)(i)(B)(6), which was derived from 5 U.S.C. 1208(b) because the statutory provision was repealed by section 3(a)(8) of Public Law 101–12, the Whistleblower Protection Act (WPA) of 1989. Section 1208(b) granted agencies the authority to extend the advance notice period for a performance-based action in order to comply with a stay ordered by a member of the Merit Systems Protection Board. Concurrent with the repeal of 5 U.S.C. 1208(b), the WPA established 5 U.S.C. 1214(b)(1)(A)(i), wherein the Office of Special Counsel is granted the authority to request any member of the Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice. Further, under 5 U.S.C. 1214(b)(1)(B), the Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate. If the Board lacks a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A). Therefore, OPM proposes to change the reason at subparagraph (B)(6) to read as follows: ''[t]o comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B).''

Section 432.108 Settlement Agreements

Section 5 of E.O. 13839, established a requirement that an agency shall not agree to erase, remove, alter or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. Such agreements have traditionally been referred to as ''clean record'' agreements. Consistent with the rescission of E.O. 13839 and pursuant to its authorities under 5 U.S.C. 2951 to maintain personnel records and under 5 U.S.C. 1103(a)(5) to execute, administer, and enforce the law governing the civil service, OPM proposes to rescind § 432.108, Settlement Agreements.

Due to continued objections raised since the publication of the November 16, 2020, final rule, OPM believes that the prohibition of clean record agreements hampers agencies' ability to resolve informal and formal complaints at an early stage and with minimal costs to the agency. Notably, stakeholders have stressed that the prohibition of clean record agreements limits resolution options; reduces the likelihood of parties reaching a mutually agreeable resolution of informal or formal complaints; potentially increases costly litigation and arbitration; and crowds the dockets of third-party investigators, mediators, and adjudicators such as the Merit Systems Protection Board (MSPB), Office of Special Counsel (OSC), and Equal Employment Opportunity Commission. While agencies may derive some value from having access to unaltered personnel records when making hiring decisions, OPM believes it should place greater weight on granting agencies a degree of flexibility to resolve individual workplace disputes. Therefore, OPM proposes to delete § 432.108. The clean record prohibition applied to actions taken under parts 432 and 752. Accordingly, the proposed rule would also rescind §§ 752.104, 752.203(h), 752.407 and 752.607. The removal of the prohibition on clean record agreements will allow agencies discretion to resolve informal and formal complaints and settle administrative challenges in a manner that balances the needs of the agency and fairness to the employee. In doing so, agencies should still adhere to the principles of promoting high standards of integrity and accountability within the Federal workforce. In addition, agencies are advised that, in any such agreement, they have an obligation to speak truthfully to Federal investigators performing future background investigations with respect to the employee and may not agree to

withhold information about the circumstances of an individual's departure from the agency.

5 CFR Part 752—Adverse Actions

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

This subpart addresses mandatory procedures for addressing retaliation by supervisors for whistleblowing.

Section 752.101 Coverage

This section describes the adverse actions covered and defines key terms used throughout the subchapter. Section 752.101 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for the definition of ''business day'' in subpart A, OPM proposes to revise the regulation at § 752.101(b) to remove the definition of ''Business day''.

Section 752.103 Procedures

This section establishes the procedures to be utilized for actions taken under this subpart. With the rescission of E.O. 13839 and pursuant to its congressionally granted authority to regulate chapter 75 adverse actions, OPM proposes to rescind the requirement at § 752.103(d)(3) that an agency should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond under paragraph (d)(1) of this section. The 15-day requirement was derived solely from Section 2(f) of E.O. 13839. Although it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present multiple issues, conflicting evidence, or other complications that warrant full and fair consideration over a longer period of time, and careful crafting of the final decision. Accordingly, it is not in the Government's best interests to force decisions to be completed on an arbitrary timetable that may not allow for the deciding official to prepare a thoughtful, well-reasoned decision document.

Section 752.104 Settlement Agreements

The language in this section establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart B—Regulatory Requirements for Suspensions for 14 Days or Less

This subpart addresses the procedural requirements for suspensions of 14 days or less for covered employees.

