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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206–AL90

Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to assist agencies in carrying out new requirements to reinvestigate individuals in public trust positions under Executive Order (E.O.) 13488, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust,* to ensure their continued employment is appropriate. This final regulation will implement the suitability reinvestigation provisions of E.O. 13488.

DATES: This rule is effective December 9, 2011.

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SUPPLEMENTARY INFORMATION:

Background

On January 16, 2009, President George W. Bush signed Executive Order 13488. Section 5 of the order states that ''[i]ndividuals in positions of public trust shall be subject to reinvestigation under standards (including but not limited to the frequency of such reinvestigation) as determined by the Director of the Office of Personnel Management, to ensure their suitability for continuing employment.'' Section 2 of the order defines the terms ''Position of Public Trust'' and ''Suitability'' by reference to 5 CFR part 731. Section 6(b) delegates to OPM the ''authority to implement this order, including the authority to issue regulations and guidance governing suitability, or guidance related to fitness, as the Director determines appropriate.'' Finally, section 6(a) states that ''[a]n agency shall report to the Office of Personnel Management the nature and results of the background investigation and fitness determination (or later changes to that determination) made on an individual, to the extent consistent with law.''

E.O. 13488 is distinct from, but complementary to, E.O. 13467, which concerns, among other things, alignment, to the extent possible, of investigations and standards relating to suitability or fitness, eligibility for logical and physical access, eligibility to hold a sensitive position, eligibility for access to classified information, and, as appropriate, contractor employee fitness.

Public trust positions are those covered by 5 CFR part 731 that an agency head, under 5 CFR 731.106, has designated at a moderate or high risk level, based on the position's potential for adverse impact on the efficiency or integrity of the service. These positions may involve policy-making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust, or access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain. Agencies designate public trust positions, and their risk levels, following OPM guidance and taking into account the specific duties of each position.

On November 3, 2009, OPM published, in the **Federal Register** at 74 FR 56747, a proposed rule to guide agencies in carrying out the new requirement to reinvestigate individuals in public trust positions under E.O. 13488. The public comment period ended on January 4, 2010. Several Federal Agency commenters indicated they were unable to provide an informed recommendation related to the frequency of reinvestigations without specific information regarding the scope of the reinvestigations. Thus, on November 5, 2010, OPM published a notice in the **Federal Register** at 75 FR 68222 reopening the comment period on the proposed rule. This notice provided additional information about the scope of reinvestigations for public trust positions to allow for further comment about reinvestigation frequency. In addition, OPM proposed revising the text of the proposed rule at 5 CFR 731.106(d)(2), to resolve an ambiguity regarding investigations that satisfy the public trust reinvestigation requirement, and solicited additional public comment on the revised text. The comment period on this second **Federal Register** notice ended on December 6, 2010.

Response to Public Comments

In response to the original proposed rule and the reopener, OPM received comments from 8 agencies, 4 unions, and 5 individuals. OPM carefully considered comments received in response to the November 3, 2009, and November 5, 2010, **Federal Register** notices in the development of this final rule. The comments fell into one of the following categories: frequency of reinvestigations; impact on resources; timing of implementation of the reinvestigation cycle; reinvestigation requirements; alignment of reinvestigation standards; confusion regarding the term ''assessment''; insufficiency of the information provided; breaks in service of less than 24 months; collective bargaining and labor relations; and miscellaneous. We have not addressed the remaining comments either because they concerned other suitability subparts not being revised or did not relate to suitability at all.

Frequency of Reinvestigations

Many commenters voiced concerns about the frequency of public trust reinvestigations. One labor organization representative said OPM should withdraw the proposed rule and reissue it after providing the rationale for the reinvestigation, the number of Federal employees affected, the reinvestigation criteria, and a cost estimate for performing such investigations. Another labor organization commented that OPM should reconsider the need for periodic reinvestigations in the first place and, upon reexamination, recommend to the Administration that the Executive Order be rescinded. Other commenters stated that OPM should not issue a reinvestigation cycle requirement

