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 230, 315, 432, 751, and 752

[Docket ID: OPM–2025–0013]

RIN: 3206–AO96

Streamlining Probationary and Trial Period Appeals

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing a rule to change the circumstances and procedures for adjudicating appeals from employees covered by these provisions and terminated during their probationary or trial periods and supervisors and managers who fail to complete their probationary periods. This change follows the President's rescinding of the regulations at subpart H of part 315 of this chapter as directed by Executive Order 14284. As proposed, employees would file appeals limited to: discrimination based on partisan political reasons or marital status; and failure to follow procedures for terminations based upon pre-appointment reasons. OPM would replace the Merit Systems Protection Board (MSPB) as the adjudicative agency for all appeals. Employees who wish to pursue claims of discrimination under statutes administered by the Equal Employment Opportunity Commission (EEOC) would not be allowed to raise these claims with OPM.

DATES: Comments must be received on or before January 29, 2026.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for this proposed rulemaking, by the following method:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for sending comments.

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. To ensure that your comments will be considered, you must submit them within the specified open comment period. Before finalizing this rule, OPM will consider all comments within the scope of the regulations received on or before the closing date for comments. OPM may make changes to the final rule after considering the comments received.

As required by 5 U.S.C. 553(b)(4), a summary of this rule may be found in the docket for this rulemaking at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Carol Matheis by email at *employeeaccountability@opm.gov* or by phone at (202) 606–2930.

SUPPLEMENTARY INFORMATION: OPM proposes this rule to establish streamlined appeal procedures for employees terminated during their probationary or trial periods and supervisors and managers who fail to complete their probationary periods. Under Executive Order (E.O.) 14284, the President rendered the probationary period appeal procedures in subpart H of part 315 of this chapter ''inoperative and without effect'' and directed OPM to rescind those regulations and make conforming amendments. OPM published a final rule implementing those directives on June 24, 2025, at 90 FR 26727. E.O. 14284 delegated authority to OPM to establish such procedures by regulation. The proposed rule removes authority from the MSPB for actions under subpart I of part 315 of this chapter and grants authority to OPM to adjudicate appeals. The proposal would grant authority to OPM to adjudicate appeals by employees terminated during their probationary or trial periods and by supervisors and managers who fail to complete their probationary periods (akin to the former § 315.806 and the current § 315.908, respectively). OPM will only adjudicate appeals that allege either discrimination based on partisan political reasons or marital status; or an agency's failure to follow procedures for terminations based upon pre-appointment reasons. Employees will not, however, be able to attach claims of unlawful discrimination under the laws administered by the EEOC to an appeal as previously permitted before issuance of E.O. 14284. Employees may pursue such claims at the EEOC to the same extent they could do so before issuance of E.O. 14284.

Additionally, when OPM adjudicates an appeal, it will do so based on the written record without the need of extensive discovery. However, where OPM determines additional information is necessary, it may conduct an investigation or audit into an agency's termination action. An appellant will not have a right to a hearing, but OPM may conduct one only when necessary and where it will aid in the efficient resolution of an appeal. Lastly, the proposed rule provides a procedure for an appellant to seek reconsideration of the decision.

I. Background

a. History of Probationary Periods in the Federal Service

Since the dawn of the modern civil service, it has been widely recognized—by courts, by OPM, and by OPM's predecessor agency, the Civil Service Commission—that Federal employees serving a probationary or trial period had far more limited procedural rights regarding their terminations than other Federal employees.

''Probation'' comes from the Latin ''probatio,'' [1] which means ''trying, proving'' or ''a trial, inspection, [or] examination.'' [2] Ballentine's Law Dictionary defines ''probationary status'' in relevant part as ''[a] person having a period of probation in a civil service position by way of a further test of his qualifications for appointment.'' [3]

[1] *Webster's Revised Unabridged Dictionary of the English Language, available at https://www.websters1913.com/words/Probation.*

[2] Charlton T. Lewis & Charles Short, *A Latin Dictionary,* Oxford: Clarendon Press, *available at https://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=probatio* (1879).

[3] *Ballentine's Law Dictionary,* (3rd ed. 1969).

The concept of a probationary, or trial, period in the U.S. civil service dates to the Pendleton Civil Service Act of 1883 (Pendleton Act). The Pendleton Act required ''that there shall be a period of probation before any absolute appointment or employment aforesaid.'' [4] The new Civil Service Commission created by the Pendleton Act reflected a similar understanding of probation. In its first annual report in 1884, the Commission characterized the probationary period as lasting ''six months before any absolute appointment can be made. At the end of this time the appointee goes out of the service unless then reappointed.'' [5] Two years later, the Commission wrote in its third annual report that ''doing the public work is precisely what the Merit System provides. If at its termination the appointing officer is not . . . willing to make an unconditional appointment, the probationer is . . . absolutely out of the service without any action on the part of the Government.[6] In 1897 President William McKinley signed E.O. 101, Amending Civil Service Rules Regarding Removal from Service, adding a number 8 to Rule II that stated: ''No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.''

In 1910, the Court of Claims explained in the case of *Ruggles* v. *United States* that probationers lacked any cognizable legal rights under the rules or the Pendleton Act.[7]

With the enactment of the Lloyd-Lafollette Act of 1912, Congress created the first legislative codification of protection against removal for civil servants. The Act established ''[t]hat no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service.'' [8] The Act also imposed certain procedural requirements on removals including advance notice and an opportunity to respond in writing.[9] However, Congress did not establish employment protections for probationary employees.

After the passage of the Lloyd-La Follette Act and the court's decision in *Ruggles,* the Civil Service Commission took the opportunity to clarify that the removal rules first established in 1897 should never have been treated as creating any serious limits on removing civil servants from employment.[10] Regarding probationers, the Commission quoted from *Ruggles* that probationers have no cognizable right to their employment [11] and that the Lloyd-La Follette Act's protections did not apply to probationers at all.[12] Over the next decade, the Commission would repeatedly cite the *Ruggles* decision and its assessment of the Lloyd-La Follette Act.[13] The Court of Claims also repeated its assessment that the Lloyd-La Follette Act did not convey any right for a probationary employee over his or her position 45 years after its decision in *Ruggles.*[14]

By 1922, the Commission expressed concerns that too few probationers were being terminated and that agencies were not adequately using the probationary period as a screening mechanism.[15] Consistent with that concern, over the next couple of decades, the Commission maintained the view, embodied in its regulations, that probationers retained virtually no protection from removal at all. For example, in its 1938 regulations, the Commission described the removal procedures for probationers as follows: ''Probationer; charges not necessary. A probationer may be separated from the service at any time during or at the expiration of the probationary period without further formality than a written notification setting forth the reasons in full.'' [16] The Commission would also repeat its complaint about agencies' inadequate use of the probationary period to screen out probationers several times, including in 1929, 1934, 1948, and 1949.[17]

The Veterans Preference Act of 1944 expanded civil service protections beyond the Lloyd-La Follette Act to preference eligible Federal employees, but it explicitly excluded probationers.[18] President John F. Kennedy later expanded these protections beyond preference eligibles. As the Civil Service Commission recognized, ''[w]ith the issuance of Executive Orders 10987 and 10988 on January 17, 1962, a new era of greatly expanded appeals rights for employees was opened.'' [19] However, nothing in these E.O.s or implementation by the Civil Service Commission attempted to expand application of those protections to probationers.

For a brief period of time starting in 1958, the Civil Service Commission instituted a rule granting broader appeal

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[4] The Pendleton Act of 1883, 22 Stat. 403, 404 (1883), *available at https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/22/STATUTE-22-Pg403a.pdf.*

[5] First Annual Report of the United States Civil Service Commission to the President (1884), p. 29, *available at https://babel.hathitrust.org/cgi/pt?id=nnc1.cu09006737&seq=9.*

[6] Third Annual Report of the United States Civil Service Commission to the President (1886), p. 36, *available at https://babel.hathitrust.org/cgi/pt?id=njp.32101073361022&seq=40.*

[7] 45 Ct. Cl. 86 (Ct. Cl. 1910).

[8] The Lloyd-La Follette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C.A §§ 652(a).

[9] *Id.*

[10] *See* 29th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1912 (1913), p. 21, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152033&seq=11.*

[11] *Id.* at p. 96.

[12] *Id.* at p.112.

[13] See, *e.g.,* 30th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1913 (1914), p. 91, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152041&seq=97,* 31st Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1914 (1915), pp. 79, 95, *available at https://babel.hathitrust.org/cgi/pt?id=coo.319240542413558seq=223;* 32nd Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1915 (1915), pp. 72, 89, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152066&seq=9;* 33rd Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1916 (1916), pp. 48, 66, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152074&seq=112;* 38th Annual report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1921 (1921), pp. 52, 75, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152124&seq=8.*

[14] *Nadelhaft* v. *United States,* 132 Ct. Cl. 316, 319, 131 F. Supp. 930, 932–33 (Ct. Cl. 1955).

[15] 39th Annual report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1922 (1922), p. xxi, *available at https://babel.hathitrust.org/cgi/pt?id=coo.31924103152140&seq=9* (''The proportion of failures on probation seems small to the commission, being only about one-half of 1 per cent. This may indicate that appointing officers do not in all cases fully scrutinize the conduct and capacity of the probationers and perform the duty of dropping those found unsuitable.'').

