Proposed Rules

Federal Register
Vol. 75, No. 239
Tuesday, December 14, 2010

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 732

RIN 3206–AM27

Designation of National Security Positions

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is proposing to revise its regulation regarding designation of national security positions. This proposed rule is one of a number of initiatives OPM has undertaken to simplify and streamline the system of Federal Government investigative and adjudicative processes to make them more efficient and as equitable as possible. The purpose of this revision is to clarify the requirements and procedures agencies should observe when designating national security positions as required under E.O. 10450, *Security Requirements for Government Employment.* The proposed regulations maintain the current standard which defines a national security position as "any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." The purpose of the revisions is to clarify the categories of positions which, by virtue of the nature of their duties, have the potential to bring about a material adverse impact on the national security, whether or not the positions require access to classified information.

Another purpose of the amendments is to acknowledge, for greater clarity, complementary requirements set forth in part 731, *Suitability,* so that every position is properly designated with regard to both public trust risk and national security sensitivity considerations, both of which are necessary for determining appropriate investigative requirements. Finally, the proposed rule clarifies when reinvestigation of individuals in national security positions is required.

DATES: OPM will consider comments received on or before February 14, 2011.

ADDRESSES: You may submit comments, identified by "3206–AM27," using either of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Please organize comments by section designation. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

All Mail: Tim Curry, Deputy Associate Director, Partnership and Labor Relations, Employee Services, U.S. Office of Personnel Management, Room 7H28, 1900 E Street, NW., Washington, DC 20415–8200.

FOR FURTHER INFORMATION CONTACT: Debra Buford, U.S. Office of Personnel Management, Employee Services, 1900 E St., NW., Room 7H28, Washington, DC 20415–8200; fax to 202–606–2613; e-mail to *PLR@opm.gov.*

SUPPLEMENTARY INFORMATION: OPM proposes to amend part 732 of title 5, Code of Federal Regulations (CFR), to clarify its coverage, and the procedural requirements for making position sensitivity designations. OPM also proposes various revisions to make the regulations more readable.

Scope

OPM proposes to update the definition of "national security position" in § 732.102, Definitions and applicability, to include positions that may have a material adverse impact on the national security, but that may not seem to fall squarely within the current definition in § 732.102(a) of this chapter. While access to classified information is, in and of itself, a reason to designate a position as a national security position, positions may have the requisite national security impact independent of whether the incumbent of the position requires eligibility for access to classified information. For example, positions involving protection from terrorism have the potential to bring about a material adverse impact on the national security, especially where the position duties involve protection of borders and ports, critical infrastructure, or key resources. Positions that include responsibilities related to public safety, law enforcement, and the protection of Government information systems could also legitimately be designated as national security positions, where neglect of such responsibilities or malfeasance could bring about a material adverse effect on the national security.

OPM therefore proposes to update the definition of "national security position" to add positions where the duties include "protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression, including * * * protecting the nation's borders, ports, critical infrastructure or key resources and where the occupant's neglect, action or inaction could bring about a material adverse effect on the national security." The new text would appear in § 732.102(a)(2)(i) of the proposed rule. In utilizing the terms "critical infrastructure" and "key resources" OPM has been guided by their definitions in the USA PATRIOT Act of 2001 and the Homeland Security Act of 2002, both enacted in the aftermath of the September 11, 2001, terrorist attacks. OPM intends that agencies, likewise, be guided in their assessment of positions with these types of duties by referring to these statutes.

For clarity, OPM also proposes to update its regulations to specify that an agency may designate a position as national security sensitive where it involves other responsibilities, including but not limited to protecting or controlling access to facilities or information systems; controlling, maintaining custody, safeguarding or disposing of hazardous materials, arms, ammunition, or explosives; exercising investigative or adjudicative duties related to national security, suitability, fitness or identity credentialing; exercising criminal justice, public safety or law enforcement duties; or conducting audits or investigations of these functions, where the occupant's neglect, action or inaction could bring about a material adverse effect on the national security. The new text appears in § 732.102(a)(2)(iv) through (viii) of the proposed rule.