without first analyzing the actual need for, and effectiveness of, these investigations, their overall costs to the Government, and whether research exists that suggests 5 years is the most appropriate timeframe. A commenter recommended that reinvestigations be conducted every 10 or 15 years, and opined that it does not appear appropriate to require the same reinvestigation timeframes for public trust positions as for national security positions, considering the potential for harm to the United States. Another commenter recommended a frequency of 10 years, as OPM has not provided data to demonstrate that a more frequent reinvestigation cycle for public trust positions than for national security positions promotes the efficiency of the service. One commenter suggested the frequency be every 7 years as a cost-saving measure. Still another commenter recommended agencies be given additional flexibility so periodic background checks can be extended beyond a 5-year time limit or agencies be granted the flexibility to identify, based on their needs and knowledge of the positions, which ones require reinvestigations every 5 years, rather than imposing a blanket requirement for all positions. During the first comment period, one commenter stated that those positions that truly warrant periodic reinvestigations, such as supervisory and auditor positions, should be reinvestigated no more frequently than once every 5 years. However, during the second comment period, this same commenter stated those positions should be subject to periodic reinvestigations without mentioning a specific timeframe. A labor organization representative stated that, in making certain assumptions about the scope of the investigation, a frequency of every 10 years is sufficient. On the other hand, two commenters suggested that the time period for reinvestigations be lowered from 5 years to a frequency of every 2 or 3 years. Lastly, two commenters stated the policy change is appropriate considering the risk posed by public trust positions in their agency.

OPM did not adopt any of these recommendations. This rule is intended to satisfy E.O. 13488, which requires reinvestigations of public trust positions with a frequency as determined by the Director of the Office of Personnel Management. As described in the reopener, the investigative product for reinvestigations of employees occupying nonsensitive public trust positions will be the National Agency Check with Local Agency Check and Credit Check (NACLC) or Periodic Reinvestigation (PRI) depending on the level of public trust. As proposed, reinvestigations must occur frequently enough to ensure that continued employment of persons in public trust positions remains appropriate. The E.O. requires a meaningful determination of continuing suitability for employment. To be meaningful, a determination cannot reasonably be made with outdated information. Accordingly, we have decided to retain the 5-year reinvestigation requirement.

OPM chose the 5-year timeframe because it is consistent with the coverage period that has long been established as the minimum coverage period for suitability investigations. The National Agency Check with Written Inquiries (NACI) is the minimum required level of initial investigation and is required for low-risk positions. The coverage period for the NACI is 5 years and has historically been 5 years. Considering that a public trust position's potential adverse impact on the efficiency or integrity of the service is greater than that of low-risk positions, we believe 5 years is a reasonable timeframe for public trust reinvestigations. Further, if the scope of coverage for the original suitability investigation is 5 years, it follows that the reinvestigations should be completed within the same timeframe, at a minimum. Therefore, a less-frequent timeframe for reinvestigations has not been adopted.

E.O. 13467 requires OPM to consider efficiency and cost effectiveness in setting reinvestigative requirements as well. Regarding comments about the number of employees impacted and the costs associated with reinvestigations, we recognize that the number of employees who may be affected has a direct correlation to the cost of reinvestigations. However, it is difficult to arrive at an accurate number affected because of the evolving needs of agencies. Historical costs are, therefore, poor indicators of future costs. Agencies are responsible for assessing the position designations within their agencies and will know the number of employees to be reinvestigated and may, therefore, predict the cost based on the price of the required investigation. However, while we cannot allow too much time to go by between reinvestigations, we recognize the need to balance risk and cost. Therefore, we have chosen relatively low-cost investigative products, the NACLC and the PRI, to minimize the cost. As described below, we have also sought to reduce cost by aligning public trust and national security reinvestigation requirements. In addition, OPM commits to periodically assess the cost-effectiveness of the investigative products selected.

Commenters suggested that the frequency of public trust reinvestigations should be aligned with those required for clearance holders. We recognize the need for alignment to the extent possible. Therefore, in section 731.106(d)(2) of the final rule, as in the proposed rule, a reinvestigation for eligibility for access to classified information or to occupy a sensitive national security position may be sufficient to meet the requirements for a public trust reinvestigation. Likewise, in our proposed rule amending 5 CFR part 732, dated December 14, 2010, Designation of National Security Positions, the timeframe for reinvestigations is also set at 5 years for national security positions not requiring eligibility for access to classified information. We expect to publish the revised part 732 regulations in early 2012. In tandem, these provisions in parts 731 and 732 will ensure that one reinvestigation at least every 5 years will be sufficient to meet national security and public trust requirements, so that agencies will not have to bear the burden and expense of requesting multiple reinvestigations to meet separate requirements. A reinvestigation on a Special Sensitive or Critical Sensitive national security position will be sufficient to meet, the reinvestigation need of a High Risk public trust position. A reinvestigation on a Non-Critical Sensitive national security position will be sufficient to meet the reinvestigation need of a Moderate Risk public trust position.

A commenter suggested a 15-year timeframe is an appropriate frequency for reinvestigations for low-risk positions that are investigated with the National Agency Check with Inquiry Investigations (NACI's). However, this rule does not cover low-risk positions. It fulfills the requirements of E.O. 13488, which mandates that individuals who are in public trust positions, defined by 5 CFR part 731 as those designated as moderate and high risk, be reinvestigated. There is no government-wide requirement to conduct reinvestigations of employees in low-risk, nonsensitive positions.