Section 752.202 Standard for Action and Penalty Determination

This section sets forth the standard for action applicable under this subpart and the penalty determination provisions that must be adhered to when taking suspensions for 14 days or less. Consistent with the rescission of E.O. 13839, under its congressionally granted authority to regulate part 752, OPM proposes to amend the regulation at § 752.202 to revise the section heading to ''Standard for Action'' and rescind paragraphs (c) through (f). These paragraphs address the use of progressive discipline; appropriate comparators as the agency evaluates a potential disciplinary action; consideration of, among other factors, an employee's disciplinary record and past work record; and the requirement that a suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Specifically, paragraphs (c) through (f) state:

''(c) An agency is not required to use progressive discipline under this subpart. The penalty for an instance of misconduct should be tailored to the facts and circumstances. In making a determination regarding the appropriate penalty for an instance of misconduct, an agency shall adhere to the standard of proposing and imposing a penalty that is within the bounds of tolerable reasonableness. Within the agency, a proposed penalty is in the sole and exclusive discretion of a proposing official, and a penalty decision is in the sole and exclusive discretion of the deciding official. Penalty decisions are subject to appellate or other review procedures prescribed in law.

(d) Employees should be treated equitably. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time. An agency should consider appropriate comparators as the agency evaluates a potential disciplinary action. Appropriate comparators to be considered are primarily individuals in the same work unit, with the same supervisor, who engaged in the same or similar misconduct. Proposing and deciding officials are not bound by previous decisions in earlier similar cases, but should, as they deem appropriate, consider such decisions consonant with their own managerial authority and responsibilities and independent judgment. For example, a supervisor is not bound by his or her predecessor whenever there is similar conduct. A minor indiscretion for one supervisor based on a particular set of facts can amount to a more serious offense under a different supervisor. Nevertheless, they should be able to articulate why a more or less severe penalty is appropriate.

(e) Among other relevant factors, agencies should consider an employee's disciplinary record and past work record, including all applicable prior misconduct, when taking an action under this subpart.

(f) A suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require that an employee have previously been suspended or demoted before a proposing official may propose removal, except as may be appropriate under applicable facts.''

Given the revocation of E.O. 13839, and under its congressionally granted authority to regulate part 752, OPM proposes to rescind §§ 752.202(c), 752.202(d), 752.202(e) and 752.202(f). Though the penalty determination guidelines of these subsections, as discussed below, reflect established principles, OPM believes that it is unnecessary to enshrine the guidelines in regulation, thus providing agencies maximum flexibility.

In § 752.202(c), OPM made clear that an agency is not required to use progressive discipline under this subpart. As we have previously said regarding progressive discipline and tables of penalties, each action stands on its own footing and demands careful consideration of facts, circumstances, context, and nuance. OPM reminds agencies to calibrate discipline to the unique facts and circumstances of each case, which is consistent with the flexibility afforded agencies under the ''efficiency of the service'' standard for imposing discipline contained in the Civil Service Reform Act. Proposing and deciding officials should consult with the agency counsel and the agency's human resources office to determine the most appropriate penalty.

Further, in § 752.202(d), OPM adopted the test articulated by the Court of Appeals for the Federal Circuit in *Miskill* v. *Social Security Administration,* 863 F.3d 1379 (Fed. Cir. 2017). We clarified that appropriate comparators are primarily individuals in the same work unit, with the same

supervisor, who engaged in the same or similar misconduct. The adoption of the *Miskill* test reinforced the key principle that each case stands on its own factual and contextual footing. However, OPM believes that agencies can be sufficiently guided by *Miskill* and other applicable case law without a regulatory amendment.