In proposing these changes, OPM cautions that not all positions with these responsibilities must be designated as national security

positions. Rather, in each instance, agencies must make a determination of whether the occupant's neglect, action or inaction could bring about a material adverse effect on the national security, *i.e.,* could cause at least "significant or serious damage to the national security." *See* proposed §§ 732.102(a) (general standard for designating a national security position) and 732.201(a)(1) (standard for designating the minimum level of a national security position).

OPM believes that, with these updates and clarifications, the regulation will more fully conform to section 3(b) of E.O. 10450, as amended, under which an agency head shall designate as sensitive "any position * * * the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Consistent with this provision, agencies are reminded that sensitivity designations are based on the nature of a position, not on the mission of the agency or of its subcomponents. OPM will issue further detailed guidance in its Position Designation System and other supplementary issuances.

The regulations currently cover only positions in the competitive service and certain Senior Executive Service positions. OPM proposes, in § 732.102(b), to extend part 732 to apply to positions where the incumbent can be noncompetitively converted to the competitive service. Such positions include those to which appointments are made with the intent of converting the employee to an appointment in the competitive service if the employee satisfies eligibility requirements. In these instances, the process for entry into the competitive service is continuous, beginning with initial appointment to the excepted service and ending in (noncompetitive) conversion to the competitive service, all while generally serving in the same position. Extension of the regulation's scope to include sensitivity designations of such positions is consistent with OPM's authority to investigate persons entering or employed in the competitive service. Excepted service positions that can lead to noncompetitive conversion to the competitive service should be subject to the same sensitivity designation assessments as other covered positions. This change would also serve to align this part with the current coverage of part 731.

Part 732, if amended as proposed, would apply to the limited category of excepted service employees whose appointments lead to noncompetitive conversion into the competitive service. Part 732 would not apply, however, to any other employees whose positions are in the excepted service. The proposed rule would note that agencies may apply the requirements of this part to other excepted service positions within the executive branch, and to contractor positions, to the extent consistent with law, but this option would be wholly at the discretion of each agency.

Implementation

Proposed § 732.103 would authorize OPM to issue appropriate implementing guidance.

Sensitivity Levels

The proposed rule changes further clarify the designation of national security positions and provide examples of duties that would result in a sensitivity designation at each level. These non-exclusive examples are intended to assist agency personnel in placing positions at the Noncritical-Sensitive, Critical-Sensitive, or Special-Sensitive level, once they have been properly designated as national security positions. As noted in the proposed regulations, to avoid the risk of over-designation, a position's duties support a determination that a national security position is Critical-Sensitive, rather than Noncritical-Sensitive, only if the occupant's neglect, action, or inaction could bring about "exceptionally grave damage to the national security." Further, a position's duties support a determination that a national security position is Special-Sensitive, rather than Critical-Sensitive, only if the occupant's neglect, action, or inaction could bring about "inestimable damage to the national security."

To avoid the risk of under-designation, the proposed regulations also note that the position duties supporting a designation include but are "not limited to" those listed in the examples. Therefore, positions not listed in the examples could be properly designated as national security positions at one of the three prescribed levels if the occupant's neglect, action, or inaction could bring about a "material adverse effect on the national security," *i.e.,* could cause, at a minimum, "significant or serious damage to the national security." *See* proposed §§ 732.102(a) and 732.201(a)(1).

This section complements 5 CFR 731.106, discussing public trust risk designations related to suitability. When read together, the two sections provide that every covered position must be evaluated based on public trust risk as well as national security sensitivity considerations in order to determine the appropriate investigation required. OPM currently issues guidance on how to designate a position's risk and sensitivity level, and the resulting level of investigation that is appropriate based on those designations. OPM will make revisions to the Position Designation System required to conform to amendments OPM proposes in this part.