During the initial comment period, a commenter suggested that OPM consider allowing additional flexibility following the first 5-year reinvestigation. The commenter suggested widening the window for subsequent reinvestigations to every 5–10 years at the discretion of the agency, depending on the nature of the position and its public trust level. During the

second comment period, the same commenter suggested agencies be given discretion to stretch the reinvestigation period to 10 years. We did not adopt these recommendations. E.O. 13488 requires reinvestigations of individuals in public trust positions with a frequency determined by the Director of OPM, not by individual agencies. OPM has decided to require all agencies to follow the same reinvestigation schedule to promote consistency across the Federal Government. Further, 5 CFR 731.104 and 731.202 require reciprocal acceptance of prior suitability investigations and adjudications. A consistent reinvestigation cycle will promote reciprocity by giving gaining agencies confidence that they are accepting prior investigations and adjudications that were recent enough to have identified any serious issues that would have affected eligibility for continued employment.

A labor organization representative stated that longer intervals are needed between reinvestigations because it is a stressful and time-consuming process for the typical employee. However, reinvestigations must occur frequently enough if agencies are to carry out the purpose of Executive Order 13488 to ensure that continued employment of persons in public trust positions remains appropriate.

A commenter stated that clarification may be needed to ensure agencies understand the reinvestigation requirement is based on the completion date of the prior investigation. We agree and will provide clarification in the implementing guidance.

Impact on Resources

Many commenters made observations regarding the impact of reinvestigations on time, personnel, and financial resources. A commenter stated that large agencies with a high number of public trust positions would incur a heavy economic impact, while another commenter voiced concerns regarding the strain on personnel resources when taking on the additional reinvestigation requirements, since most employees in moderate-risk positions have not been reinvestigated. A commenter also voiced concern about OPM's Federal Investigative Services having the capacity to perform reinvestigations in a timely manner, while another commenter stated OPM will have major increases in costs and workload. Further, a labor organization representative commented that, since OPM does not know how many Federal employees will be subject to the regulation, no analysis of the program's cost has been provided. A labor organization representative further stated that, before the regulation can be properly evaluated, the costs must be examined. Another labor organization representative stated that OPM should postpone issuing the regulation until the number of employees affected by this regulation and the scope of the investigations that will be conducted are known. However, agencies also commented that such reinvestigations are necessary, and one commenter felt it was irrelevant to consider future investigation and resource capacities in the implementation of suitability policies and procedures.

OPM has not made changes to the rule as a result of these comments. While we agree that reinvestigations will take time and resources to accomplish, they are essential investments to ensure that continued employment of employees is appropriate. OPM's responses to comments about the cost and resource implications of the frequency of reinvestigations, the population affected, and the reinvestigation products selected, are addressed in greater detail above. OPM provides investigative services on a reimbursable basis, pursuant to a revolving fund established by Congress for this purpose, and is thus in a position to readily ensure that sufficient investigative resources are dedicated to meet the requirements of this rule.

During the first comment period, a commenter questioned whether the proposed regulation will allow effective and efficient use of time and resources if the regulations do not establish substantive regulatory standards for adjudicating public trust reinvestigations, and if agencies are unable to use suitability actions as the result of a reinvestigation. During the reopener, the commenter again voiced concerns that the proposed regulation does not meet the test of effectiveness and efficiency regarding the use of time and resources. The regulation is intended to satisfy E.O. 13488 which requires reinvestigations of public trust positions.

Because the Executive order requires a reinvestigation of ''suitability for continuing employment'' and defines ''suitability'' by reference to 5 CFR part 731, agencies should consider the substantive standards in § 731. 202, when evaluating the results of a public trust reinvestigation. However, a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. In most situations the subject of a reinvestigation will have been employed by his or her agency for more than 1 year following an appointment subject to investigation, and, in that context, only OPM could take a suitability action under 5 CFR part 731 and only under the limited circumstances described in § 731.105(d). Nonetheless, conduct that surfaces during a reinvestigation could form the basis for an adverse action under 5 CFR part 752. Whether to propose and take an adverse action on the basis of a public trust reinvestigation is a matter within the employing agency's discretion.

A commenter expressed concern that, given finite resources, security clearance cases are given first priority to ensure they meet the requirements of the law (*i.e.,* the timeliness requirements for security clearance adjudications in 50 U.S.C. 435b(g)). Further, the commenter stated that, with the implementation of the reinvestigation cycle for public trust positions, the timeliness of determinations based on public trust reinvestigations will only diminish unless Congress or the President requires them to be made within a specified timeframe. These comments did not make any specific recommendation as to the text of the rule. Accordingly, we did not make changes to the rule as a result of these comments. We note that E.O. 13488 requires individuals to be investigated with a frequency determined by the Director of OPM to ensure suitability for continued employment; and that to help achieve this objective the order requires agencies to report the results of background investigations to OPM. Section 731.206 of the final rule implements this reporting requirement, so that OPM can assess the timeliness of agency decisions. This regulation complements the reporting requirements in part 732 for national security investigations and adjudications, which also facilitate monitoring.