In § 752.202(e), OPM adopted formally by regulation the standard applied by MSPB in *Douglas* v. *Veterans Administration,* 5 M.S.P.R. 280 (1981) to removals, suspensions, and demotions, including suspensions of fewer than 15 days. Specifically, OPM adopted the requirement that agencies should propose and impose a penalty that is within the bounds of tolerable reasonableness. However, OPM believes that it is unnecessary to regulate a principle that is already embedded deeply in Federal civil-service law, thereby allowing greater flexibility for agencies. *Douglas* provides an adequate and useful template for arriving at reasonable penalty determinations. *Douglas* requires that, among other relevant factors, an agency should consider an employee's disciplinary record and past work record, including all prior misconduct, when taking an action under this subpart. Many agencies apply this standard not only to those actions taken under 5 U.S.C. 7513 but also to those taken under 5 U.S.C. 7503 as well.

In § 752.202(f), OPM stated that suspension should not be a substitute for removal in circumstances in which removal would be appropriate. This is a straightforward principle that OPM believes agencies can apply without regulation. It is vital that supervisors use independent judgment, take appropriate steps in gathering facts, and conduct a thorough analysis to decide the appropriate penalty. If a penalty is disproportionate to the alleged violation or is unreasonable, it is subject to being reduced or reversed even when the charges are sustained. While OPM proposes to remove § 752.202(f) and defer to agency management in selecting an appropriate penalty, OPM reminds agencies that imposing a suspension when removal is appropriate may adversely impact employee morale and productivity and hamper the agency's ability to achieve its mission and promote effective stewardship.

Because of the revocation of E.O. 13839, and in light of OPM's independent regulatory authority under chapter 75, we propose to remove the penalty selection guidelines at §§ 752.202(c) through (f). OPM reminds agencies that supervisors are responsible for ensuring that a disciplinary penalty is fair, reasonable, and appropriate to the facts and circumstances. In doing so, supervisors will address misconduct in a manner that has the greatest potential to avert harm to the efficiency of the service.

Section 752.203 Procedures

The language in this section discusses the requirements for a proposal notice issued under this subpart. The language in this section also establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove the requirement set forth in § 752.203(h). Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

This subpart addresses the procedural requirements for removals, suspensions for more than 14 days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of 30 days or less for covered employees.

Section 752.401 Coverage

This section discusses adverse actions and employees covered under this subpart. The National Defense Authorization Act (NDAA) for Fiscal Year 2017 added MSPB appeal rights for National Guard military technicians for certain adverse actions taken against them when they are not in a military pay status or when the issue does not involve fitness for duty in the reserve component. In § 752.401(b), OPM proposes to add an exclusion for an action taken against a technician in the National Guard as provided in section 709(f)(4) of title 32, United States Code.

In § 752.401(d), OPM proposes to remove from the list of employees excluded from coverage of this subpart ''a technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code.'' OPM proposes to remove this because the NDAA of 2017 removed the exclusion from 5 U.S.C. 7511(b)(1) and this language was derived from section 7511(b)(1).

Section 752.402 Definitions

This section defines key terms used throughout the subchapter. Section 752.402 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days for this section was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for the definition of ''business day'' in subpart D, OPM proposes to revise the regulation at § 752.402 to remove the definition of ''Business day''.

Section 752.403 Standard for Action and Penalty Determination

As with the proposed rule changes for the regulatory amendments to § 752.202, the proposed regulatory change to § 752.403 revises the heading to ''Standard for Action'' and rescinds paragraphs (c) through (f).

Given the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, as with §§ 752.202(c), 752.202(d), 752.202(e) and 752.202(f), OPM proposes to rescind §§ 752.403(c), 752.403(d),752.403(e), and 752.403(f). Please see the discussion at § 752.202.

Section 752.404 Procedures

Section 752.404(b) discusses the requirements for a notice of proposed action issued under this subpart. Specifically, the requirements in § 752.404(b)(1) include that, to the extent an agency, in its sole and exclusive discretion deems practicable, agencies should limit written notice of adverse actions taken under this subpart to the 30 days prescribed in 5 U.S.C. 7513(b)(1), as well as the requirement that any notice period greater than 30 days must be reported to OPM. The requirement was derived solely from Section 2(g) of E.O. 13839. In addition, we have come to the conclusion independently that there may be appropriate circumstances that warrant a notice period, and we no longer see a reason to burden agencies with a requirement to report to OPM every time they grant longer notice.