Periodic Reinvestigation Requirements

OPM has long prescribed reinvestigation requirements for positions covered by part 732, consistent with its authority under section 8(b) of E.O. 10450, as amended, to conduct the personnel investigations for persons entering or employed in the competitive service. The reinvestigation requirements in 5 CFR 732.203 must be revised, however, to accommodate three recent Presidential Executive orders. E.O. 12968 of August 2, 1995, established requirements for periodic and event-driven reinvestigations of employees requiring eligibility for access to classified information. These individuals' positions are already designated as national security positions under the current version of 5 CFR part 732. E.O. 13467 of June 30, 2008, retained these reinvestigation requirements while also authorizing "continuous evaluation" by amending E.O. 12968. E.O. 13488 of January 22, 2009, provided for reinvestigation of individuals whose positions are designated as public trust positions under 5 CFR part 731. OPM proposes to amend § 732.203 to incorporate these requirements.

Currently, under 5 CFR 732.203, an employee in a Special-Sensitive or Critical-Sensitive position is subject to a national security reinvestigation at least every 5 years, while an employee in a Noncritical-Sensitive position is not subject to a reinvestigation. This provision of regulation potentially conflicts with E.O. 12968, as amended. Under E.O. 12968, where an employee, including an employee in a Noncritical-Sensitive position, requires eligibility for access to classified information, he or she is subject to the national security reinvestigation and continuous evaluation requirements prescribed by the Executive order. OPM proposes to amend § 732.203 to recognize that when an employee in a national security position requires eligibility for access to classified information, the reinvestigation requirements of E.O. 12968 are controlling.

Numerous employees in national security positions do not require eligibility for access to classified information. Prior to the issuance of E.O. 13488, the only Governmentwide

requirement for periodically reinvestigating such employees was in 5 CFR 732.203. As noted above, under 5 CFR 732.203, an employee in a Special-Sensitive or Critical-Sensitive position is subject to a national security reinvestigation at least every 5 years, while an employee in a Noncritical-Sensitive position is not subject to any reinvestigation. However, E.O. 13488 now requires public trust suitability reinvestigations under 5 CFR part 731 for every covered employee at a frequency to be determined by OPM.

Unless conforming changes are made to the regulations, there is a risk that an employee in a Special-Sensitive or Critical-Sensitive position will unnecessarily be subject to two separate reinvestigations at least every 5 years: A national security reinvestigation under part 732, and a public trust reinvestigation under E.O. 13488. Requiring multiple reinvestigations of the same individual at least every 5 years would be inconsistent with E.O. 13467, which calls for investigations to be aligned "using consistent standards to the extent possible."

To avoid this outcome, OPM proposes to amend § 732.203 to make every incumbent of a national security position who does not require eligibility for access to classified information subject to a national security reinvestigation at least every 5 years, and to provide that such reinvestigation must be conducted using a Questionnaire for National Security Positions, at a frequency and scope that will satisfy the reinvestigative requirements for both national security and public trust positions. This amendment will avoid the risk of unnecessarily subjecting an employee in a Special-Sensitive or Critical-Sensitive position to two separate reinvestigations every 5 years, and will confirm OPM's long-standing policy that every employee in a national security position must be reinvestigated using a Questionnaire for National Security Positions, not a Questionnaire for Public Trust Positions. OPM will propose conforming changes to part 731 of this chapter in a separate rulemaking to implement E.O. 13488.

Reassessment of Current Positions

The proposed rule, in § 732.204, would require agencies to assess all current positions using the definitions of sensitivity level designations provided in § 732.201 of the proposed regulation within 24 months of the effective date of the final rule. This is necessary to ensure that all positions are properly designated using the updated definition. OPM believes that the 24-month timeframe would allow agencies ample opportunity to fully review the duties of positions within their organizations to determine whether or not they impact national security under the updated definition and make the appropriate designation changes. The proposal does not require that all investigations be completed within the 24-month timeframe, only that positions be re-evaluated by then, and that any required investigation be initiated within 14 days of a person's occupancy of a position that has been newly designated as sensitive, consistent with 5 CFR 736.201(c). Agencies may provide advance notice of the redesignation of a position to allow adequate time for the employee to complete investigative questionnaires, releases, and any other information needed from the employee. This will help ensure that agencies have a full 14 days to initiate the investigation, *i.e.,* to submit all the information needed by the investigations service provider.