One commenter noted that the same resources used to meet new reinvestigation requirements are also used to make initial determinations for suitability and security for new hires. This commenter expressed concern about having sufficient resources to meet these requirements and suggested that the requirements will have an adverse impact on agencies' ability to meet the goals of OPM's Hiring Reform Initiative. As noted above, the re-investigation requirement was imposed by a 2009 Executive Order that requires reinvestigation of public trust positions. Therefore, we do not agree with this commenter's assessment of the impact on hiring reform. The hiring reform initiative is a comprehensive and

integrated approach to Federal hiring that addresses workforce planning, recruitment, hiring process, security and suitability, and orientation. Moreover, this initiative assumes there are ongoing reform efforts to align investigative and adjudicative processes and also addresses various challenges throughout the hiring process, including limited resources. Agencies have known about the reinvestigation requirement for some time, now, and can be presumed to have anticipated its implementation.

A commenter inquired as to whether or not the proposed rule would create other changes to the investigation structure, the overall investigation process, or the types of investigations available that will ultimately impact agencies' workload. The final rule will not affect the structure of investigations, the process, or the types of investigation. However, OPM is assessing its investigative products as part of a Joint Security and Suitability Process Reform effort under E.O. 13467. Future Federal investigative standards resulting from this effort will use automated records to the extent possible and may impact the investigative structure and process. Other impacts on the investigative process may result from our proposed rule in 5 CFR part 732, dated December 14, 2010, Designation of National Security Positions, which prescribes time frames for national security reinvestigations.

Timing of the Implementation of Reinvestigation Cycle

One commenter indicated the regulation lacks clarity as to when the 5-year investigation period will begin following the rule's implementation, while other commenters suggested agencies be given flexibility to implement the reinvestigation cycle. OPM concurs and has added language to the rule stating that implementing guidance will be issued regarding time lines for implementing this regulation. Agencies will be afforded flexibility within the parameters set in that guidance.

One commenter suggested that the reinvestigation cycle be delayed until the new SF–85P, Questionnaire for Public Trust Positions, is published for agency use. This comment is beyond the scope of this regulation. This regulation is intended to satisfy E.O. 13488, which requires reinvestigations of public trust positions.

A commenter suggested delaying implementation of the reinvestigation cycle until OPM implements the tiered investigative model described in section 2.1(a) of E.O. 13467, where each successively higher level of investigation shall build upon, but not duplicate, the ones below it. We did not adopt this recommendation. Although OPM is working on the investigative standards contemplated by E.O. 13467, we do not believe the possibility of future changes to investigative products should affect the need to timely implement E.O. 13488. OPM has added language to this regulation at § 731.106(d)(1) stating that implementing guidance will be issued.

A labor organization representative expressed concern that this regulation will take effect without any prior notice to current Federal employees that informs them they may be subject to reinvestigations. This labor union representative also recommended that current employees be grandfathered under the old rules and the new rules apply only to future employees. This recommendation is not adopted as it does not satisfy the requirements of E.O. 13488, to conduct reinvestigations for all public trust positions. However, we do recognize the commenter's concern and have made revisions to the regulation at § 731.106(d)(3), requiring agencies to notify all current employees impacted by this rule of these new reinvestigation requirements.

The labor organization representative further commented that reinvestigations could result in employees being jeopardized for previously undisclosed past misconduct. OPM does not regard this as an effective argument against a reinvestigation requirement for public trust positions. Rather, the possibility that an employee may not always disclose past misconduct to the employing agency provides a sound reason for conducting such reinvestigations.

Reinvestigation Requirements

One commenter stated that the proposed language confuses reinvestigation requirements for national security positions with new reinvestigation requirements for public trust positions mandated by E.O. 13488. We disagree and did not make a change as a result of this comment. Rather, the separate authorities for reinvestigations for national security positions and public trust positions are outlined to ensure agencies avoid duplicate investigations where an existing investigation already satisfies the requirement.

In the Notice of Proposed Rulemaking dated November 3, 2009, the proposed language in § 731.106(d)(2) states: ''If, prior to the next required reinvestigation, a separate investigation (or reevaluation) is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or as a result of a change in risk level as provided in § 731.106(e), and that investigation is conducted at an equal or higher level than is required for a public trust reinvestigation, a new reinvestigation is not required. * * *'' A commenter stated that the meaning of ''at an equal or higher level'' in § 731.106(d)(2) is unclear. We have reworded this paragraph to clarify that a new investigation is not needed if the previous investigation ''meets or exceeds'' the criteria required for a public trust reinvestigation.