[16] 5 CFR 12.101(b) (1938), *available at https://www.loc.gov/item/cfr1938201-T5CIP12/.*

[17] 46th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1929 (1929), p. 35 *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112109910353&seq=5;* 51st Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1934 (1934), pp. 22–23 (1934), *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112113390196&seq=83;* 65th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1948 (1948), p. 1, *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112069434923&seq=15;* 66th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1949 (1950), p. 12, *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112069434923&seq=101.*

[18] Public Law 78–359, 58 Stat. 387 (codified, as amended in part, at 5 U.S.C. 3309–3320), *available at https://tile.loc.gov/storage-services/service/ll/uscode/uscode1940-00900/uscode1940-009005017/uscode1940-009005017.pdf.*

[19] 79th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1962 (1962), p. 15, *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112109910338&seq=237&q1.*

rights to probationary employees.[20] But in 1962, the Commission revoked these regulations.[21] In the following year, the Commission issued new regulations establishing much more limited appeal rights for probationary employees that, until E.O. 14284, permitted appeals based on improper discrimination or terminations for matters arising before employment.[22]

The passage of the Civil Service Reform Act of 1978 (CSRA) formed the basis of the current law governing probationary employment. The relevant language, unchanged since 1978, provides the President with substantial authority to issue regulations *inter alia* establishing the conditions in which an appointment in the competitive service becomes final.[23] The Senate Committee for Government Affairs explained in its report on the CSRA the importance of preserving executive discretion to remove probationers as ''an extension of the examining process to determine an employee's ability to actually perform the duties of the position. It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during this period.'' [24] Courts seized on this language in interpreting the rights of probationary employees.[25] As the United States Court of Appeals for the District of Columbia explained in *Dep't of Justice* v. *Federal Labor Relations Authority,* Congress chose not to extend the same employment protections afforded tenured employees to probationary employees because it ''recognized and approved of the inextricable link between the effective operation of the probationary period and the agency's right to summary termination.'' [26] Similarly, courts elsewhere recognized Congress' intentional limitation on protections for probationary employees.[27] Further, because Congress did not provide the same employment protections to probationary employees, probationers do not have a property interest in their employment and therefore have no constitutional right to due process.[28]

In addition, the CSRA gives OPM extensive discretion in regulating probationary periods. Pursuant to 5 U.S.C. 1301, ''The Office of Personnel Management shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service.'' Under 5 U.S.C. 1104(a)(1): ''the President may delegate, in whole or in part, authority for personnel management functions, including authority for competitive examinations, to the Director of the Office of Personnel Management.'' Further, OPM ''shall establish standards which shall apply to the activities of the Office or any other agency under authority delegated under subsection (a) of this section.'' [29] And the OPM Director has the responsibility ''to prescribe regulations and to ensure compliance with the civil service laws, rules, and regulations,'' and ''execut[e], administer[ ], and enforc[e] . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service.'' [30]

As a general matter, ''Congress wrote the statute it wrote,'' and ''[t]hat congressional election settles'' questions of interpretation. See *CSX Transp., Inc.* v. *Alabama Dept. of Revenue,* 562 U.S. 277, 296 (2011). In this light, the best reading of the statute's absence of an explicit directive is that Congress intended for the President, through OPM, to retain maximum flexibility to determine the procedures under which a probationer may be removed, including which entity is best positioned to serve as the venue for appeals of such a removal. Absent Presidential or Congressional action, the authority to grant employees serving a probationary period employment protections resides with OPM. Courts have recognized that Congress charged OPM with the authority to establish conditions of employment including procedural protections.[31] This includes rights to challenge removals in violation of these protections.[32]

b. Executive Order 14284

Concerns that agencies have not been effectively utilizing probationary periods have continued into the 21st century. In 2005, the MSPB reported to the President and to Congress that Federal agencies were failing to use the probationary period to assess and remove probationers.[33] In conducting a survey of agency supervisors, the MSPB found that, even though supervisors are aware that the probationer's appointment is not final, supervisors tend to treat their probationers as fully appointed Federal employees, with all the rights and responsibilities that implies.'' The MSPB identified that the failure of the Federal Government to maximize the probationary period is a cultural problem pervasive across all levels. The problem appeared to be a systemic one, as ''supervisors expressed frustration at the lack of agency support for the full use of the probationary period, and even a number of probationers were perturbed by what they saw as agencies' failure to use the probationary period to remove marginal and poor performers.'' The MSPB reaffirmed the 2005 report in a 2019 Research Brief, acknowledging that ''MSPB found that supervisors are sometimes reluctant to remove a probationer who is not performing well in the position, even though it is easier to remove a probationer than an employee with a final appointment.'' [34]

In 2015, the Government Accountability Office (GAO) issued a report regarding Federal workforce performance.[35] GAO interviewed a number of chief human capital officers in Federal agencies and found that ''[a]gencies may not be using the supervisory probationary period as intended.'' The GAO found that ''supervisors are often not making performance-related decisions about an

[20] 75th Annual Report of the United States Civil Service Commission for the Fiscal Year Ended June 30, 1958 (1958), p. 4, *available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112109910361&seq=495. See also* 5 CFR 9.103 (1960), *available at https://www.loc.gov/item/cfr1960002-T5CIP9/.*

[21] 27 FR 4755, at 4759 (May 19, 1962).

[22] 28 FR 9973, at 10052 (Sept. 14, 1963).

[23] 5 U.S.C. 3321(a).

[24] S. Rep. No. 95–969, 95th Cong., 2d Sess. 45 (1978).

[25] *See, e.g., Dep't of Justice* v. *FLRA,* 709 F.2d 724, 730 (D.C. Cir. 1983); *U.S.* v. *Connolly,* 716 F.2d 882, 886 (Fed. Cir. 1983); *Nat'l Treasury Emps. Union* v. *FLRA,* 848 F.2d 1273, 1275 (D.C. Cir. 1988).

[26] *FLRA,* 709 F.2d at 728.

[27] *See, e.g., Harris* v. *Moyer,* 620 F. Supp. 1262, 1265 (N.D. Ill. 1985; *Schroeder* v. *United States,* 10 Cl. Ct. 801, 803 (1986); *Allen* v. *Dep't of Air Force,* 694 F. Supp. 1527, 1529 (W.D. Okla. 1988; *Yates* v. *Dep't of the Air Force,* 115 F. App'x 57, 59 (Fed. Cir. 2004; *Nat'l Treasury Emps. Union* v. *FLRA,* 737 F.3d 273, 276 (4th Cir. 2013); *Crabtree* v. *Johnson,* No. 2:12–cv–1206, 2014 U.S. Dist. LEXIS 119588, at *16 (S.D. Ohio Aug. 27, 2014); *Jones* v. *United States DOJ,* 111 F. Supp. 3d 25, 30 n.5 (D.D.C. 2015); and *Goodwin* v. *Wormuth,* 744 F. Supp. 3d 605, 615 (D.S.C. 2024).

[28] *Pharr* v. *MSPB,* 173 Fed. Appx. 817, 819 (Fed. Cir. 2006) (holding probationary employee did not have a property interest in his employment and thus had no valid due process claim).

[29] 5 U.S.C. 1104(b)(1).

[30] 5 U.S.C. 1104(b)(3), 1103(a)(5).

[31] *Nat'l Treasury Emps. Union,* 737 F.3d at 277–78.

[32] *FLRA,* 709 F.2d at 725 n. 3.

[33] *See, generally,* Merit Systems Protection Board, The Probationary Period: A Critical Assessment Opportunity, Report to the President and the Congress of the United States (August 2005), *available at https://www.mspb.gov/studies/studies/The_Probationary_Period_A_Critical_Assessment_Opportunity_(2005)_224555.pdf.*

[34] Merit Systems Protection Board, Remedying Unacceptable Employee Performance in the Federal Civil Service, Research Brief (June 18, 2019), *available at https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.*

[35] Government Accountability Office, Federal Workforce: Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance, GAO–15–191 (February 2015), *available at https://www.gao.gov/assets/gao-15-191.pdf.*

individual's future likelihood of success with the agency during the probationary period.'' This typically happened for two reasons: ''(1) the supervisor may not know that the individual's probationary period is ending, and (2) the supervisor has not had enough time to observe the individual's performance in all critical areas of the job.'' The GAO concluded that the probationary period needed to be ''more effectively used by agencies. . . . [I]mproving how the probationary period is used could help agencies more effectively deal with poor performers.''

To this day, poor performance in the civil service has not been adequately addressed. OPM's 2024 Federal Employee Viewpoint Survey indicated that 40 percent of Federal employees reported that poor performers in their units would usually ''[r]emain in the work unit and continue to underperform[.]'' [36] The next highest percentage of respondents—21 percent—answered ''Do Not Know[.]'' Only 47 percent agreed that ''[i]n my work unit, differences in performance are recognized in a meaningful way.'' 27 percent disagreed with that claim.

President Trump sought to address this longstanding issue when he signed E.O. 14284, ''Strengthening Probationary Periods in the Federal Service,'' on April 24, 2025.[37] E.O. 14284 established Civil Service Rule XI to govern Federal agencies' use of probationary and trial periods. Under Civil Service Rule XI, agencies must assess and certify their employees serving probationary or trial periods before finalizing their appointments to the Federal service. Civil Service Rule XI provides four non-mandatory criteria for the agency head, or designee, to consider in determining whether a probationary employee's continued employment advances the public's interest. Where an agency determines not to certify an employee's continued employment, the employee's appointment expires before the end of the employee's tour of duty on the last day of their probationary or trial period. The agency also retains the discretion to dismiss them prior to the expiration of their probationary or trial period.

Section 4 of E.O. 14284 also revoked the termination and appeal procedures under subpart H of part 315 of this chapter. These procedures, which applied upon initial appointment to a career career-conditional competitive service position, included the requirement for agencies to provide, at a minimum, written notice of the agency's conclusions as to the inadequacies of an employee's performance or conduct when terminating an employee during a probationary period; procedures and bases for appealing a termination during a probationary period; and the authority of the MSPB to adjudicate appeals. Under Civil Service Rule 11.6 (5 CFR 11.6), the President delegated authority to the Director of OPM to issue rulemaking on the circumstances and procedures for employees to appeal their termination from a probationary or trial period.