Agencies retain the right to determine whether or not an incumbent in a position redesignated as a national security position may continue to exercise national security position duties pending the outcome of any required investigation. The incumbent may continue to occupy such sensitive position pending the completion of an investigation, but agencies may remove the incumbent's national security duties, as authorized by section 3(b) of E.O. 10450.

Savings Provision

The proposed rule contains the addition of a savings provision intended to avoid any adverse impact to the procedural rights of employees resulting from designations made where employees are awaiting adjudication of a prior investigation at the time of any redesignation of positions required by the final rule. OPM specifically requests comment on the necessity of such a provision in protecting employee procedural rights or agency right to take action relative to administrative or other review procedures ongoing at the time of any redesignation of positions. This savings provision would appear at § 732.205.

Waivers and Exceptions

OPM is proposing some changes to the procedures and standards for waivers and exceptions to preappointment investigative requirements, to ensure that waivers and exceptions do not pose unacceptable risks to the national security. This is to better meet the requirements of section 3(b) of E.O. 10450, as amended, under which emergency waivers of preappointment investigative requirements must be "necessary in the national interest," and section 3(a) of the same order, under which OPM may authorize such exceptions from investigative requirements "as may meet the requirements of the national security." The proposed rule addresses a waiver of the requirement to conduct the pre-appointment investigation, not to be confused with the temporary access to classified information before an investigation is adjudicated, which is governed by E.O. 12968 and Intelligence Community policy guidance. Some of the proposed changes are made possible by the more automated environment in which checks are now conducted. OPM will issue guidance with detailed instructions for agencies to make waiver and exception requests.

No change is proposed to § 732.202(a)(2)(i), which states that for Special-Sensitive positions, preappointment investigative requirements may not be waived. This requirement derives from a separate regulation, 5 CFR 736.201(c).

Under the proposed revisions, to waive the preappointment check for Critical-Sensitive positions based on an emergency, the agency would be required to initiate an investigation based on a completed questionnaire, and a Federal Bureau of Investigation fingerprint check portion of the required investigation would be required to be completed and to support a waiver. Currently, the standard is that a check is initiated but not all responses have been received within 5 days, or that the waiver decision is made on the basis of other favorably completed checks. Under the proposed regulations, a waiver of the preappointment check for Noncritical-Sensitive positions would be required to be based on an emergency, and the agency would be required to favorably evaluate a completed questionnaire and initiate the required investigation within 14 days after appointment. Currently, agencies may waive investigative requirements for these positions without a specific finding of an emergency.

OPM also proposes amending § 732.202(b) to eliminate the automatic exceptions from investigative requirements of E.O. 10450 that are currently given to positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days, as well as for aliens employed outside the United States. The proposed regulations would provide that an agency head may request an exception for those positions from OPM, but they

would no longer be automatically excepted.

To fulfill its continuing study responsibility under section 14 of E.O. 10450, as amended, OPM proposes detailed requirements related to appropriate documentation when granting waivers and exceptions to investigative requirements. These documentation requirements conform to current operating guidance provided by OPM. These requirements are further clarified to include notice to applicants that any appointment granted based on a waiver is conditional, and that continuation in the position is dependent on the favorable adjudication of the investigation.

Finally, OPM proposes an amendment to make § 732.202 inapplicable to investigations, waivers of investigative requirements, or exceptions from investigative requirements under 42 U.S.C. 2165(b), because this statute makes preemployment investigations mandatory for certain positions unless waivers or exceptions are made under the terms of the statute.