A labor organization representative stated that it welcomed an indication that OPM intends the scope of reinvestigation for moderate-risk positions to be generally less intrusive and narrower in scope than the reinvestigation of employees in high-risk positions. It should be noted that the scope of the reinvestigation may be changed to meet needs such as a further assessment of character or conduct because of new information. A commenter suggested the use of automated reinvestigative database checks without a new investigative questionnaire. This suggestion is not feasible because the effectiveness of reinvestigations relies on updated information provided by the individual. However, OPM is considering the use of automated reinvestigative database checks in addition to a new investigative questionnaire.

One commenter recommended that 5 CFR part 731 be revised to provide general authority to take suitability actions, not only for limited situations currently described in part 731. The commenter believed this change would allow the suitability decision to remain with agency officials responsible for security, enhance consistency, and aid reciprocity. Another commenter recommended that OPM revise the regulations to allow agencies to take suitability actions whenever a new suitability investigation is conducted rather than limiting agency suitability actions to 1 year from the date an individual enters on duty. We did not accept these recommendations as they are beyond the scope of the proposed rule. Further, agencies' authority to take suitability actions is delegated by OPM under 5 U.S.C. 1104(a)(2), and cannot exceed the authority that OPM itself possesses. By regulation, OPM's own jurisdiction to take a suitability action against employees who have completed the first year of appointments subject to investigation is limited to those cases where the employee has committed falsification, deception or fraud in an

examination or appointment; is disqualified under a statutory or regulatory bar to appointment; or has refused to testify when required to do so by Civil Service Rule V. *See* 5 CFR 731.103(g), 731.105(d). OPM does not interpret its suitability jurisdiction more broadly. Further, OPM declines to delegate to agencies the authority to take suitability actions against employees in these circumstances, because they are at the core of OPM's responsibility to protect the integrity of the competitive examining system and to impose government-wide debarments when appropriate. Moreover these are circumstances where there may be a conflict between OPM's and the agencies' interests, as recognized by 5 CFR 731.303(b).

One commenter stated that agencies should be delegated the authority to initiate subsequent reinvestigations based on changes in the position requirements and/or findings of misconduct. Another commenter asked why OPM doesn't issue a regulation moving this entire process to a ''risk-based'' process—*i.e.,* requiring agencies to focus on the actual employees in public trust positions instead of requiring basically all employees to complete this periodic reinvestigation. A third commenter noted that OPM should issue implementing guidance allow public trust reinvestigations to be event-driven to resolve any new potentially adverse information. As previously stated, E.O. 13488 requires reinvestigations of all employees in public trust positions. If position requirements change, an agency should use OPM's Position Designation System to determine any new investigation requirement and subsequent reinvestigation requirements. As for event-driven situations or misconduct, another reinvestigation may or may not be appropriate. When the agency becomes aware of misconduct, it should take appropriate action. This may include fact-finding inquiries and an adverse action under 5 CFR part 752, if appropriate.

A commenter asked whether employees who have been employed for a long period of time will be subject to a less rigorous reinvestigation. Employees will not be subject to less rigorous reinvestigations simply because of their length of service. All public trust employees will be required to undergo reinvestigations at the level commensurate with their position designations.

A commenter stated that the agency conducting the reinvestigation does not appear to have authority under the proposed rule to take any negative action based upon a negative ''assessment''. Another commenter asked what standards will be used to assess an employee's fitness after a reinvestigation. As noted above, since the Executive order requires a reinvestigation of ''suitability for continuing employment'' and defines ''suitability'' by reference to 5 CFR part 731, agencies should consider the substantive standards in § 731. 202, when evaluating the results of a public trust reinvestigation. As currently provided at 5 CFR 731.106(f), a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. If the character or conduct of an employee undermines the efficiency of the service, the agency may take an adverse action under 5 CFR part 752, if warranted. In addition, to provide further clarification as to the types of actions that can be taken against categories of probationary employees, we have modified the language in § 731.106(f) to include a reference to 5 CFR part 315 for appointees or 5 CFR part 359 for SES probationers.

A labor organization representative commented that the lack of a substantive need for a reinvestigation is illustrated by the narrow nature of the suitability action that could result from the reinvestigation. The labor organization representative further stated that there are better, less intrusive and more targeted ways to uncover and correct an employee's misconduct other than the ''broad brush'' of a reinvestigation. Another labor organization questioned the need to do reinvestigations when only a few investigations will uncover areas of concerns and most issues could not lead to disciplinary actions. We did not make changes to the rule as a result of these comments, which question the need for the Executive order rather than requesting a change to the proposed rule implementing the order.