Prior to E.O. 14284, OPM established through regulation the circumstances and procedures for appealing terminations during an employee's probationary period. Congress defined the term ''employee'' for purposes of identifying who could appeal certain adverse actions to the MSPB to exclude employees serving a probationary or trial period.[38] However, Congress also granted, inadvertently or not,[39] appeal rights to employees in the (1) competitive service who complete one year of current continuous service under other than a temporary appointment limited to one year or less; (2) excepted service who are preference eligibles that completed one year of current continuous service in the same or similar positions in either an Executive Agency or the United States Postal Service or Postal Rate Commission; or (3) excepted service who complete two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment as defined by OPM regulations in 5 CFR 213.104(a)(1).[40] For employees who did not meet the definition of employee, they could not appeal, for example, a termination from the Federal service. However, the Civil Service Commission and, later, OPM exercised its authority to prescribe the circumstances in which an employee serving a probationary period in the competitive service could appeal to the Civil Service Commission or MSPB, respectively.[41]

Likewise, Congress did not establish through statute the circumstances under which supervisors and managers failing their probationary period have the right to appeal their assignment to nonsupervisory or nonmanagerial positions.[42] Nor did Congress specify that the MSPB adjudicate such appeals. However, OPM exercised its regulatory authority to authorize the MSPB to adjudicate such appeals that raise discrimination based on partisan political reasons or marital status.[43]

OPM proposes to establish limited grounds for employees serving a probationary period in the competitive service to appeal their terminations. Under these proposed regulations, such employees will be able to challenge their terminations for alleged discrimination based on partisan political reasons or marital status. These limited grounds of appeal for probationary terminations reflect the historical principle that probationary periods serve as a critical evaluation phase for new Federal employees, and thus that agencies should enjoy great flexibility in separating employees serving probationary or trial periods. Some non-veteran excepted service employees may qualify for appeal rights under other regulatory or legal provisions not covered by this rule. It should also be noted that excepted service employees serving in an appointment in the excepted service outside of part 307 of this chapter did not have such appeal rights unless otherwise entitled by statute, and OPM is maintaining that policy. Providing limited grounds of appeal also ensures agencies adhere to the Merit System Principles and corrects agency actions taken contrary to these principles consistent with OPM's statutory authority.[44] Notably, in Civil Service Rule XI, the President designated OPM as the body which defines the ''circumstances under and procedures by which employees terminated from a probationary or trial period may appeal such termination.[45] Further, ''[e]xcept as otherwise required by law, such appeals shall be the sole and exclusive means of appealing terminations during probationary or trial periods.[46]

II. Proposed Amendments

OPM proposes modifying its regulations in 5 CFR chapter I, subchapter B, by amending part 315 and

[36] Office of Personnel Management, Federal Employee Viewpoint Survey Results (2024), *https://www.opm.gov/fevs/reports/opm-fevs-dashboard/*.

[37] 90 FR 17729 (Apr. 24, 2025).

[38] 5 U.S.C. 7511(a)(1).

[39] Merit Systems Protection Board, ''Navigating the Probationary Period after Van Wersch and McCormick,'' September 2006, *available at https://www.mspb.gov/studies/studies/Navigating_the_Probationary_Period_After_Van_Wersch_and_McCormick_276106.pdf*.

[40] 5 U.S.C. 7511(a)(1)(A)(ii), (a)(1)(B)(ii), and (a)(1)(C)(ii); *Mitchell* v. *MSPB,* 741 F.3d 81 (Fed.Cir. 2014) (holding that ''temporary appointment'' refers to the regulatory definition, which currently limits a temporary appointment to one year or less).

[41] See, *e.g.,* 33 FR 12422–23; 40 FR 15380; 44 FR 48951–52; 55 FR 29339; 79 FR 43922.

[42] 5 U.S.C. 3321.

[43] 44 FR 44812.

[44] 5 U.S.C. 1103(a)(7) and (c)(2)(f), 1104(b)(2). *See also* 5 CFR 5.3, 10.2–10.3.

[45] 5 CFR 11.6 (a).

[46] 5 CFR 11.6 (b).

adding part 751 as explained below to promote accountability and improve the efficient adjudication of employee appeals.

OPM proposes to revise paragraph (f) of § 230.402 to identify the proposed part 751 regulations as the applicable appeal procedures for employees serving an emergency-indefinite appointment in a national emergency. The current references to §§ 315.804 and 315.805 are no longer valid after those sections were removed pursuant to E.O. 14284.[47] The revisions also clarify that the first year of service for employees serving an emergency-indefinite appointment in a national emergency is a probationary period, not a trial period as the regulation currently states.

OPM proposes to update an invalid reference to subpart H of part 351 (which has been removed) in § 315.201(ato refer, instead, to 5 CFR part 11. OPM also proposes to revise paragraph (b) of § 315.908 such that OPM will adjudicate appeals by supervisors or managers assigned to nonsupervisory or nonmanagerial positions for failing a probationary period under subpart I of part 315.

OPM proposes to establish a new part 751 to incorporate many of the provisions rescinded by E.O. 14284. The proposed § 751.101(a) establishes a right to appeal to OPM for employees, as specifically defined at § 751.101(f), terminated during the probationary or trial period required under Civil Service Rule XI, or who are assigned to a nonsupervisory or nonmanagerial position for failure to complete a supervisory or managerial probationary period required under subpart I of part 315 of this chapter.

OPM believes that tasking its Merit System Accountability and Compliance (MSAC) office with adjudication of probationer appeals will provide much needed clarity and efficiency. MSAC is not only equipped, but best positioned, to handle this task. MSAC is an external-facing organization within OPM with longstanding oversight and adjudicative functions. As part of those functions, MSAC provides employees with administrative procedural rights to challenge agency determinations without having to seek redress in Federal court. Distinct from MSPB, it has the infrastructure in place to adjudicate probationer appeals effectively without being subject to restrictions arising from the lack of a quorum. Specifically, ''MSAC is responsible for ensuring that Federal agency human resources programs are effective and efficient and comply with merit system principles and related civil service regulations,'' [48] which includes oversight of agency personnel actions. MSAC also has ''a long history of adjudicating federal employee classification appeals, as well as Fair Labor Standards Act (FLSA), compensation and leave, and declination of reasonable offer claims.'' [49] MSAC ''offer[s] federal employees an independent review of agency personnel decisions. OPM's decision in these cases is the final administrative decision.'' [50]

Housing probationer appeals within MSAC (OPM's oversight and adjudicative body) would additionally separate the adjudicative function within OPM from OPM's policymaking function, which is housed in its Workforce Policy & Innovation (WPI) office.[51] OPM would continue to maintain appropriate administrative separation between its policy arm (WPI) and adjudication arm (MSAC).

Meanwhile, MSPB has been considerably backlogged due to a protracted period without a quorum that leaves employees and agencies in limbo. Between January 7, 2017, and March 3, 2022, and between April 10 and October 27, 2025, MSPB lacked a quorum, which prevented it from reviewing cases and resulted in a considerable backlog.[52] In light of the Senate's failure to confirm nominees to the MSPB in a timely way, a process over which the executive branch lacks any meaningful control, prudent governance requires the executive to minimize disruption in personnel operations caused by loss of a quorum at MSPB. MSPB too has mitigated, as far as practicable, the effects of a future lack of quorum on delays. 89 FR 72957 (Sept. 9, 2024). However, this lack of faith in its own ability to timely adjudicate appeals provides additional evidence of the prudence of relocating probationer appeals to MSAC. While employees may lack some procedural mechanisms if appeals are transferred to MSAC as contemplated by this rule, OPM believes streamlining the process will not have a consequential impact upon the substantive outcomes of the appeals, while improving the efficiency and consistency of the process.

The proposed § 751.101(a) also establishes that an individual serving a probationary period does not have a right to appeal their termination under this part if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart. Instead, the appropriate procedures established under 5 CFR part 432 or 752 may apply unless otherwise excluded by the provisions of those parts. OPM notes that it has proposed to amend referenced provisions of 5 CFR parts 432 and 752 in its rulemaking under RIN 3206–AO80 (90 FR 17182); however, the cross-references proposed in this rule would be unaffected by the changes proposed in that rulemaking.

The proposed § 751.101(b) establishes the burden of proof as a ''preponderance of the evidence'' standard when establishing the timeliness of the appeal, OPM jurisdiction, and the appealable issues under § 751.101(c), and places that burden of proof on the employee.

The proposed § 751.101(c) establishes the appealable issues appellants may raise to OPM. These issues mirror those under subpart I and the now-rescinded subpart H 315 with one exception. OPM is not proposing to continue to allow appellants to attach complaints of discrimination that would otherwise be heard by the EEOC. OPM believes the EEOC is better suited to adjudicate these matters given its expertise in administering and overseeing the anti-discrimination laws. Removing these issues from the probationary or trial period appeals process would also improve the efficiency in resolving probationary and trial period termination appeals.

The proposed § 751.101(d) explains that no other issues may be appealed under this part.

The proposed § 751.101(e) establishes the procedures in this section as the sole and exclusive means for resolving appeals from terminations during probationary or trial periods consistent with E.O. 14284. The proposed § 751.101(f) defines the term ''employee'' to limit the scope of appeals to only those employees who

[47] *See* 90 FR 26727.

[48] U.S. Off. of Personnel Management Off. of the Inspector General, ''Final Evaluation Report: Evaluation of the Merit System Accountability and Compliance Office,'' Rept. No. 2021–OEI–011 (Dec. 12, 2022), *available at https://www.oversight.gov/sites/default/files/documents/reports/2022-12/Final-Report-2021-OEI-001.pdf.*

[49] *See* U.S. Off. of Personnel Management, *Adjudications,* available at *https://www.opm.gov/compliance/adjudications/.*

[50] *Id.*

[51] *See* U.S. Off. of Personnel Management, *FY 2026 Congressional Budget Justification and Annual Performance Plan* at p. 26, *available at https://www.opm.gov/about-us/fy-2026-congressional-budget-justification/fy-2026-congressional-budget-justification.pdf.*

[52] U.S. Merit Sys. Prot. Bd., *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board* (Nov. 14, 2025), *available at https://www.mspb.gov/FAQs%20Absence%20of%20Board%20Quorum%2011-14-25.pdf.*

would be able to appeal an action before E.O. 14284.

The CSRA ''creates an integrated scheme of administrative and judicial review, wherein the Congress intentionally provided—and intentionally chose not to provide—particular forums and procedures for particular kinds of claims.'' [53] Congress allowed certain individual Federal employees who are affected by agency personnel decisions to challenge those decisions ''by litigating their claims through the statutory scheme in the context of [a] concrete'' dispute, with limitations imposed by Congress on the kinds of claims and remedies available.[54]

The CSRA's review scheme is both ''comprehensive and exclusive.'' [55] It is ''comprehensive'' in that ''[i]t regulates virtually every aspect of federal employment and prescribes in great detail the protections and remedies applicable to adverse personnel actions, including the availability of administrative and judicial review.'' [56] It is ''exclusive,'' meanwhile, in that ''[i]t constitutes the remedial regime for federal employment and personnel complaints.'' [57]

The CSRA's review scheme is exclusive even when ''the CSRA provides no relief,'' and in fact, ''precludes other avenues of relief.'' [58] In other words, ''the CSRA is the exclusive avenue for suit even if the plaintiff cannot prevail in a claim under the CSRA.'' [59] ''Congress designed the CSRA's remedial scheme with care, 'intentionally providing—and intentionally not providing—particular forums and procedures for particular kinds of claims.' '' [60]

In contrast to covered employees, probationers generally do not enjoy the same guaranteed right to appeal termination decisions to the MSPB, as Congress excluded them from the definition of ''employee[s]'' for purposes of the CSRA's Chapter 75.[61] Instead, probationers are still considered ''applicants'' under the extended hiring and evaluation period of the CSRA.[62] And the CSRA, which sets forth the Merit System Principles underlying the entire statutory scheme and provides remedies for alleged violations of those principles, generally applies to both ''applicants and employees.'' [63]

Therefore, the administrative review scheme provided in this regulation is the sole and exclusive means for a probationary employee to appeal his or her termination. The proposed § 751.102 establishes where appeals and reconsiderations are filed at OPM and a 30-day deadline from the effective date of the action from which appeal is taken. OPM is proposing to require appeals to be filed electronically and for all parties and their representatives to register with OPM's electronic filing system. However, OPM may exempt a party or representative from the electronic filing requirements for good cause shown. All appeals, reconsiderations, evidence, orders, decisions, and other documents generated by this process will be officially served through the electronic filing system absent an exception granted by OPM.