OPM proposes to remove the following language in § 752.404(b)(1): ''However, to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code. Advance notices of greater than 30 days must be reported to the Office of Personnel Management.''

Additionally, § 752.404(g) discusses the requirements for an agency decision issued under this subpart. Under its authority to regulate 5 CFR part 752, OPM proposes to rescind § 752.404(g)(3). The requirement of § 752.404(g)(3) was derived solely from Section 2(f) of E.O. 13839. Specifically, § 752.404(g)(3) includes language that, to the extent practicable, an agency

should issue the decision on a proposed removal under this subpart within 15 business days of the conclusion of the employee's opportunity to respond. As discussed above with respect to section 752.103(d)(3) and the rescinding of the 15-day requirement to issue a decision on a proposal, although it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present complications that warrant a longer period of time to achieve careful crafting of the final decision.

Notwithstanding these proposed changes to the notice and decision requirements, agencies are reminded that misconduct should be addressed as soon as possible in each case. Prompt action helps promote changed behavior whereas failure to act promptly can damage morale and productivity, and failure to remove employees who should be removed can do the same.

Section 752.407 Settlement Agreements

The language in this section establishes the same requirements that are detailed in 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Subpart F—Regulatory Requirements for Taking Adverse Actions Under the Senior Executive Service

This subpart addresses the procedural requirements for suspensions for more than 14 days and removals from the civil service as set for in 5 U.S.C. 7542.

Section 752.602 Definitions

This section defines key terms used throughout the subchapter. Section 752.602 includes a definition for the term ''business day.'' The requirement for taking an action within a proscribed number of business days for this section was derived solely from Section 2(f) of E.O. 13839. With the rescission of E.O. 13839 and given that there is no other use for ''business day'' in subpart F, OPM proposes to revise the regulation at § 752.402 to remove the definition of ''Business day''.

Section 752.603 Standard for Action and Penalty Determination

As with the proposed rule changes for the regulatory amendments to § 752.202 and § 752.403, the proposed regulatory change to § 752.603 revises the heading to ''Standard for Action'' and rescinds paragraphs (c) through (f). Please see the discussion at § 752.202.

Given the rescission of E.O. 13839 and under its congressionally granted authority to regulate part 752, as with §§ 752.202(c), 752.202(d), 752.202(e), and 752.202(f) and §§ 752.403(c), 752.403(d), 752.403(e), and 752.403(f), OPM proposes to rescind §§ 752.603(c), 752.603(d),752.603(e), and 752.603(f). See discussion above with respect to section 752.202.

Section 752.604 Procedures

This section discussed requirements for a notice of proposed action. Due to the revocation of E.O. 13839 and under its congressionally granted authority to regulate 5 CFR part 752, as with the rule changes proposed for § 752.103(d)(3) and § 752.404(b)(1), and for the same reasons, OPM proposes to rescind the language at § 752.604(b)(1) that requires to the extent an agency in its sole and exclusive discretion deems practicable, agencies should limit a written notice of an adverse action to the 30 days prescribed in section 7543(b)(1) of title 5, United States Code. As well, OPM proposes to remove the language in § 752.604(b)(1) that requires that advance notices of greater than 30 days must be reported to OPM. These requirements were derived solely from Section 2(g) of E.O. 13839.

OPM proposes to rescind § 752.604(g)(3), which requires agencies to issue decisions, to the extent practicable, within 15 business days of the conclusion of the employee's opportunity to respond under paragraph of this section. This requirement was derived solely from Section 2(f) of E.O. 13839. Thus, as with the discussion concerning the 15-day requirement for issuance of decisions in section 752.103(d)(3) and section 752.404(g), while recognizing it is good practice for agency deciding officials to resolve proposed removals promptly, some actions present complexities that necessitate a longer period of time to prepare the final decision.