A labor organization representative called on OPM to recommend to the Administration that it reexamine the need for reinvestigations for public trust positions. This comment is outside the scope of the rulemaking, so it cannot be considered by OPM as part of the rulemaking process.

A commenter stated that the rule should include a requirement that, prior to performing a reinvestigation, the employing agency must review and determine that the employee's position has been properly designated as to risk level. We did not adopt this recommendation, as agencies must use OPM's Position Designation System, and should re-designate positions as appropriate, such as when duties of the position change. OPM will not impose a requirement to review the position designation solely due to a pending reinvestigation. We note that our proposed amendment to 5 CFR 732.204 would require agencies to reassess the sensitivity designation of each national security position within a 24-month period. Proposed section 732.201(c) states that OPM will issue guidance under which an appropriate risk designation will automatically follow from the position's sensitivity designation. Agencies are free to reassess the risk designations of their nonsensitive public trust positions at the same time.

One commenter stated that it has a Continuous Evaluation Program (CEP) in place to identify, investigate, and adjudicate many of the same issues a public trust reinvestigation process would address. Further, the commenter suggested that focusing efforts on agency CEPs would reduce the need for more frequent reinvestigation cycles. Another commenter questioned whether or not there is redundancy between the reinvestigation and the FD–961 (Bioterrorism Preparedness Act: Entity/Individual Information) form. An investigation based on a CEP or the FD–961 that meets all requirements for reinvestigation or goes beyond those requirements may be sufficient. However, the commenters have not provided enough information about the content of the CEP or an FD–961 investigation; therefore, we are not able to determine if these investigations will satisfy the intended investigative requirement for public trust reinvestigations. These recommendations are not adopted because we do not have enough information to evaluate them.

A commenter recommended aligning fingerprinting requirements for periodic reinvestigations on public trust positions with those of reinvestigations for national security positions; and indicated that no fingerprinting is required in most periodic reinvestigations. Criminal checks will remain a critical component of reinvestigations, but whether or not fingerprinting for criminal checks will be required will be addressed in implementing guidance.

One commenter stated that it is using the National Agency Check with Inquiries (NACI) investigation in lieu of the Modified Background Investigation or Limited Background Investigation for moderate-risk public trust positions where the incumbent has no access to

national security classified information. The NACI is not an appropriate level of investigation for Public Trust positions. OPM issued an October 2010 instruction to executive branch agencies regarding the appropriate investigations for moderate-risk public trust positions. The NACLC will be the reinvestigation required for moderate-risk public trust positions because it efficiently provides high-value information necessary to evaluate a person's continued suitability for a moderate-risk position. Future Federal investigative standards may redefine investigation and reinvestigation standards for public trust positions.

One commenter recommended OPM grant exemptions for reinvestigations on Minimum Background Investigations and revise the regulations to clarify or expand definitions of representative public trust position duties in 5 CFR 731.106. This recommendation is not adopted because the Executive order does not authorize OPM to grant exemptions from reinvestigation requirements, and because the definitions of representative public trust position duties are not within the scope of this rulemaking.

Alignment of Reinvestigation Standards

A commenter voiced a concern that OPM may propose that reinvestigations for moderate and high-risk positions be different from the continuous evaluation requirements (at the same tier level) approved in Federal Investigative Standards that were issued in December 2008, but never implemented. OPM declines to modify the rule to reference or align with standards that were not implemented. However, as previously noted, we recognize the need for alignment of reinvestigation requirements to the extent possible, and this alignment is reflected both in § 731.106(d)(2) of this final rule, and in proposed 5 CFR 732.203. Also as previously noted, new investigative standards are under development. The new investigative standards are targeted to be implemented in 2013.

Another commenter stated it is unclear why OPM is deferring establishing new investigative standards for public trust investigations until a later issuance, as this means that the rule offers little guidance on anything other than the frequency of reinvestigations. The commenter also stated that the rule cannot be implemented until guidance on the investigative standards is published. The purpose of this rulemaking is to prescribe the frequency of public trust reinvestigations. In the reopener, we also explained the investigative products we intend to use for public trust reinvestigations for non-sensitive positions: The NACLC and the PRI. Scope and coverage standards have already been established for these products. Investigations and adjudications have been proceeding throughout the period that OPM and other agencies have been working on alignment issues, and will continue to proceed after implementation of these regulations. OPM therefore disagrees with the commenter's assertion that introducing changes to the suitability rule that are required by Executive Order is somehow inappropriate or that there is insufficient guidance to implement the rule. Further, as alignment efforts move forward, new investigative standards and products will be developed, but it is neither necessary nor desirable to codify the scope and coverage standards for investigative products in permanent rules.