The proposed § 751.103(a), (b), and (c) establish the form, content, and deadlines of an employee's initial appeal, the agency's response, and the employee's reply. The proposed § 751.103(d) allows the employee, the employee's representative, and the agency to review the appellate record upon request. It also provides that any information provided by one party must be made available to the other parties.

The proposed § 751.104 prescribes the right for an employee to choose a representative subject to certain limitations. This language mirrors the limitations in 5 CFR 511.608; however it also restricts employees from providing representation while in a duty status.

The proposed § 751.105 establishes the procedures OPM will follow in adjudicating appeals. Paragraph (a) establishes a conflict-of-interest provision that precludes OPM personnel from adjudicating an appeal if the employee was subject to a covered action or served as a representative of an employee subject to a covered action during the preceding two years. Paragraph (b) provides for an administrative law judge to adjudicate an appeal filed by an OPM employee. In this proposal, OPM is adopting an approach similar to that used by the MSPB at 5 CFR 1201.13 to adjudicate appeals arising from its employees. Paragraph (c) establishes a procedure for OPM to audit or investigate an agency's probationary or trial period termination to ascertain additional facts for use in adjudicating an appeal, similar to how OPM conducts classification appeals at 5 CFR 511.609. Where OPM conducts an audit or investigation to ascertain additional facts, it will provide the parties with the results and provide a reasonable opportunity to submit arguments or additional information in support of their positions. Paragraph (d) establishes that OPM will provide written notification of its decision. Paragraph (e) establishes OPM's authority to award remedies under its authority under 5 U.S.C. 1103(a)(5) and 5596(b). Where OPM grants an employee's appeal, it will order relief including correction of the personnel action and any back pay, interest, and reasonable attorney fees consistent with 5 CFR part 550 subpart H. Paragraph (e) also establishes that if an agency timely requests reconsideration of an initial decision or OPM reopens and reconsiders an initial decision, the agency must continue to provide the relief ordered unless OPM issued an order staying any such relief. OPM will not order a stay, however, that would deprive pay and benefits to a prevailing employee while the initial decision is pending reconsideration.

The proposed § 751.106 describes the process for sanctions and protective orders. MSPB procedures, while providing for protective orders, are inadequate to protect Federal employees from threats and harassment. While MSPB permits a party to petition the board for a protective order, it cannot, sua sponte, bind a party to a protective order without a motion. Instead, MSPB relies primarily on mutual consent of the parties, which allows for significant abuse by bad actors. The failure to preemptively issue an order provides ample opportunity to those who would channel unwarranted attention, harassing messages, and threats to Federal employees, who neither sought nor deserve public attention, merely for fulfilling their responsibilities. This failure should be corrected to protect rank and file Federal employees seeking to serve the public interest. However, unfortunately, to date, MSPB has proven itself unwilling to take necessary steps to protect Federal employees, who deserve to be fully protected from harassment. As such, OPM believes it would be prudent and provide much

[53] *Am. Fed'n of Gov't Emps.* v. *Secretary of the Air Force,* 716 F.3d 633, 636 (D.C. Cir. 2023) (alterations, citation, and quotations marks omitted).

[54] *See Am. Fed'n of Gov't Emps.* v. *Trump,* 929 F.3d 748, 757 (D.C. Cir. 2019).

[55] *Grosdidier* v. *Broad. Bd. of Govs.,* 560 F.3d 495, 497 (D.C. Cir. 2009).

[56] *Nyunt* v. *Broad. Bd. of Gov.,* 589 F.3d 445, 448 (D.C. Cir. 2009) (cleaned up).

[57] *Id.*

[58] *Graham* v. *Ashcroft,* 358 F.3d 931, 935 (D.C. Cir. 2004).

[59] *Grosdidier,* 560 F.3d at 497.

[60] *Id.* (quoting *Filebark* v. *Dep't of Transp.,* 555 F.3d 1009, 1010 (D.C. Cir. 2009)); *Fornaro* v. *James,* 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.).

[61] *See* 5 U.S.C. 7511(a)(1).

[62] *Id.*

[63] 5 U.S.C. 2302(a)(2)(A)(i)–(xii) (identifying ''personnel action[s]'' that may form the basis for alleged prohibited personnel practices ''with respect to an employee in, or applicant for, a covered position in any agency'').

needed protection for Federal employees to adjudicate these appeals by issuing cease-and-desist directives, with strict consequences for failure to comply.

The proposed § 751.107 establishes a procedure for employees or their representatives and agencies to seek reconsideration of an initial decision. Paragraph (a) establishes a timeline of 30 days from the date the decision is issued for a party to seek reconsideration. Paragraph (b) establishes the grounds upon which OPM may grant a request for reconsideration. Paragraph (c) establishes the actions OPM may take when an initial decision is reopened or reviewed. Paragraph (d) prescribes what actions OPM may take upon reopening or reconsidering an initial decision.

The proposed § 751.108 establishes that the Director may act at his or her discretion to reopen and reconsider any decision in which OPM issued a final decision.

The proposed § 751.109 describes the process by which OPM's initial decision becomes its final decision. The section proposes that initial decisions become final when neither party requests reconsideration within 30 days. It further proposes to convert a reconsidered opinion into a final decision 30 days following its issuance if the Director does not intercede but, in such cases, backdates the date on which the final decision becomes effective to the date on which the reconsidered opinion is issued. In instances in which the Director does intercede, this section proposes to define a final decision as effective as of the date on which the Director issues his or her decision.[64] Finally, the section proposes to limit further rights to appeal following a final agency decision, including judicial review.

OPM views this appellate process as necessary to ensure that the Director is able to sufficiently supervise adjudicators and avoid any serious constitutional concerns from having subordinate officials wield executive authority. Under Article II, the Constitution vests the executive power in the President who must rely upon subordinates to exercise his authority. Adjudicators assigned to adjudicate appeals under this proposed rule exert significant authority that must be properly supervised by a principal officer appointed by the President with Senate consent to avoid a constitutional problem. *United States* v. *Arthrex, Inc.,* 594 U.S. 1 (2021).

OPM is also considering whether to amend Rule 11 (5 CFR part 11) to include certain provisions from E.O. 14284. Specifically, paragraphs (b)–(d) of Section 5 set forth certain procedures for agencies to follow as part of their certification process for continued employment of employees serving probationary or trial periods. For example, paragraph (b) of Section 5 requires agencies to meet with each employee serving an initial probationary or trial period at least 60 days prior to the end of their probationary or trial period. Although these provisions are already in effect and controlling, these procedures within E.O. 14284 are not currently reflected in Rule 11. OPM is considering whether incorporating these provisions into the regulations would provide administrative convenience for employees and human resources practitioners. OPM welcomes comments on whether and how it should modify Rule 11 to explicitly incorporate these provisions of Section 5(b)–(d) of E.O. 14284.

Finally, OPM proposes to modify its regulations under parts 432 and 752 to conform to E.O. 14284. The proposed changes in § 432.102 remove reference in paragraphs (f)(1) and (2) to a trial period that employees in the competitive service may serve. Similarly, the proposed changes to §§ 752.201 and 752.401 remove references to trial periods for employees in the competitive service. Under E.O. 14284 and 5 CFR 11.2 and 11.3, employees in the competitive service serve probationary periods while employees in the excepted service serve trial periods. OPM also proposes modifying paragraph (f)(3) and adding a new (f)(4) to clarify that preference eligible and nonpreference eligible employees serving a trial period that have not completed one or two years of current continuous service, respectively, may not appeal an action under this part. These changes are consistent with and necessary to conform to E.O. 14284 and 5 CFR 11.5 that preclude employees serving a trial period from appealing an action under part 432 or failure of an agency to certify their appointment advances the public interest.

III. Regulatory Analysis

A. Statement of Need

OPM is issuing this proposed rule to issue regulations under Section 11.6 of Civil Service Rule XI and 5 U.S.C. 1103. This proposed rule follows the issuance of E.O. 14284 which rescinded the regulations in subpart H of part 315 of this chapter, including the circumstances and procedures for filing an appeal from termination during a probationary period. Thus, the purpose of this rulemaking is to prescribe the circumstances under and procedures by which employees terminated from a probationary or trial period may appeal to OPM. OPM believes this rule balances the needs of promoting greater accountability of the Federal workforce while also providing an avenue for employees to appeal terminations they believe are contrary to some covered Merit System Principles, or when they believe an agency failed to follow procedures for terminations based upon pre-appointment reasons. The rule also proposes to streamline the adjudication of appeals currently before the MSPB which provide for legal discovery and a right to a hearing, which are neither necessary for reviewing these types of appeals nor conducive to the efficient administration of the civil service. This proposal would also give OPM jurisdiction over appeals from supervisors and managers assigned to nonsupervisory and nonmanagerial positions for failing their probationary period. This is necessary to streamline the procedures of all appeals related to probationary periods and promote consistency between how such probationary periods are treated.