Section 752.607 Settlement Agreements

The language in this section establishes the same requirements that are detailed in § 432.108, Settlement agreements. OPM proposes to remove this requirement. Please see the discussion at § 432.108 regarding the proposed rescission of OPM requirements related to settlement agreements.

Expected Impact of This Proposed Rule

OPM is issuing this proposed rule to implement requirements of E.O. 14003 and new statutory requirements for procedural and appeal rights for dual status National Guard technicians for certain adverse actions. E.O. 14003 requires OPM to rescind portions of the OPM final rule published at 85 FR 65940 which implemented certain requirements of E.O. 13839. In addition, section 512(a)(1)(C) of the 2017 NDAA provides appeal rights under 5 U.S.C. 7511, 7512, and 7513 to dual status National Guard technicians for certain adverse actions.

OPM believes that portions of the final rule which became effective on November 16, 2020, and which implemented certain requirements of E.O. 13839, are inconsistent with the current policy of the United States to protect, empower and rebuild the career Federal workforce as well as its current policy to encourage employee organizing and collective bargaining. The proposed revisions implement applicable statutory mandates and provide agencies the necessary tools and flexibility to address matters related to unacceptable performance and misconduct or other behavior contrary to the efficiency of the service by Federal employees when they arise, consistent with the policies of E.O. 14003.

Given that the November 16, 2020, regulations OPM proposes to rescind were in effect only for a brief period before E.O. 14003 was issued on January 22, 2021, agencies had limited opportunity to implement changes under the regulations. With the issuance of E.O. 14003, OPM discontinued collecting agency data on performance-based actions, adverse actions, and settlement agreements as was required by Section 5 of E.O. 13839. OPM does not otherwise collect agency data about the matters covered by the November 2020 regulatory amendments that OPM proposes to rescind (namely, the timing and frequency of probationary period expiration notifications; the timing and nature of performance assistance for employees who have demonstrated unacceptable performance; penalty determination guidelines; advance notice and decision notice timeframes for adverse action; and settlement agreements). For these reasons, OPM has virtually no data on the extent to which adverse actions were pursued under the regulations proposed for rescission here. This proposed rule will relieve agencies of the administrative burden of implementing the November 2020 regulatory amendments to the extent that agencies did not already have such policies and practices in place. Out of an abundance of caution, we clarify that OPM still is requiring that agencies submit to it arbitration awards taken under 5 U.S.C. 4303 or 5

U.S.C. 7512 of title 5 so that OPM can efficiently carry out its authority under 5 U.S.C. 7703(d) to seek judicial review of any arbitration award that the Director of OPM determines is erroneous and would have a substantial impact on civil service law, rule, or regulation affecting personnel management that will have a substantial impact on a civil service law, rule, regulation, or policy directive.

Costs

This proposed rule will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. Regarding implementation of E.O. 14003 requirements, we estimate that this proposed rule will require individuals employed by these agencies to revise and rescind policies and procedures to implement certain portions the OPM final rule published at 85 FR 65940 to the extent agencies have not already done so. Section 3(e) of E.O. 14003 directs heads of agencies whose practices were covered by E.O. 13839 to review and identify existing agency actions related to or arising from E.O. 13839 and ''as soon as practicable, suspend, revise, or publish for notice and comment proposed rules suspending, revising, or rescinding, the actions identified in the review'' described in Section 3(e). On March 5, 2021, OPM issued ''Guidance for Implementation of Executive Order 14003—Protecting the Federal Workforce'' to heads of agencies. In this guidance, OPM advised that ''agencies should not delay in implementing the requirements of Section 3(e) of E.O. 14003 as it relates to any changes to agency policies made as a result of OPM's regulations.'' Therefore, some agencies may not need to make any updates to agency policies as a result of this revised OPM rule. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2021 for GS–14, step 5, from the Washington, DC, locality pay table ($138,66 annual locality rate and $66.54 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $133.08 per hour.

In order to comply with the regulatory changes in this proposed rule, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 200 hours of work by employees with an average hourly cost of $133.08. This would result in estimated costs in that first year of implementation of about $26,616 per agency, and about $2,129,280 in total Governmentwide. We do not believe this proposed rule will substantially increase the ongoing administrative costs to agencies.