Procedural Rights

OPM proposes to amend § 732.301 to improve its terminology and ensure agencies comply with all applicable procedural requirements when making adjudicative decisions. OPM proposes to add a reference to the procedural requirements of E.O. 12968, which had not yet been issued at the time part 732 was originally promulgated, and to the agency's own procedural regulations. Part 732 is not intended to provide an independent authority for agencies to take adverse actions when the retention of an employee is not consistent with the national security. Nor should part 732 be construed to require or encourage agencies to take adverse actions on national security grounds under 5 CFR part 752 when other grounds are sufficient. Nor, finally, does part 732 have any bearing on the Merit Systems Protection Board's appellate jurisdiction or the scope of the Board's appellate review of an adverse action. To make this clear, in § 732.301(a), we propose deleting the reference to adjudicative decisions made "under this part."

Reporting

OPM proposes to amend § 732.302 to require agencies to report the completion of investigations, as well as the initiation of investigations, and to collect additional data needed to comply with process efficiency requirements. These changes support OPM's obligation to maintain security and suitability databases and to report on security investigations. OPM further proposes to require agencies to report an adjudicative determination and action taken as a result of investigation within 90 days after receipt of the final report of investigation. The current regulation implies that the ultimate determination is required no later than 90 days after receipt of the final report of investigation. OPM recognizes that in certain instances, an initial adjudicative determination may not be final; however, in order to meet the reporting requirements established in section 14(c) of E.O. 10450, an official report of adjudication is required within 90 days after receipt of the final report of investigation.

Former Employees Terminated in the Interest of National Security

OPM proposes to clarify requirements for agency actions and rights of former employees under 5 U.S.C. 7312 and section 7 of E.O. 10450, as amended, regarding employment of former employees who were terminated under 5 U.S.C. 7532 or any other statute or Executive order authorizing removal in the interest of national security. Where an employee is removed under 5 U.S.C. 7532, 5 U.S.C. 7312 provides that the individual may accept reemployment with another agency, if the head of the other agency first consults with OPM, and that OPM, upon the request of the individual or the agency head, may determine the individual's reemployment eligibility. Section 7 of E.O. 10450 provides more broadly that the requirement to consult with OPM applies whether the employee is removed under 5 U.S.C. 7532 or under "any other security or loyalty program relating to officers or employees of the Government." Currently, the regulation implementing these requirements explains that the former employee may request a determination of reemployment eligibility from OPM, but does not explain that the agency head must consult with OPM before reemploying an individual removed for national security reasons. OPM proposes to amend § 732.401 to explain this requirement and to clarify that the employee or agency seeking a determination of reemployment eligibility from OPM should submit a copy of the vacancy announcement since OPM's decision affects only selections from that vacancy announcement. We note that the requirement applies only in the specific case where an employee is removed under a statute authorizing summary termination in the interest of national security, such as 5 U.S.C. 7532. There is no requirement for an agency or an individual to contact OPM for a determination of reemployment eligibility, where the individual was removed in an adverse action under 5 U.S.C. 7513 due to revocation of a security clearance.

OPM also proposes to remove § 732.401(b)(2), which authorizes OPM to debar or cancel the reinstatement eligibility of an individual who was previously terminated for national security reasons and whose eligibility was obtained through fraud. This section of the regulations is obsolete and should accordingly be eliminated. OPM may take a suitability action against an applicant based on his or her deception or fraud in examination or appointment under a separate authority, 5 CFR part 731, which provides full procedural protections for the applicant.

Technical Amendment

A technical amendment is proposed in the Authorities for this part to reflect 5 U.S.C. 1103(a)(5), which broadly authorizes the Director of OPM to execute, administer, and enforce the civil service laws, rules and regulations. Finally, OPM proposes a technical amendment to include E.O. 10577, as amended, rule V of which requires the Director of OPM to promulgate and enforce regulations necessary to carry out the provisions of all Executive orders imposing responsibilities on OPM (including E.O. 10450); to include E.O. 13467, which expresses the policy of aligning investigative requirements to the extent possible; and to include E.O. 12968, referenced in proposed §§ 732.203(a) and 732.301.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal employees and agencies.

E.O. 12866, Regulatory Review

This proposed rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

E.O. 13132

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

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 732

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM proposes to revise part 732, title 5, Code of Federal Regulations, to read as follows:

PART 732—DESIGNATION OF NATIONAL SECURITY POSITIONS

Subpart A—Scope

Sec.