Confusion Regarding the Term ''Assessment''

Some commenters stated that the term ''assessment'' caused confusion. One commenter suggested we use the term ''decision'' instead, as ''assessment'' implies observation and evaluation. Another commenter stated that OPM did not adequately explain why it is proposing to replace ''determination'' with ''assessment.'' The commenter recommended that the language remain as it is in the current rule and include new language that states what action must be taken as a result of a reinvestigation. A commenter recommended we change the term ''assessment'' back to ''determination,'' as this commenter believed that any final decision regarding an individual's continued suitability for Federal employment based upon a completed investigation should be called a ''determination'' for consistency across agencies. Another commenter recommended that OPM outline what happens after a completed suitability investigation (''determination'') and what happens after a completed reinvestigation (''assessment''). The commenter also stated that the term ''assessment'' needs to be further defined or explained. Only one commenter indicated that the term ''assessment'' clarified the process.

Since use of the term ''assessment'' has not provided clarification as intended, in § 731.106(d)(1) we have changed the term back to ''determination,'' to reflect the decision-making process associated with ensuring suitability for continuing employment. In the context of this rule, the ''determination'' is a decision as to whether or not to take a suitability action, adverse action, or probationary action, or to refer a case to OPM for adjudication, as appropriate. An adverse action, if taken, must meet statutory procedural requirements. E.O. 13488 does not require an agency to take an adverse action when it otherwise would not be warranted.

To provide further clarification as to the types of actions that can be taken against categories of employees, we have modified the language in § 731.106(f) to include a reference to 5 CFR part 315 for probationers or 5 CFR part 359 for Senior Executive Service (SES) probationers. We have also changed § 731.106(e) to include appointees as well as employees, as changes in risk levels can occur with respect to both.

Insufficient Information

Some labor organization representatives expressed concerns that sufficient information was not provided to enable them to comment in a meaningful fashion regarding the frequency of reinvestigation. We disagree. This rule was originally proposed on November 3, 2009, and reopened on November 5, 2010, to specifically solicit comments on the reinvestigation cycle. The new notice provided adequate information about the intended reinvestigation products. Despite continuing concerns expressed on lack of information, a number of substantive comments were still provided by these parties regarding frequency of reinvestigation.

Breaks in Service That Are Less Than 24 Months

Some commenters observed that the proposed rule does not contain language addressing how breaks in service affect investigative requirements. As a result, they recommended that OPM amend the proposed rule to clarify that a break in service of less than 24 months would not require a new investigation. They argued that this would support the goals of reciprocity and alignment between suitability and national security investigations. OPM agrees and has revised § 731.104(a) to clarify that a new investigation is not required when there has been a break in service of less than 24 months.

Collective Bargaining and Labor Relations

One agency commenter and a labor organization representative expressed the opinion that implementation of these regulations may require collective bargaining for employees in bargaining

units prior to implementation. The commenters made no specific recommendations, so no changes were made to the rule.

A labor organization representative commented that implementation of these regulations will have a negative impact on labor relations and Federal employees and recommends that the National Council on Federal Labor-Management Relations review the rule and make recommendations to the President on whether to proceed with the rule. This labor organization representative also proposed that OPM hold the rule in abeyance until the President decides whether or not to proceed with it. The labor organization representative did not provide any additional information regarding the perceived negative impact on labor relations and Federal employees. We did not adopt these recommendations. The rulemaking is required by E.O. 13488. As long as the E.O. remains in place, there is no basis for OPM to submit this rule for the National Council's review or to hold it in abeyance. The proposed rule dated November 3, 2009, and the reopener dated November 5, 2010, were provided to all unions with Governmentwide consultation rights with OPM for their comments and recommendations regarding the rule. Additionally, agencies, members of the public, and other labor organizations were also provided an opportunity to comment on the proposed rule.

Miscellaneous Comments

One commenter stated that a review should be made as to whether agencies will initiate adverse action proceedings should off-duty criminal conduct be discovered, when the conduct does not have a nexus to the service. OPM did not adopt this recommendation as it is outside the scope of this rule. However, as stated earlier, 5 CFR 731.106(f) currently provides that a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. This rule prescribes reinvestigation requirements, and cannot be read to amend the statutory standard for bringing an adverse action under 5 U.S.C. chapter 75. Under this standard an adverse action must have a nexus with the efficiency of the service.