Regarding the portion of the proposed rule regarding appeal rights under 5 U.S.C. 7511, 7512, and 7513 for dual status National Guard technicians for certain adverse actions, this only impacts the Army National Guard and Air National Guard for dual status National Guard technicians that are covered by policies of the National Guard Bureau. Since this portion of the proposed rule reflects statutory changes in the 2017 NDAA which have been effective for several years, these statutory requirements should already be applied by the National Guard notwithstanding any regulatory changes by OPM. However, for the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work at the National Guard Bureau will be the rate in 2021 for GS–14, step 5, from the Washington, DC, locality pay table ($138,66 annual locality rate and $66.54 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of $133.08 per hour. In order to comply with the regulatory changes in this proposed rule, the affected agency will need to review the rule and update its policies and procedures. We estimate that, in the first year following publication of the final rule, this will require an average of 40 hours of work by employees with an average hourly cost of $133.08. This would result in estimated costs in that first year of implementation of about $5,323 for the impacted agency. We do not believe this proposed rule will substantially increase the ongoing administrative costs to the National Guard.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget as a significant, but not economically significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 *et seq.*) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this proposed rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this proposed rule is not a major rule as defined by the CRA (5 U.S.C. 804). The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this proposed rule is not a major rule as defined by the CRA (5 U.S.C. 804).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action is not expected to impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 315, 432 and 752

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 315, 432 and 752 as follows:

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

■ 1. Revise the authority citation for part 315 to read as follows:

Authority: 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 365. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O. 13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S.C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

Subpart H—Probation on Initial Appointment to a Competitive Position

■ 2. Revise § 315.803(a) to read as follows:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if the employee fails to demonstrate fully his or her qualifications for continued employment.

* * * * *

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 3. The authority for part 432 continues to read as follows:

Authority: 5 U.S.C. 4303, 4305.

■ 4. Amend § 432.102 by:
■ a. Revising paragraphs (b)(14) and (15);
■ b. Adding paragraph (b)(16);
■ c. Removing paragraph (f)(12); and
■ d. Redesignating (f)(13) and (14) as (f)(12) and (13).

The revisions and additions read as follows:

§ 432.102 Coverage.

* * * * *

(b) * * *

(14) A termination in accordance with terms specified as conditions of employment at the time the appointment was made;

(15) An involuntary retirement because of disability under part 831 of this chapter; and

(16) An action against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code.

* * * * *

■ 4. Revise § 432.104 to read as follows:

§ 432.104 Addressing unacceptable performance.

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

■ 5. Amend § 432.105 by revising paragraphs (a)(1) and (a)(4)(i)(B)(6) to read as follows:

§ 432.105 Proposing and taking action based on unacceptable performance.

(a) * * *

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to § 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in one or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

(4) * * *

(i) * * *

(B) * * *

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. 1214(b)(1)(A) or (B).

* * * * *

§ 432.108 [Removed]

■ 6. Remove § 432.108.

PART 752—ADVERSE ACTIONS

■ 7. Revise the authority citation for part 752 to read as follows:

Authority: 5 U.S.C. 7504, 7514, and 7543, Pub. L. 115–91, and Pub. L. 114–328.

Subpart A—Discipline of Supervisors Based on Retaliation Against Whistleblowers

§ 752.101 [Amended]

■ 8. Amend § 752.101(b) by removing the definition for ''Business day''.

§ 752.103 [Amended]

■ 9. Amend § 752.103 by removing paragraph (d)(3).

§ 752.104 [Removed]

■ 10. Remove § 752.104.

Subpart B—Regulatory Requirements for Suspensions for 14 Days or Less

■ 11. Amend § 752.202 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.202 Standard for action.

* * * * *

§ 752.203 [Amended]

■ 12. Amend § 752.203 by removing paragraph (h).