Subpart B—Designation and Investigative Requirements

Subpart C—Procedural Rights and Reporting

Subpart D—Security and Related Determinations

Authority: 5 U.S.C. 1103(a)(5), 3301, 3302, 7312; 50 U.S.C. 403; E.O. 10450, 3 CFR, 1949–1953 Comp., p. 936; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218; E.O. 12968, 3 CFR, 1996 Comp., p. 391; E.O. 13467, 3 CFR, 2009 Comp., p. 196.

Subpart A—Scope

§ 732.101 Purpose.

(a) This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450—Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949–1953 Comp., p. 936, as amended.

(b) All positions must be evaluated for a position sensitivity designation commensurate with the responsibilities and assignments of the position as they relate to the impact on the national security, including but not limited to eligibility for access to classified information.

§ 732.102 Definition and applicability.

(a) For purposes of this part, the term "national security position" includes any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security.

(1) Such positions include those requiring eligibility for access to classified information.

(2) Other such positions include, but are not limited to, those whose duties include:

(i) Protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression, including those positions where the occupant's duties involve protecting the nation's borders, ports, critical infrastructure or key resources, and where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(ii) Developing defense plans or policies;

(iii) Planning or conducting intelligence or counterintelligence activities, counterterrorism activities and related activities concerned with the preservation of the military strength of the United States;

(iv) Protecting or controlling access to facilities or information systems where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(v) Controlling, maintaining custody, safeguarding, or disposing of hazardous materials, arms, ammunition or explosives, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(vi) Exercising investigative or adjudicative duties related to national security, suitability, fitness or identity credentialing, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(vii) Exercising duties related to criminal justice, public safety or law enforcement, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security; or

(viii) Investigations or audits related to the functions described in paragraphs (a)(2)(i) through (a)(2)(vii) of this section, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security.

(b) The requirements of this part apply to positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service within the executive branch. Departments and agencies may apply the requirements of this part to other excepted service positions within the executive branch and contractor positions, to the extent consistent with law.

§ 732.103 Implementation.

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

Subpart B—Designation and Investigative Requirements

§ 732.201 Sensitivity level designations and investigative requirements.

(a) For purposes of this part, the head of each agency shall designate, or cause to be designated, a position within the department or agency as a national security position pursuant to § 732.102(a). National security positions must then be designated, based on the degree of potential damage to the national security, at one of the following three sensitivity levels:

(1) *Noncritical-Sensitive* positions are national security positions which have the potential to cause significant or serious damage to the national security, including, but not limited to:

(i) Positions requiring eligibility for access to Secret, Confidential, or "L" classified information; or

(ii) Positions not requiring eligibility for access to classified information, but having the potential to cause significant or serious damage to the national security.

(2) *Critical-Sensitive* positions are national security positions which have the potential to cause exceptionally grave damage to the national security, including, but not limited to:

(i) Positions requiring eligibility for access to Top Secret or "Q" classified information;

(ii) Positions involving development or approval of war plans, major or special military operations, or critical and extremely important items of war;

(iii) National security policy-making or policy-determining positions;

(iv) Positions with investigative duties, including handling of completed counter-intelligence or background investigations, the nature of which have the potential to cause exceptionally grave damage to the national security;

(v) Positions involving adjudication or granting of personnel security clearance eligibility;

(vi) Positions involving duty on personnel security boards;

(vii) Senior management positions in key programs, the compromise of which could result in grave damage to the national security,

(viii) Positions having direct involvement with diplomatic relations and negotiations;

(ix) Positions involving independent responsibility for planning or approving continuity of Government operations;

(x) Positions involving major and immediate responsibility for, and the ability to act independently without detection to compromise or exploit, the protection, control, and safety of the nation's borders and ports or immigration or customs control or policies, where there is a potential to cause exceptionally grave damage to the national security;

(xi) Positions involving major and immediate responsibility for, and the ability to act independently without detection to compromise or exploit, the design, installation, operation, or maintenance of critical infrastructure systems or programs;

(xii) Positions in which the occupant has the ability to independently damage public health and safety with devastating results;

(xiii) Positions in which the occupant has the ability to independently compromise or exploit biological select agents or toxins, chemical agents, nuclear materials, or other hazardous materials;

(xiv) Positions in which the occupant has the ability to independently compromise or exploit the nation's nuclear or chemical weapons designs or systems;

(xv) Positions in which the occupant obligates, expends, collects or controls revenue, funds or items with monetary value in excess of $50 million, or procures or secures funding for goods and/or services with monetary value in excess of $50 million annually, with the potential for exceptionally grave damage to the national security;

(xvi) Positions in which the occupant has unlimited access to and control over unclassified information, which may include private, proprietary or other controlled unclassified information, but only where the unauthorized disclosure of that information could cause exceptionally grave damage to the national security;

(xvii) Positions in which the occupant has direct, unrestricted control over supplies of arms, ammunition, or explosives or control over any weapons of mass destruction;

(xviii) Positions in which the occupant has unlimited access to or control of access to designated restricted areas or restricted facilities that maintain national security information classified at the Top Secret or "Q" level;

(xix) Positions working with significant life-critical/mission-critical systems, such that compromise or exploitation of those systems would cause exceptionally grave damage to essential Government operations or national infrastructure; or

(xx) Positions in which the occupant conducts internal and/or external investigation, inquiries, or audits related to the functions described in paragraphs (a)(2)(i) through (a)(2)(xix) of this section, where the occupant's neglect, action, or inaction could cause exceptionally grave damage to the national security.

(3) *Special-Sensitive* positions are those national security positions which have the potential to cause inestimable damage to the national security, including but not limited to positions requiring eligibility for access to Sensitive Compartmented Information (SCI), requiring eligibility for access to any other intelligence-related Special Sensitive information, requiring involvement in Top Secret Special Access Programs (SAP), or positions which the agency head determines must be designated higher than Critical-Sensitive consistent with Executive order.

(b) OPM issues, and periodically revises, a Position Designation System which describes in greater detail agency requirements for designating positions that could bring about a material adverse effect on the national security. Agencies must use the Position Designation System to designate the sensitivity level of each position covered by this part.

(c) All positions receiving a position sensitivity designation under this part must also receive a risk designation under part 731 of this chapter (*see* 5 CFR 731.106). The Position Designation System provides guidance enabling agencies, where appropriate, to base risk designations under part 731 on the position sensitivity designations made under this part; and specifies appropriate investigative requirements to avoid duplication of effort.

§ 732.202 Waivers and exceptions to preappointment investigative requirements.

(a) *Waivers*—(1) *General.* A waiver of the preappointment investigative requirement contained in section 3(b) of Executive Order 10450 for employment in a national security position may be made only for a limited period:

(i) In case of emergency if the head of the department or agency concerned finds that such action is necessary in the national interest; and

(ii) When such finding is made a part of the records of the department or agency.

(2) *Specific waiver requirements.*

(i) The preappointment investigative requirement may not be waived for appointment to positions designated Special-Sensitive under this part.

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by paragraph (a)(1) of this section must document the decision as follows:

(A) The nature of the emergency which necessitates an appointment prior to completion of the investigation and adjudication process;

(B) A record demonstrating the successful initiation of the required investigation based on a completed questionnaire; and

(C) A record of the Federal Bureau of Investigation fingerprint check portion of the required investigation supporting a preappointment waiver.

(iii) When a waiver for a position designated Noncritical-Sensitive is granted under this part, the agency head will determine documentary requirements needed to support the waiver decision. In these cases, the agency must favorably evaluate the completed questionnaire and initiate the required investigation. The required

investigation must be initiated within 14 days of placing the individual in the position.

(iv) When waiving the preappointment investigation requirements, the applicant must be notified that the preappointment decision was made based on limited information, and that the ultimate appointment decision depends upon favorable completion and adjudication of the full investigative results.