B. Regulatory Alternatives

An alternative to this rulemaking is a rule that would mirror the appeal rights and procedures under subpart H of part 315 including allowing employees to file appeals with the MSPB. Continuing to allow employees to appeal to the MSPB would not be as efficient as OPM adjudicating appeals. MSPB procedures unnecessarily add complexity to a process designed for Federal agencies to evaluate whether it is in the public's interest to retain employees newly hired into the Federal service. When appealing to the MSPB, employees have a statutory right to a hearing when the matter is within its jurisdiction.[65] And before reaching a hearing, MSPB regulations allow the parties to engage in discovery.[66] These procedures unnecessarily delay and increase costs of the adjudication of appeals that could be more efficiently accomplished by limiting the transactional costs of litigation and adjudication. Further, OPM believes that the costs and resources associated with MSPB appeals processes have been one factor that has inhibited supervisors from fully

[64] This regulation is modeled after those of the Commission, published in 1949. U.S. Senate Committee on Post Office and Civil Service, *supra* note 15, at p. 68.

[65] 5 U.S.C. 7701(a).

[66] 5 CFR 1201.71–1201.75.

utilizing probationary periods.[67] As discussed in more detail in sections III.C., III.D., and III.E., OPM does not believe that returning appeals of probationary actions to MSPB is the best alternative for the Government or employees.

OPM also considered whether to include an agency's failure to provide written notice required under 5 CFR 11.5(e) as a basis for appeal. OPM concluded that allowing an appeal on this basis would be unnecessary for two reasons. First, employees serving a probationary or trial period understand that, as a condition of employment, their employment will conclude before the end of their tour of duty on the last day of their appointment unless the agency issues the certification required under 5 CFR 11.5. Second, an agency's failure to adhere to a purely administrative requirement would not affect the outcome of the employee's separation.

Another alternative to this rulemaking is to not issue a rule that provides covered employees with a right to appeal. However, employees terminated during their probationary or trial periods would not be able to seek relief for discrimination based on partisan political reasons or marital status. Supervisors and managers reassigned to nonsupervisory or nonmaterial positions would still be allowed to appeal to the MSPB under subpart I of part 315, which OPM views as suboptimal given the efficiency gains from OPM adjudicating these appeals under its own authority.

We considered whether to include as a basis for appeal the circumstances described in the proposed § 751.101(d). We view an agency's inaction or decision not to finalize an employee's appointment beyond the probationary or trial period as the natural conclusion of the appointment akin to the expiration of a term employee's appointment.[68] Under OPM regulations, the Board similarly views an agency's inaction to renew or extend a term employee's appointment beyond the initial term as not an appealable adverse action.[69]

We also conclude that granting employees a right to appeal the OPM Director's decision to deny an agency's petition to reinstate an employee to the Federal service under 5 CFR 11.5(f) is inappropriate. Consistent with our view that the employee's appointment naturally comes to an end as described in 5 CFR 11.5(a), the agency and not the employee retains the right to seek the OPM Director's approval to reinstate the employee. It would be inconsistent with E.O. 14284 and 5 CFR 11.5 to establish a right to challenge the OPM Director's decision to deny a petition from the agency given the nature of the employee's appointment and the lack of standing of the employee.

C. Impact

The proposed rule promotes greater accountability of the Federal workforce while delivering cost-savings to the American taxpayer. Streamlining the appeals process by reducing unnecessary legal processes to adjudicate a narrow set of appealable issues and locating adjudicative responsibilities at OPM would produce a net savings in terms of both costs and efficiency of government administration. Although employees who might otherwise obtain adjudication of collateral claims of discrimination would need to file complaints with the EEOC, the adjudication of those claims at the EEOC may result in better outcomes as the EEOC administers and oversees nearly all anti-discrimination laws protecting Federal employees. Employees seeking relief before the EEOC may also experience longer times to receive a decision given the number of cases pending charges at the end of Fiscal Year 2024.[70] However, employees will gain the ability to bypass delays in the processing of their complaints by filing a lawsuit in Federal district court under certain circumstances.[71]

D. Costs

This proposed rule, once finalized and in effect, would affect how Federal employees pursue appeals from terminations during their probationary or trial periods and reassignments to nonsupervisory or nonmanagerial positions. This proposal grants authority over adjudication of these appeals to OPM. The proposed rule also removes authority from the MSPB to adjudicate complaints of discrimination that could attach to appeals from terminations during a probationary period.

The grant of adjudicative responsibility to OPM will likely result in net cost savings for the Government for two reasons. First, the proposed rule streamlines the adjudicative process by replacing discovery with an as-needed investigation or audit conducted by OPM. The parties will no longer have a right or ability to conduct discovery which can result in extensive, needless costs, including time spent on document production, depositions, and written discovery, each of which involve extensive costs in time and resources for the Government. It also eliminates an employee's right to a hearing in favor of decisions based on the written record unless OPM determines that a hearing is both necessary and will result in an efficient adjudication. Second, the rule locates the adjudicative function at OPM, resulting in significant cost savings based on a reduction in personnel salaries as detailed below.[72]

Based on the most recent publicly available annual report of the MSPB, 622 employees filed appeals from their terminations during their probationary or trial periods and reassignments to nonsupervisory or nonmanagerial positions in Fiscal Year 2024.[73] While OPM acknowledges the significant number of appeals filed since agencies undertook termination actions after the change in Administration on January 20, 2025, this period of time appears to be an anomaly and not a sustainable trend. Employees filed 486, 424, and 461 ''Termination of Probationer'' appeals from Fiscal Years 2021–2023,[74] respectively. Therefore, for the purposes of this analysis, OPM assumes an average of 457 appeals of probationer terminations per year.

One-Time Costs

OPM estimates that this rulemaking will require individuals employed by more than 80 Federal agencies including the MSPB and EEOC to modify their regulations, policies, and procedures to implement this rulemaking and train human resources (HR) practitioners, hiring managers, attorneys, and

[67] *See* U.S. Government Accountability Office, ''Improved Supervision and Better Use of Probationary Periods Are Needed to Address Substandard Employee Performance,'' (2015), p. 7, *available at https://www.gao.gov/assets/gao-15-191.pdf.*

[68] In the event an agency fails to make the required certification due to administrative error, the agency head can petition the Director of OPM to reinstate an employee. OPM Memorandum to Heads and Acting Heads of Departments and Agencies, ''Initial Guidance on President Trump's Executive Order Strengthening Probationary Periods in the Federal Service'' (Apr. 28, 2025).

[69] 5 CFR 752.401(b)(11); *Scott* v. *Dep't of the Air Force,* 113 MSPR 434, ¶ 9 (2010).

[70] Equal Employment Opportunity Commission, ''Fiscal Year 2024 Annual Performance Report,'' January 17, 2025, available at *https://www.eeoc.gov/sites/default/files/2025-01/24-126_EEOC_2024_APR_508_1.16.25_508.pdf.*

[71] 29 CFR 1614.407.

[72] OPM used the most recently available data in the FedScope employment data cube for September 2024 to estimate grade levels of MSPB and EEOC personnel assigned to adjudicate appeals covered by this proposed rule. The data is available at *https://www.fedscope.opm.gov/.*

[73] Merit Systems Protection Board, ''Annual Report for FY 2024,'' June 24, 2025, available at *https://www.mspb.gov/about/annual_reports/MSPB_FY_2024_Annual_Report.pdf.*

[74] Merit Systems Protection Board annual reports are available at *https://www.mspb.gov/about/annual.htm.*

administrative judges. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 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 $154.76 per hour.

To comply with the regulatory changes, affected agencies would need to review the final rule and update their regulations, policies, and procedures. We estimate that, in the first year following publication of the final rule, doing so will require an average of 100 hours of work by employees with an average hourly cost of $154.76. This work would result in estimated costs in that first year of implementation of about $15,476 per agency, and about $1.2 million governmentwide.

Recurring Costs/Savings

OPM believes this rulemaking will not substantially increase the cost to agencies in litigating terminations during employees' probationary or trial periods and reassignments to nonsupervisory or nonmanagerial positions. OPM first calculated the cost of shifting complaints of discrimination raised in probationary appeals from the MSPB to the EEOC. OPM assumes that an extremely conservative rate of 100% of appellants (457) also seek counseling with their agency's EEO office. OPM expects that an existing EEO Specialists would process employees' complaints of discrimination at the rate in 2025 for GS–12, step 5, from the Washington, DC, locality pay table ($114,923 annual locality rate and $55.07 hourly locality rate) with about 16 hours of pre-complaint processing for each complaint.[75] OPM assumes 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 $110.14 per hour. OPM estimates that the total cost to the Federal Government for EEO pre-complaint is approximately $805,000.

After the EEO pre-complaint process, OPM estimates that 174 complaints will proceed to an investigation. OPM assumes that the complaint processing will be performed by EEO Specialists paid at the rate in 2025 for GS–12, step 5, from the Washington, DC, locality pay table ($114,923 annual locality rate and $55.07 hourly locality rate), to perform a total of 30 hours of investigative work for each complaint. OPM also assumes 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 $110.14 per hour. OPM estimates that the total cost to the Federal Government for EEO investigations is approximately $575,000.

Following the investigative stage, OPM assumes that 76 complaints will proceed to a final agency decision while 30 will be adjudicated by an EEOC administrative judge. In drafting and issuing a final agency decision, OPM estimates that agencies will employ one EEO Specialist paid at the rate in 2025 for GS–12, step 5, from the Washington, DC, locality pay table ($114,923 annual locality rate and $55.07 hourly locality rate) to perform 12 hours of work to draft the decision; and one EEO Director paid at the GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.06 hourly locality rate) to perform 4 hours of work to review and sign the decision. OPM also assumes 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 $110.14 and $182.04 per hour, respectively. OPM estimates that the total cost to the Federal Government to issue 76 final agency decisions is approximately $156,000.

Assuming all probationer appeals result in a report of discrimination and assuming probationer appellants proceed through the EEOC process in rates similar to employees solely raising discrimination claims, the number of complaints filed with the EEOC would rise no greater than 6.5% based on the most recent publicly available data.[76] In adjudicating the 30 cases filed with the EEOC, OPM assumes that an EEOC administrative judge paid at the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate) will adjudicate complaints; the chief administrative judge paid at the GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.06 hourly locality rate) will review the administrative judge's decision; and a paralegal paid at the GS–11, step 5, from the Washington, DC, locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate) will assist the administrative judge during the adjudicative hearing process. OPM also assumes 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 $154.76, $182.04, and $91.88 per hour, respectively. OPM estimates that each complaint will require 40, 8, and 4 hours, respectively, of an administrative judge, chief administrative judge, and paralegal to adjudicate each complaint. OPM also assumes each case will cost as much as $5,000 in miscellaneous litigation costs associated with litigation (*e.g.,* court reporter fees, discovery) borne by the parties. Therefore, OPM estimates that the total cost to adjudicate these 30 complaints is approximately $390,000.