Subpart D—Regulatory Requirements for Removal, Suspension for More Than 14 Days, Reduction in Grade or Pay, or Furlough for 30 Days or Less

■ 13. Amend § 752.401 by:
■ a. Revising paragraphs (b)(15) and (16);
■ b. Adding paragraph (b)(17);
■ c. Removing paragraph (d)(5); and
■ d. Redesignating paragraphs (d)(6) through (13) as paragraphs (d)(5) through (12).

The revisions and additions read as follows:

§ 752.401 Coverage.

* * * * *

(b) * * *

(15) Reduction of an employee's rate of basic pay from a rate that is contrary

to law or regulation, including a reduction necessary to comply with the amendments made by Public Law 108–411, regarding pay-setting under the General Schedule and Federal Wage System and regulations implementing those amendments;

(16) An action taken under 5 U.S.C. 7515.; or

(17) An action taken against a technician in the National Guard concerning any activity under section 709(f)(4) of title 32, United States Code, except as provided by section 709(f)(5) of title 32, United States Code.

* * * * *

§ 752.402 [Amended]

■ 14. Amend § 752.402 by removing the definition for ''Business day''.

■ 15. Amend § 752.403 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.403 Standard for action.

* * * * *

■ 16. Amend § 752.404 by revising paragraph (b)(1), and removing paragraph (g)(3) to read as follows:

§ 752.404 Procedures.

* * * * *

(b) * * *

(1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

§ 752.407 [Removed]

■ 17. Remove § 752.407.

Subpart F—Regulatory Requirements for Taking Adverse Action Under the Senior Executive Service

§ 752.602 [Amended]

■ 18. Amend § 752.602 by removing the definition for ''Business day''.

■ 19. Amend § 752.603 by revising the section heading and removing paragraphs (c) through (f) to read as follows:

§ 752.603 Standard for action.

* * * * *

§ 752.604 [Amended]

■ 20. Amend § 752.604 by revising paragraph (b)(1), and removing paragraph (g)(3) to read as follows:

§ 752.604 Procedures.

* * * * *

(b) * * *

(1) An appointee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state the specific reason(s) for the proposed action and inform the appointee of his or her right to review the material that is relied on to support the reasons for action given in the notice. The notice must further include detailed information with respect to any right to appeal the action pursuant to section 1097(b)(2)(A) of Public Law 115–91, the forums in which the employee may file an appeal, and any limitations on the rights of the employee that would apply because of the forum in which the employee decides to file.

* * * * *

§ 752.607 [Removed]

■ 21. Remove § 752.607.

[FR Doc. 2021–28205 Filed 1–3–22; 8:45 am]

BILLING CODE 6325–39–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[EPA–R01–RCRA–2020–0175; FRL 8892–01–R1]

Massachusetts: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Massachusetts has applied to the EPA for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. The EPA proposes to grant final authorization to Massachusetts for these revisions by a direct final rule, which can be found in the ''Rules and Regulations'' section of this issue of the **Federal Register**. We have explained the reasons for this authorization in the preamble to the direct final rule. Unless the EPA receives written comments that oppose this authorization during the comment period, the direct final rule will become effective on the date it establishes, and the EPA will not take further action on this proposal.

DATES: Send your written comments by February 3, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2020–0175, at *https://www.regulations.gov/.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full the EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sara Kinslow, RCRA Waste Management, UST, and Pesticides Section; Land, Chemicals, and Redevelopment Division; U.S. EPA Region 1, 5 Post Office Square, Suite 100 (Mail code 07–1), Boston, MA 02109–3912; phone: 617–918–1648; email: *kinslow.sara@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of this issue of the **Federal Register**, the EPA is authorizing the revisions by a direct final rule. The EPA did not make a proposal prior to the direct final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble of the direct final rule. Unless the EPA receives adverse written comments that oppose this authorization during the comment period, the direct final rule will become effective on the date it establishes, and the EPA will not take further action on this proposal. If the EPA receives comments that oppose this action, we will withdraw the direct final rule, and it will not take effect. The EPA will then respond to public comments in a later final rule based on this