(b) *Exceptions to investigative requirements.* Pursuant to section 3(a) of E.O. 10450, as amended, upon request of an agency head, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirement of national security with respect to:

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

(2) Positions filled by aliens employed outside the United States.

(c) This section does not apply to investigations, waivers of investigative requirements, and exceptions from investigative requirements under 42 U.S.C. 2165(b).

§ 732.203 Periodic reinvestigation requirements.

(a) The incumbent of a national security position requiring eligibility for access to classified information is subject to the reinvestigation requirements of E.O. 12968, as amended.

(b) The incumbent of a national security position that does not require eligibility for access to classified information is subject to periodic reinvestigation at least once every five years. Such reinvestigation must be conducted using a national security questionnaire, and at a frequency and scope that will satisfy the reinvestigative requirements for both national security and public trust positions.

§ 732.204 Reassessment of current positions.

(a) Agency heads must assess each position covered by this part within the agency using the standards set forth in this regulation as well as guidance provided in OPM issuances to determine whether changes in position sensitivity designations are necessary within 24 months of [EFFECTIVE DATE OF THE FINAL RULE].

(b) Where the sensitivity designation of the position is changed, and requires a higher level of investigation than was previously required for the position,

(1) The agency must initiate the investigation no later than 14 working days after the change in designation, and

(2) The agency will determine whether the incumbent's retention in sensitive duties pending the outcome of the investigation is consistent with the national security.

(c) Agencies may provide advance notice of the redesignation of a position to allow time for completion of the forms, releases, and other information needed from the incumbent to initiate the investigation.

§ 732.205 Savings provision.

No provision of the regulations in this part shall be applied in such a way as to affect any administrative proceeding pending on the effective date of the final regulation. An administrative proceeding is deemed to be pending from the date of the agency or OPM notice described in § 732.301(a)(4).

Subpart C—Procedural Rights and Reporting

§ 732.301 Procedural rights.

(a) When an agency makes an adjudicative decision based on an OPM investigation, or when an agency, as a result of information in an OPM investigation, changes a tentative favorable placement or clearance decision to an unfavorable decision, the agency must comply with all applicable administrative procedural requirements, as provided by law, rule, regulation, or Executive order, including E.O. 12968, as amended, and the agency's own procedural regulations, and must:

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

(2) Consider all available, relevant information in reaching its final decision;

(3) Keep any record of the agency action required by OPM as published in its issuances;

(4) At a minimum, provide the individual concerned:

(i) Notice of the specific reason(s) for the decision;

(ii) An opportunity to respond; and

(iii) Notice of appeal rights, if any.

(b) [Reserved]

§ 732.302 Reporting to OPM.

(a) Each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated and when it is completed.

(b) Agencies shall report to OPM an adjudicative determination and action taken with respect to an individual investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

(c) To comply with process efficiency requirements, additional data may be collected from agencies conducting investigations or taking action under this part. These collections will be identified in separate OPM guidance, issued as necessary under § 732.103.

Subpart D—Security and Related Determinations

§ 732.401 Reemployment eligibility of certain former Federal employees.

(a) *Request.* (1) A former employee who was terminated from a department or agency of the Government under 5 U.S.C. 7532, or other statute or Executive order authorizing termination in the interest of national security, may submit a request to OPM in writing, including a copy of the vacancy announcement, to determine whether the individual is eligible for employment in another department or agency of the Government.

(2) A department or agency (other than the agency from which the former employee was removed) seeking to appoint a former employee who was terminated from a department or agency of the Government under 5 U.S.C. 7532, or other statute or Executive order authorizing termination in the interest of national security, must submit a request to OPM in writing, including a copy of the vacancy announcement, to determine the former employee's eligibility for employment.

(b) *Action by OPM.* OPM shall determine, and will notify the former employee, and where applicable, the agency seeking to appoint such former employee, after appropriate consideration of the case, including such investigation as it considers necessary, whether the individual is eligible for appointment to the position outlined in the vacancy announcement.

[FR Doc. 2010–31373 Filed 12–13–10; 8:45 am]

BILLING CODE P