OPM also estimates that 12 of the 30 complaints adjudicated will be appealed to the EEOC's Office of Federal Operations. OPM assumes that an EEOC attorney paid at the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate) will draft and issue the opinion, requiring 6 hours of work per appeal. OPM also assumes that an EEOC paralegal paid at the GS–11, step 5, from the Washington, DC, locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate) will assist the attorney, requiring 2 hours of work. OPM also assumes 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 $154.76 and $91.88 per hour, respectively. Thus, OPM calculates that the total cost to adjudicate 12 appeals is approximately $13,350.

During the course of processing the 457 complaints, OPM assumes agencies will require the use of agency attorneys to advise their EEO offices as well as defend against the 30 complaints and 12 appeals. OPM estimates that an attorney paid at the rate in 2025 for GS–13, step 5, from the Washington, DC, locality pay table ($136,658 annual locality rate and $65.48 hourly locality rate) will advise agency EEO offices on average 8 hours per complaint. OPM also estimates that an attorney paid at the rate in 2025 for GS–13, step 5, from the Washington, DC, locality pay table, will defend the agency on average 60 hours per complaint that proceeds to a hearing and 24 hours per appeal. OPM also assumes 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

[75] EEOC, Chapter 2, ''Management Directive for 29 CFR Part 1614 (EEO–MD–110),'' as revised, August 5, 20215, *https://www.eeoc.gov/federal-sector/management-directive/management-directive-110.*

[76] EEOC, ''Fiscal Year 2021 Annual Report Complaints Tables,'' *https://www.eeoc.gov/sites/default/files/2024-12/2021%20Annual%20Report%20Complaints%20Tables.zip.*

labor cost of $130.96 per hour. Thus, OPM estimates that agencies' costs for attorney services are approximately $780,000. The total increased annual cost to the Federal Government from discrimination claims being handled through the EEO process rather than as a mixed case with the MSPB would be about $1.1 million. OPM expects that this estimate exceeds the true cost as a result of conservative assumptions (*e.g.,* 100% of probationer appeals also make a claim of discrimination) and likely duplication of costs (*e.g.,* some appellants probably already seek EEO counseling).

OPM also examined the costs of an adjudication at the MSPB as compared to OPM. MSPB employs administrative judges at the GS–15 grade level to adjudicate appeals. We assume that each probationary appeal requires one administrative judge paid at the rate in 2025 for GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.02 hourly locality rate); and one paralegal at the GS–11, step 5, from the Washington, DC, locality pay table ($95,878 annual locality rate and $45.94 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 $182.04 and $91.88 per hour for these respective positions. We estimate that each initial appeal of a termination from a probationary appeal requires 3 and 1 hour for an administrative judge and paralegal to adjudicate an appeal, respectively. A Chief Administrative Judge requires about an hour to review four cases. Based on these assumptions, we estimate the cost for MSPB to adjudicate an appeal at about $700 per appeal or $316,000 per year for 457 appeals, the average number of appeals over the preceding three-year period.

In contrast, adjudicating appeals at OPM will require adjudicators at the rate in 2025 for GS–13, step 5, from the Washington, DC, locality pay table ($136,658 annual locality rate and $65.48 hourly locality rate); paralegals at the GS–11, step 5, from the Washington, DC, locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate); and supervisory adjudicators at the GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate), to adjudicate 457 appeals each year. 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 $130.96, $91.88, and $154.76 per hour for the respective positions above. We estimate that each appeal will require 30 hours of work performed by an adjudicator, 1 hour of work by a paralegal, and 1 hours of work by a supervisory adjudicator. On average, probationer appeals require very limited time commitments to process because most cases are dismissed on jurisdictional grounds. Nonetheless, for cases where there is jurisdiction, OPM expects that OPM adjudication will require less time than an MSPB adjudication due to several factors. OPM expects that cases will rarely require a hearing and that most cases will be decided on the written record. OPM's proposed process also does not provide for discovery, which is often provided in cases before the MSPB. In addition to requiring less time commitment, OPM expects to have employees at lower pay rates adjudicate the cases with review by supervisors rather than using higher-paid attorneys to adjudicate cases as the MSPB does. Based on these assumptions, we estimate the cost to adjudicate an appeal at $640 and $290,000 per year to adjudicate 457 appeals. This results in a net, recurring savings of about $25,000 from adjudicating appeals at OPM as opposed to MSPB.

MSPB estimates that it receives petitions of review of approximately 11% of decisions on appeal. Therefore, we assume that employees in 46 of the 457 cases adjudicated will seek reconsideration of an initial decision issued by OPM. With respect to the costs for the MSPB to adjudicate petitions for review from initial appeals, we estimate that each petition requires the Chairman and one Member of the MSPB [77] paid at the rate of Executive Schedule Level IV of $195,200 ($93.53 hourly rate); an one attorney paid at the GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.06 hourly locality rate); and an attorney paid at the GS–13, step 5, from the Washington, DC, locality pay table ($136,658 annual locality rate and $65.48 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 $187.06, $182.04, and $130.96 for these respective positions. We estimate that each petition requires 1, 2, and 6 hours, respectively, for the Board, GS–15 attorney, and GS–13 attorney to adjudicate. Based on these assumptions, we estimate the cost for MSPB to adjudicate petitions for review to be $550 per petition or about $25,000 per year for 46 petitions.

Reconsideration under the proposed rule at OPM will require a GS–14 adjudications officer, not involved in the initial decision, at the rate in 2025 for GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate); the Associate Director of MSAC at the rate for a Senior Executive Service member at $225,700 ($108.15 hourly 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 $154.76, and $216.30 per hour for the respective positions. We estimate that each appeal on reconsideration will require 4 hours of work performed by the adjudications officer and 1 hour of work by the Associate Director for MSAC. OPM estimates that a very small number (*e.g.,* 10) of cases will be reviewed by the Director of OPM. Based on these assumptions, we estimate the cost of OPM reconsidering an appeal at approximately $1,835 with $38,500 per year for 46 reconsiderations. This results in a net, recurring cost of about $13,500 for OPM reconsideration of appeals.

OPM also estimated costs to agencies to defend against probationary appeals filed at the MSPB and OPM. OPM estimates that agencies employ one attorney paid at the rate of a GS–14, step 5, from the Washington, DC, locality pay table ($161,486 annual locality rate and $77.38 hourly locality rate); one paralegal paid at the GS–11, step 5, from the Washington, DC, locality pay table ($95,878 annual locality rate and $45.94 hourly locality rate); and one supervisory attorney paid at the rate of GS–15, step 5, from the Washington, DC, locality pay table ($189,950 annual locality rate and $91.06 hourly locality rate) to defend against appeals and petitions for review filed at the MSPB. OPM assumes that agencies will employ the same positions paid at the same rates of pay for appeals filed at OPM under the proposed rule. OPM further assumes 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 $154.76, $91.88, and $182.04 per hour for the respective positions above. However, OPM estimates that the amount of labor required to defend agencies will be lower under the proposed rule. OPM

[77] Based on the past decade and the current outlook, MSPB is unlikely to have three concurrently sitting Board members for the foreseeable future. Therefore, OPM has estimated the work of only two Board members and staff.

assumes each appeal before the MSPB requires 15, 4, and 1 hour of time for an attorney, paralegal, and supervisory attorney, respectively. And for PFRs, agencies require one attorney to work 10 hours. Under the proposed rule, OPM estimates that agencies will require 10, 4, and 1 hour of time for an attorney, paralegal, and supervisory attorney, respectively. And for reconsiderations of an OPM initial decision, OPM estimates that the proposed rule would require 8 hours for one attorney. Using the cost information above, OPM estimates that the total cost to the Federal Government for litigation defense before the MSPB is $1.4 million, and $1 million before OPM.

In summary, OPM calculates increased costs associated with moving discrimination claims to the EEOC at approximately $2.6 million. Estimated costs associated with MSPB continuing to adjudicate probationer and trial period appeals at $1.759 million versus estimate costs of adjudicating those cases at OPM at $1.373 million, yielding savings of $386,000. These savings partially offset the cost of moving discrimination claims to the EEOC. After considering the costs detailed above, we estimate the first-year costs to be about $3.5 million governmentwide with recurring annual costs to the Federal Government of approximately $2.3 million.

E. Benefits

In addition to the direct cost savings this proposed rule would generate, OPM expects that the faster adjudication of appeals will result in additional benefits. First, receiving a timely decision on an appeal will provide an individual with a clear determination of whether the individual will be reinstated. Agencies will similarly benefit as the streamlined appeal procedures proposed in this rule remove the default requirement for a hearing before a MSPB administrative judge and eliminate protracted, costly legal discovery between an appellant and agency. Second, a timely decision on appeal will allow the government to limit backpay and attorney's fees in instances where the individual was removed in error.

Because appeals will be limited to discrimination based on partisan political reasons or marital status, and failure to follow procedures for terminations based upon pre-appointment reasons, OPM also anticipates that the proposal will result in improved efficiency of the service by freeing agencies' resources for facilitating an ongoing assessment of whether new positions or new hires are meeting the needs of the government. A study by the MSPB found that the success of probationary periods' ability to find and assess talent to meet agencies' missions and the Federal service is dependent upon supervisors' ability to evaluate new talent and take appropriate action to prevent less than successful candidates from becoming Federal employees.[78] By allowing supervisors and managers to spend more time training, mentoring, and evaluating new employees, agencies should achieve savings from better outcomes with recruiting and retaining talent to the Federal service.

IV. Procedural Issues and Regulatory Review

A. Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities because the rule involves adjudicative authority of Federal agencies to adjudicate appeals filed by current and former Federal employees. While small entities representing current or former Federal employees will be impacted by the change in venue for appeals and complaints of discrimination, the procedures employed by the OPM and EEOC will not cause significant economic impacts on these small entities.

B. Regulatory Review

OPM has examined the impact of this rulemaking as required by Executive Orders 12866 (Sept. 30, 1993) and 13563 (Jan. 18, 2011), which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. A regulatory impact analysis must be prepared for major rules with effects of $100 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. *This proposed rule is not expected to be an Executive Order 14192 regulatory action.*

C. Executive Order 13132, 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 (Aug. 10, 1999), it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

D. Executive Order 12988, Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and (b)(2) of Executive Order 12988 (Feb. 7, 1996).

E. Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation with the base year 1995). Thus, no written assessment of unfunded mandates is required.

F. Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This regulatory action will not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act. OPM is reviewing its existing System of Records Notices (SORNs) in light of the changes proposed in this rulemaking. OPM will publish any proposed changes to any relevant SORNs in the **Federal Register**.

The Director of OPM, Scott Kupor, reviewed and approved this document and has authorized the undersigned to electronically sign and submit this document to the Office of the Federal Register for publication.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

List of Subjects

5 CFR Part 230

Civil defense, Government employees.

5 CFR Part 315 and 432

Government employees.

5 CFR Part 751 and 752

Administrative practice and procedure, Government employees.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR parts 230, 315, 432, 751, and 752 as follows:

[78] MSPB, ''The Probationary Period: A Critical Assessment Opportunity,'' August 2005, *available at https://www.mspb.gov/studies/studies/The_Probationary_Period_A_Critical_Assessment_Opportunity_224555.pdf.*

PART 230—ORGANIZATION OF THE GOVERNMENT FOR PERSONNEL MANAGEMENT

■ 1. The authority citation for part 230 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302. E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; E.O. 14284, 90 FR 17729. Sec. 230.402 also issued under 5 U.S.C. 1104.

Subpart D—Agency Authority To Take Personnel Actions in a National Emergency

■ 2. Amend 230.402 by revising paragraph (f) to read as follows:

§ 230.402 Agency authority to make emergency-indefinite appointments in a national emergency.

* * * * *

(f) *Probationary Period.*

(1) The first year of service of an emergency-indefinite employee is a probationary period.

(2) The agency may terminate the appointment of an emergency-indefinite employee at any time during the probationary period. The employee is entitled to the procedures set forth in part 751 of this chapter as appropriate.

* * * * *

PART 315—CAREER AND CAREER-CONDITIONAL EMPLOYMENT

■ 3. The authority citation for part 315 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, unless otherwise noted; E.O. 14284, 90 FR 17729. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. 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, 43 FR 1917, 3 CFR, 1978 Comp., p.111. Sec. 315.606 also issued under E.O. 11219, 30 FR 6381, 3 CFR, 1964–1965 Comp., p. 303. Sec. 315.607 also issued under 22 U.S.C. 2560. Sec. 315.608 also issued under E.O. 12721, 55 FR 31349, 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 under E.O. 13473, 73 FR 56703, 3 CFR, 2009 Comp., p. 241. Sec 315.613 also issued under 5 U.S.C. 9602. Sec. 315.710 also issued under E.O. 12596, 52 FR 17537, 3 CFR, 1978 Comp., p. 264.

Subpart B—The Career-Conditional Employment System

■ 4. Amend § 315.201 by revising paragraph (a) to read as follows:

§ 315.201 Service requirement for career tenure.

(a) *Service requirement.* A person employed in the competitive service for other than temporary, term, or indefinite employment is appointed as a career or career-conditional employee subject to the probationary period required by part 11 of this chapter. Except as provided in paragraph (c) of this section, an employee must serve at least 3 years of creditable service as defined in paragraph (b) of this section to become a career employee.

Subpart I—Probation on Initial Appointment to a Supervisory or Managerial Position

■ 5. Amend § 315.908 by revising paragraph (b) to read as follows:

§ 315.908 Appeals.

* * * * *

(b) An employee who alleges that an agency action under this subpart was based on partisan political affiliation or marital status may appeal to the Office of Personnel Management using the procedures in 5 CFR part 751.

PART 432—PERFORMANCE BASED REDUCTION IN GRADE AND REMOVAL ACTIONS

■ 6. The authority citation for part 432 is revised to read:

Authority: 5 U.S.C. 4303, 4305. E.O. 14284, 90 FR 17729.

■ 7. Amend § 432.102 by:

■ a. Revising paragraphs (f)(1), (2), and (3);

■ b. Redesignating paragraphs (f)(4)–(13) as (f)(5)–(14); and

■ c. Adding a new paragraph (f)(4).

The revisions and addition read as follows:

§ 432.102 Coverage.

* * * * *

(f) *Employees excluded.* This part does not apply to:

(1) An employee in the competitive service who is serving a probationary period under an initial appointment;

(2) An employee in the competitive service serving in an appointment that requires no probationary period, who has not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) A preference eligible employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;

(4) A nonpreference eligible employee in the excepted service who has not completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment (see 5 CFR 213.104(a)) limited to 2 years or less;

■ 8. Add part 751 to read as follows:

PART 751—PROBATIONARY AND TRIAL PERIOD APPEALS

Authority: 5 U.S.C. 1103, 1302, 3301, 3302, 3321, 5596. E.O. 14284, 90 FR 17729. 5 CFR 11.6.

Sec.

§ 751.101 Right to appeal.

(a) *Right of appeal.*

(1) An employee may appeal to the Office of Personnel Management (OPM):

(i) Termination during a probationary period required under 5 CFR part 11 or other authority administered by the Office, and

(ii) Assignment to a nonsupervisory or nonmanagerial position for failure to complete a supervisory or managerial probationary period required under subpart I of part 315 of this chapter.

(2) An individual serving a probationary period does not have a right to appeal their termination under this part if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less. Such individual may have a right to appeal under the provisions of 5 CFR 432.106 or 752.405, as appropriate, provided that such appeal is not excluded by the provisions of § 432.102(b), (d), and (f) and 752.401(b) and (d) of this chapter.

(b) *Burden of proof.* The employee (*i.e.,* appellant) bears the burden to demonstrate, by a preponderance of the evidence:

(1) The timeliness and form of the written appeal,

(2) That OPM possesses jurisdiction over the appeal, and

(3) The agency's action was discriminatory based on partisan political reasons or marital status or failed to follow the procedures for terminating the employee for reasons based in whole or in part on conditions arising before the employee's appointment.

(c) *Appealable issues.* (1) *Discrimination.* An employee may appeal one of the following actions that he or she alleges was based on partisan political reasons or marital status:

(i) Termination not required by statute,

(ii) Assignment to a nonsupervisory or nonmanagerial position under 315.907 of this chapter,

(iii) An agency's decision not to certify the continuation of the appointment of an employee serving a probationary or trial period, or

(iv) An agency's failure to certify and finalize the appointment of an employee serving a probationary or trial period.

(2) *Improper procedure.* An employee whose termination is based in whole or part on conditions arising before his or her appointment may appeal to OPM challenging that the agency failed to provide:

(i) advance written notice stating the reasons, specifically and in detail, for the proposed action;

(ii) a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his or her answer. If the employee answers, the agency shall consider the answer in reaching its decision; and

(iii) a written decision at the earliest practicable date delivered at or before the effective date of the action. The decision shall inform the employee of the reasons for the action, the right to appeal to OPM, the need to include documented supporting facts, and time limits within which the appeal must be submitted under this Section.

(d) *Nonappealable issues.* An employee may not appeal under this part any other issue not specified in paragraphs (c) of this section.

(e) *Exclusive appeal procedure.* The procedures in this Part are the sole and exclusive means of appealing terminations during probationary or trial periods but does not preclude an employee from filing a complaint, appeal, or other matter within the jurisdiction of the Equal Employment Opportunity Commission, an Inspector General, Merit Systems Protection Board, or Office of Special Counsel. A party cannot obtain judicial review of a decision under this part.

(f) *Definition of employee.* For purposes of this part, an employee means an individual who was appointed:

(1) to the competitive service as described in 5 CFR 11.2 who has not completed one year of current continuous service under other than a temporary appointment limited to one year or less;

(2) to the competitive service and serving a probationary period on an initial appointment to a supervisory or managerial position under subpart I of part 315 of this chapter;

(3) to the competitive service under an emergency-indefinite appointment in a national emergency serving a probationary period under subpart D of part 230 of this chapter and who is in the first year of service; or

(4) to the excepted service before the end of their first year on an initial appointment under part 307 of this chapter. Employees serving in an appointment in the excepted service outside of part 307 are not covered under this section and, therefore, may not appeal a termination during their trial period unless otherwise entitled by statute.

§ 751.102 Procedures for submitting appeals.

(a) *Filing an appeal.* An employee, or his or her authorized representative, seeking to file an appeal or reconsideration under this part must utilize the electronic filing system available at {URL TBD}. Absent an exception, OPM will not accept pleadings, evidence, or other documents via electronic mail or postal mail.

(b) *Time limits.* An employee may file an appeal within 30 calendar days from the effective date of the action. An appeal is deemed timely when it is electronically filed by 11:59 p.m. Eastern Standard Time on the 30th calendar day after the effective date of the action.

(1) In computing the number of days allowed for filing an appeal, the first day counted is the day after the effective date of an Agency action. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date.

(2) If an employee does not file an appeal within the time set by this section, the appeal will be dismissed as untimely filed unless the employee demonstrates good cause for an untimely appeal. The determination of good cause will be in the sole and exclusive discretion of OPM.

(c) *E-filing procedures.*

(1) All parties and their representatives to an appeal or reconsideration must register as instructed by OPM on its probationary appeals website using a unique email address.

(2) Registration as an e-filer constitutes consent to accept electronic service of pleadings, evidence, notices, orders, and other documents filed by other e-filers or issued by OPM. No party may electronically file any document with OPM or access an appeal or reconsideration of an appeal unless registered as an e-filer.

(3) All notices, orders, decisions, and other documents issued by OPM, as well as all documents filed by parties, will be made available for viewing and downloading at OPM's electronic filing system. Access to documents is limited to the parties and their representatives who are registered e-filers in the cases in which they were filed.

(4) All parties and their representatives must follow the instructions on OPM's website for properly filing all pleadings, evidence, and other documents. OPM may strike a document where an e-filer repeatedly fails to follow these instructions subsequent to a show cause order.

(5) Each e-filer must promptly update their profile in OPM's electronic filing system and notify OPM and other parties of any change in their address, telephone number, or email address by filing a pleading in each pending case with which they are associated. E-filers are responsible for monitoring case activity regularly in OPM's electronic filing system to ensure that they have received all case-related documents.

(6) A party or representative may withdraw their registration as an e-filer pursuant to the requirements posted on OPM's website. Withdrawing registration in OPM's electronic filing system means that, effective upon OPM's processing of a proper withdrawal, pleadings, evidence, orders, and other documents filed by a party or party's representative and OPM will no longer be served on that person electronically and that person will no longer have electronic access to their case records through OPM's electronic filing system. OPM may still process an appeal or request for reconsideration after a party withdraws as an e-filer. Withdrawal as a party or party's representative will not be considered good cause for staying a case. As the e-file system is the only accepted method for filing an appeal, a withdrawal of registration as an e-filer may preclude future re-registering as an e-filer.

(7) OPM, in its sole and exclusive discretion, may exempt a party or representative from registering as an e-filer for good cause. A party or representative must promptly contact OPM as instructed on OPM's website to request an exemption from the e-filing requirements in this Part. OPM will not find good cause for failing to timely file an appeal or seek reconsideration if the party or representative fails to contact OPM to request an exemption before any deadline to appeal or seek reconsideration.

(8) Documents filed in OPM's electronic filing system are deemed

received on the date of the electronic submission.

§ 751.103 Form and content of probationary or trial period appeal and agency response.

(a) *Initial appeal.* An employee's appeal shall be in writing and shall state the basis of the employee's appeal; the name, address, and email address or phone number of the appellant and appellant's representative, if any; and any documentation supporting the appellant's appeal.

(b) *Agency response.* The agency response to an appeal must be filed within 30 calendar days of the initial appeal; contain the name of the appellant and of the agency whose action the appellant is appealing; a statement identifying the agency action taken against the appellant and stating the reasons for taking the action; all documents contained in the agency record of the action; designation of and signature by the authorized agency representative; and any other documents or responses requested by the Office. The agency's 30 calendar days to respond begins upon service of the appeal.

(c) *Reply.* An employee may file a reply to an agency response to an initial appeal within 15 calendar days of the agency response. The reply may only address the factual and legal issues raised by the agency in response to the initial appeal. The reply may not raise new allegations of error.

(d) *Inspection of OPM's appellate record.* The employee, an employee's representative, and the agency will be permitted to inspect OPM's appellate record on request.

(e) *Service of documents.* The employee, employee's representative, and agency will serve on each other copies of any and all information submitted to OPM with respect to an appeal. Such information must be served on all other parties at the same time the information is submitted to OPM and must be accompanied by a certificate of service stating how and when service was made.

(f) *Untimely filings.* Untimely filings may be accepted upon a party's showing of good cause at the sole and exclusive discretion of OPM.

§ 751.104 Employee representatives.

An appellant may select a representative of his or her choice to assist in the preparation and presentation of an appeal, provided that the appellant submits his or her designation of representative in writing related to the specific appeal. If the selected representative is a Federal employee, the representative may not perform such representational functions while in a duty status (including while on official time under 5 U.S.C. 7131), nor may the representative claim agency reimbursement for any expenses incurred while performing such representational function. OPM or the responsible agency may, in its sole and exclusive discretion, disallow an appellant's choice of representative when the representative is an employee of the responsible agency or OPM and his or her activities as a representative would cause a conflict of interest or position; that employee cannot be released from his or her official duties because of the priority needs of the Government; or that employee's release would give rise to unreasonable costs to the Government.

§ 751.105 Adjudication of appeals.

(a) *Appeals by non-OPM employees.* OPM will assign personnel to adjudicate an appeal under this subpart by an employee of an agency other than OPM. However, no employee may be assigned to adjudicate an appeal if the employee has a relationship with the appellant or, during the preceding two years, that person was an employee of the agency that is party to the action to be assigned. When necessary, OPM may appoint an administrative law judge to preside over the adjudication of an appeal.

(b) *Appeals by OPM employees.* OPM will assign an administrative law judge to adjudicate an appeal under this subpart by an OPM employee. To insulate the adjudication of its own employees' appeals from agency involvement, OPM will not disturb initial decisions in those cases unless a party shows that there has been harmful procedural irregularity in the proceedings before the administrative law judge or a clear error of law. For these purposes, the term *harmful procedural irregularity* means an irregularity in the application of procedures was likely to have caused the administrative law judge to reach a conclusion different from the one it would have reached in the absence or cure of the irregularity.

(c) *Ascertainment of facts.* OPM may audit or investigate an agency's termination action in the course of adjudicating an appeal if it determines, in its sole and exclusive discretion, that such an audit or investigation is in the interest of justice . An individual serving as a representative of either party may not participate in an audit or investigation unless OPM specifically requests them to do so. The review of an agency action must be based solely on the developed written record unless OPM determines that a hearing is necessary and efficient to resolve an appeal. For purposes of this section, the terms *necessary and efficient* means circumstances in which the written record is insufficiently developed to make a determination regarding one or more facts material to the outcome of the appeal, or where there is a disputed issue of witness credibility that is material to the outcome of the appeal. Where an investigation or audit is conducted, OPM will:

(1) Inform the employee, the employee's representative, and the agency of an investigation or audit, and

(2) Provide the employee, the employee's representative, and the agency with the results of an investigation or audit, and a reasonable opportunity to submit arguments or additional information to support their positions.

(d) *Initial decision.* OPM will notify the employee, employee's representative, and agency in writing of its decision.

(e) *Remedies.*

(1) If the employee is the prevailing party, OPM will order relief including correction of the personnel action and any back pay, interest, and reasonable attorney fees consistent with subpart H of part 550 of this chapter. The employee as a prevailing party is not entitled to compensatory damages or other relief not authorized under 5 U.S.C. 5596(b).

(2) If the agency timely requests reconsideration of an initial decision or the OPM reopens and reconsiders an initial decision, the agency must continue to provide the relief ordered unless OPM issues an order staying any such relief. No such stay may be ordered that would deprive pay and benefits to the employee while the initial decision is pending reconsideration.

§ 751.106 Sanctions and protective orders.

(a) *Cease-and desist directive.* OPM may issue a directive to a party to prevent or to cease-and-desist harassing communications (or communications which could reasonably be foreseen to lead to harassment) with or about any individual, or to prohibit a party from using any information related to the appeal for any purpose whatsoever unrelated to the adjudication of the appeal. OPM may do this sua sponte, or at the request of a party, preemptively or at any juncture in the appeal process. A party requesting OPM to issue a protective order or cease-and-desist should file such request using the e-filing procedures proscribed at § 751.102(c), and must include statement of reasons justifying the

request, together with any relevant documentary evidence.

(b) *Failure to comply with an OPM directive.* When a party to an appeal fails to comply with an order issued under subsection (a), OPM may, except when prohibited by law:

(1) Draw all inferences in opposition to the noncompliant party with regard to the appeal in question;

(2) Prohibit the noncompliant party from introducing evidence, or additional evidence, concerning the appeal, or otherwise relying on the record; or

(3) Eliminate from consideration any appropriate part of the filings or other submissions of the noncompliant party.

§ 751.107 Requests for reconsideration of an initial decision.

(a) Upon a request from either party to the dispute or upon its own initiative, OPM may, in its sole and exclusive discretion, reopen and reconsider an initial decision issued under this subpart. An employee, the employee's representative, or agency may request reconsideration of an initial decision within 30 calendar days from issuance of the decision. The request for reconsideration must be filed as directed in the initial decision.

(b) Grounds for which OPM may grant a request for reconsideration are:

(1) The initial decision contains erroneous findings of material fact sufficient to warrant an outcome different from that of the initial decision;

(2) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The party must explain how the error affected the outcome of the case;

(3) New and material evidence or legal argument is available that, despite the party's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed; or

(4) OPM finds good cause to reconsider an appeal.

(c) In any case that is reopened or reviewed, OPM may:

(1) Issue a reopened and reconsidered decision (''R&R decision'') that affirms, reverses, modifies, vacates, or otherwise decides the case, in whole or in part;

(2) Require the parties to submit argument and evidence;

(3) Take any other action necessary for final disposition of the case; and

(4) Issue an order with a date for compliance with the R&R decision.

(d) There is no further right of administrative appeal from the R&R decision.

§ 751.108 Review by the OPM Director.

The Director may, at his or her discretion, *sua sponte,* reopen and reconsider any appeal in which OPM has issued a decision that has not yet become final.

§ 751.109 Final decision.

(a) The initial decision becomes OPM's final decision if a party does not request OPM to reopen or reconsider the initial decision, or OPM does not do so on its own initiative, within 30 calendar days from the date of the initial decision.

(b) A R&R decision pursuant to § 751.107 becomes OPM's final decision if the OPM Director does not reopen the decision pursuant to § 751.108 within 30 calendar days from the date on which the R&R decision was issued.

(c) A decision by the Director pursuant to § 751.108 is the final decision of OPM and effective upon issuance.

(d) There is no further right of appeal of a final decision of OPM.

(e) OPM shall maintain a publicly accessible website containing all final decisions issued on this part that address a party's claim on the merits. Any final decision not made publicly available shall be made available upon request by a concerned party. For purposes of this subsection, *a concerned party* means the Federal employee or former Federal employee involved in a proceeding under this subpart, his or her representative selected pursuant to § 751.104, or a representative of a Federal agency or office.

PART 752—ADVERSE ACTIONS

■ 9. The authority citation for part 752 is revised to read as follows:

Authority: 5 U.S.C. 6329b, 7504, 7514, 7515, and 7543; 38 U.S.C. 7403. Sec. 512, Pub. L. 114–328, 130 Stat. 2112; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218; E.O. 14284, 90 FR 17729.

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

■ 10. Amend § 752.201 by revising paragraphs (b)(1) and (2) to read as follows:

* * * * *

(b) Employees covered. This subpart covers:

(1) An employee in the competitive service who has completed a probationary period, or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(2) An employee in the competitive service serving in an appointment which requires no probationary period, and who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

* * * * *

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

■ 11. Amend § 752.401 by revising paragraphs (c)(1), (c)(2)(i), (d)(10), and (d)(12) to read as follows:

§ 752.401 Coverage.

* * * * *

(c) * * *

(1) A career or career conditional employee in the competitive service who is not serving a probationary period;

(2) * * *

(i) Who is not serving a probationary period under an initial appointment; or

* * * * *

(d) * * *

(10) A nonpreference eligible employee serving a trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(11) * * *

(12) An employee in the competitive service serving a probationary period, unless he or she meets the requirements of paragraph (c)(2) of this section.

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DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 30

[Docket ID OCC–2025–0207]

RIN 1557–AF36

OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Technical Amendments

AGENCY: Office of the Comptroller of the Currency, Treasury.