One commenter stated that OPM's separate proposal to amend part 732 will, if adopted, have the effect of broadening the categories of position duties that are categorized as ''sensitive'' and, as a result, OPM should not make references in part 731 to the representative position duties of ''public trust'' positions. The definition of representative ''public trust'' position duties in 5 CFR 731.106(b) is not within the text that OPM proposed to amend in the rule, so the comment is outside the scope of the rulemaking. Nonetheless, we note that the commenter appears to assume that national security positions do not also have a public trust risk designation. This assumption is incorrect under § 731.106(b)(2). We also note that the commenter's statement about the possible effect of OPM's proposal to amend part 732 is speculative. As we noted in the Supplementary Information accompanying the notice of proposed rulemaking, the proposed rule contains text intended to address the risk of over-designating national security positions as well as the risk of under-designating such positions.

One commenter stated that directing agencies to make an ''assessment'' of whether findings of an investigation would justify an action against an employee will take the decision out of the personnel security arena and place it into the employee and labor relations arena. While we have agreed to retain the term ''determination'' instead of ''assessment,'' there is no intended change in how these actions are handled in an agency. OPM is aware that some agencies conduct suitability reviews as a human resources function, while other agencies conduct such reviews as a security function. It is not OPM's intent in this rulemaking to prescribe which internal component of an agency will conduct a function.

One commenter stated that, given the reporting requirement, the agency will have to complete the INV Form 79A, Report of Adjudicative Action on OPM Personnel Investigations. The agency further stated that this requirement will place the burden on personnel security divisions to report on actions that may be taken by other offices. While agencies have responsibilities to comply with this rule, it is up to each agency to determine how it will do so.

One commenter questioned why OPM doesn't issue a regulation regarding how employees can dispute the designation of their positions as public trust positions. This question is beyond the scope of the proposed rule, which is limited to the frequency of reinvestigations. However, because the position designation process is a discretionary agency decision, employees should consult with their agency human resources office regarding whether any administrative procedures are available to employees if they wish to dispute whether rules and regulations have been properly applied.

One commenter questioned how designations of public trust positions are made, and recommended that OPM clarify the definition of public trust position duties in its regulation. Designations of public trust positions and their risk levels are made by agencies following OPM guidance and taking into account the specific duties of each position. The comment that OPM should clarify the definition of public trust position duties in the rule cannot be considered because it addresses matters outside the scope of the rulemaking.

Finally, OPM is updating the authority citation for part 731 to include a reference to E.O. 13488. We also are making a correction to the citation format.

Regulatory Flexibility Act

OPM has determined that this rule will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

Executive Order 13563 and Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 13563 and E.O. 12866.

E.O. 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, 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 regulation will not result in the expenditure by State, local, or Tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

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.

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

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 731

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM amends part 731, title 5, Code of Federal Regulations, as follows:

PART 731—SUITABILITY

■ 1. The authority citation for part 731 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5.

Subpart A—Scope

■ 2. In § 731.104, remove ''or'' at the end of paragraph (a)(3), replace the period at the end of paragraph (a)(4) with ''; or'', and add a new paragraph (a)(5) to read as follows:

§ 731.104 Appointments subject to investigation.

(a) * * *

(5) Appointment to a covered position where there has been a break in service of less than 24 months, and the service immediately preceding the break was in a covered position, an excepted service position, or a contract employee position described in paragraphs (a)(1) to (a)(4) of this section.

* * * * *

■ 3. In § 731.106, revise paragraphs (d), (e), and (f) to read as follows:

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(d) *Reinvestigation requirements.* (1) Agencies must ensure that reinvestigations are conducted and a determination made regarding continued employment of persons occupying public trust positions at least once every 5 years. The nature of these reinvestigations and any additional requirements and parameters will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required reinvestigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in paragraph (e) of this section, and that investigation meets or exceeds the requirements for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

(3) Agencies must notify all employees covered by this section of the reinvestigation requirements under this paragraph.

(e) *Risk level changes.* If an employee or appointee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's or appointee's position is changed to a higher level, the employee or appointee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

(f) *Completed investigations.* Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as part 315, 359, or 752 of this chapter. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

Subpart B—Suitability Determinations and Actions

■ 4. Revise § 731.206 to read as follows:

§ 731.206 Reporting requirements.

Agencies must report to OPM the level or nature, result, and completion date of each background investigation or reinvestigation, each agency decision based on such investigation or reinvestigation, and any personnel action taken based on such investigation or reinvestigation, as required in OPM issuances.

[FR Doc. 2011–29057 Filed 11–8–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Docket No. FAA–2011–0585; Airspace Docket No. 11–AWP–9

Modification of Class E Airspace; Blythe, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace at Blythe, CA, to accommodate aircraft using Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Blythe Airport. This action also corrects geographic coordinates in the regulatory text. This improves the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective date, 0901 UTC, December 15, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA, 98057; *telephone* (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On August 2, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify controlled airspace at Blythe, CA (76 FR 46212). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found that the boundaries for the controlled airspace needed to be adjusted; this action makes that adjustment.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations