

# Proposed Rules

Federal Register

Vol. 88, No. 20

Tuesday, January 31, 2023

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 302 and 731

RIN 3206–AO17

#### Suitability and Fitness Vetting

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing amendments to the Federal Government personnel vetting investigative and adjudicative processes for determining suitability and fitness. The purpose of OPM's work in this area is to establish requirements and standards for agencies to properly vet individuals to assess risk to the integrity and efficiency of the service. Nothing in this proposed rule shall be read in derogation of any individual's rights under Title VII. OPM is also proposing to update and streamline the language of several provisions to include conforming and minor editorial changes throughout.

**DATES:** Comments must be received on or before April 3, 2023.

**ADDRESSES:** You may submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. All submissions received must include the agency name and docket number or Regulation Identifier Number (RIN).

Where possible, please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Comments received after the close of the comment period will be marked "late," and OPM is not required to consider them in formulating a final decision. If you cannot submit comments electronically, please contact the individual listed in the further information section.

**FOR FURTHER INFORMATION CONTACT:** For questions contact Christine Bilunka, Program Manager, Suitability Executive Agent Programs, Operations (Adjudications) by email at [SuitEA@opm.gov](mailto:SuitEA@opm.gov) or by phone at 202–606–1800.

#### SUPPLEMENTARY INFORMATION:

##### Authority and Background

Under 5 U.S.C. 3301 and 7301, "[t]he President may . . . prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," "ascertain the fitness of applicants as to . . . character," and "prescribe regulations for the conduct of employees in the executive branch." In addition to the President's authority to prescribe standards for suitability and fitness for civil service appointment based on character and conduct, 5 U.S.C. 3301 recognizes the President's authority to "ascertain the fitness of applicants as to . . . knowledge, and ability for the employment sought," i.e., to prescribe qualification standards based on applicants' education and experience and to assess their relative knowledge, skill, and ability.

Historically the President delegated to OPM and its predecessor, the Civil Service Commission, the authority to prescribe both qualification standards and suitability standards, and to conduct both examinations of applicants' qualifications and investigations of suitability for appointment and continuing employment. See 5 U.S.C. 1104(a)(1). However, the delegation was generally limited to positions in the competitive service under the Civil Service Rules compiled in Executive Order (E.O.) 10577, Nov. 23, 1954, 19 FR 7521, as amended. See Civil Service Rules II, V, VI, as codified in 5 CFR parts 2, 5, 6.

E.O. 13764 of January 17, 2017, *Amending the Civil Service Rules, Executive Order 13488, and Executive Order 13467 to Modernize the Executive Branch-Wide Governance Structure and Processes for Security Clearances, Suitability and Fitness for Employment, and Credentialing and Related Matters* amended the Civil Service Rules to expand OPM's responsibilities for establishing minimum standards of fitness based on character and conduct for appointment to positions in the excepted service of the executive

branch. Previously, OPM's jurisdiction over suitability for appointment to positions in the excepted service was limited to positions in the excepted service where the incumbent could be non-competitively converted to the competitive service, consistent with OPM's jurisdiction over positions in the competitive service and career appointments to the Senior Executive Service. E.O. 13764 set forth requirements for the OPM Director to establish mutually consistent standards and procedures to determine the reliability, trustworthiness, and good character and conduct of those working for the Government in the executive branch regardless of appointment type. Additionally, E.O. 13764 expanded OPM's responsibilities by making OPM responsible for establishing investigative standards, risk designation procedures, and reciprocity rules for this additional population.

E.O. 13488, as amended, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust*, establishes that contractor employee fitness or nonappropriated fund employee fitness is subject to the same position designation requirements and investigative standards, policies, and procedures as fitness determinations for civil service employees as prescribed by OPM under the Civil Service Rules. E.O. 13467, as amended, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Classified National Security Information*, establishes a requirement for continuous vetting for persons who perform, or who seek to perform, work for the executive branch in competitive service, excepted service, career Senior Executive Service, contractor, and nonappropriated fund positions that are included in covered positions as defined in the E.O. Furthermore, E.O. 13467 (section 2.1(c)) establishes that "(t)he investigative and adjudicative standards for fitness shall, to the extent practicable, be consistent with the standards for suitability."

In May 2018, the OPM Director and the Director of National Intelligence, in their respective roles as Suitability and Credentialing Executive Agent and Security Executive Agent, launched an effort consistent with this direction,

“Trusted Workforce 2.0,” to transform workforce vetting by employing a modernized and more efficient process for ensuring that only trusted individuals enter and remain in the Federal workforce. Key goals of the initiative are to capitalize on information technology capabilities that allow for the integration of automation and take advantage of a wider spectrum of data, reduce time-intensive manual processing, and promote greater mobility of the workforce by providing vetting processes that enable each individual’s vetting status to be continuously up-to-date.

On February 4, 2021, the President issued National Security Memorandum (NSM-) 3, Revitalizing America’s Foreign Policy and National Security Workforce, Institutions, and Partnerships. See Daily Comp. Pres. Docs., DCPD No. 202100122. The Memorandum established an Interagency Working Group on the National Security Workforce (the Working Group), with one of its goals to “[a]ssess implementation of security clearance reforms and reciprocity proposals, additional reforms to eliminate bias, and ensure efficient timelines for completion of security clearance investigations.” Together with the Security, Suitability, and Credentialing Performance Accountability Council (PAC), the Working Group developed a set of follow-on policy goals and actions that were communicated to Executive departments and agencies on December 14, 2021 through a cabinet memorandum, *Transforming Federal Personnel Vetting*.

Four actions implementing NSM-3 have informed OPM’s policy choices in developing this proposed rule. Those actions state that the Director of OPM and the Director of National Intelligence, in their respective roles as the Suitability and Credentialing Executive Agent and the Security Executive Agent under E.O. 13467, will:

(a) Issue, not later than 180 days from the date of this memorandum, investigative and adjudicative guidelines and standards for Federal personnel vetting, consistent with the Federal Personnel Vetting Core Doctrine, which became effective on February 13, 2021;

(b) Transition from traditional periodic reinvestigations to U.S. Government-wide continuous vetting, as defined in E.O. 13467, as amended, to the maximum extent practicable, consistent with law and as further directed by the E.O., to assess security, suitability, fitness, and credentialing decisions on an ongoing basis;

(c) Eliminate unnecessarily duplicative applications, investigations, adjudications, and access determinations and gain efficiencies and align, to the maximum extent practicable, the processes and criteria used for all Federal personnel vetting determinations as described in E.O. 13467, as amended; and

(d) Enable efficient timelines for personnel vetting; improve mobility; promote equal treatment; streamline standards, to the maximum extent practicable, for background investigations; and maximize uniformity across all Federal personnel vetting.

#### **What is suitability and fitness?**

Suitability and fitness refer to a decision by an agency that an individual does or does not have the required level of character and conduct necessary to perform work for a Federal agency. These determinations are based on whether a person’s character or conduct may have an adverse impact on the integrity or efficiency of the service. The difference in terminology used, as to suitability or fitness, is based on the type of position being adjudicated. Suitability determinations are made in reference to positions in the competitive service or career Senior Executive Service, whereas fitness determinations are made for excepted service positions, contractor positions, or Department of Defense (DOD) nonappropriated fund positions.

Suitability and fitness determinations are distinct from the assessment of an individual’s job qualifications. With respect to suitability determinations, “competitive service or career Senior Executive Service” positions refer 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 to positions in the Senior Executive Service.

With respect to fitness determinations, in the context of this regulation “excepted service” positions are positions in the excepted service of the executive branch, except for (A) positions in any element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent they are not otherwise subject to OPM appointing authorities, (B) positions where OPM is statutorily precluded from prescribing such standards, (C) positions when filled by political appointment, and (D) excepted service positions where the incumbent can be noncompetitively converted to the competitive service, as noted above. For purposes of this regulation, a “contractor employee” is

an individual who performs work for or on behalf of any agency under a contract and who, in order to perform the work specified under the contract, will require access to Federal space, information, information technology systems, staff, or another asset of the Federal Government, and who could, by the nature of their access or duties, adversely affect the integrity or efficiency of the Government. Such contracts include, but are not limited to: a personal service contract; a contract between any non-Federal entity and any agency; and a subcontract between any non-Federal entity and another non-Federal entity to perform work related to the primary contract with the agency. Finally, DOD “nonappropriated fund employee” means an employee paid from non-appropriated funds of an instrumentality of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces as described in section 2105 of title 5, United States Code.

Title 5 CFR part 731 establishes and maintains OPM’s policies and procedures governing suitability investigations and adjudications, including the procedures for taking suitability actions and the general process for appealing a suitability action. Title 5 CFR part 1201 provides procedures for appeals of suitability actions to the Merit Systems Protection Board (MSPB).

OPM’s suitability program has been shaped by more than policy. Throughout the program’s history, through precedential decisions made upon appeals of suitability actions, the suitability program has been impacted. For example, through case law, evidentiary standards have been shaped, standards for establishing intent with regard to making false statements have been made, impacts of employing an individual who has falsified information have been addressed, and authorities of MSPB have been affirmed.

While the responsibility for suitability adjudication falls to OPM, OPM is authorized, in accordance with 5 U.S.C. 1104, to delegate this responsibility to other departments and agencies employing positions in the competitive service, positions where the incumbent can be noncompetitively converted to the competitive service, and career appointments to positions in the Senior Executive Service. As with all delegated functions, OPM must establish and maintain an oversight program to ensure that activities under any delegated authority are in accordance with merit

system principles and departments and agencies are following the standards established by OPM for the activity. For the most part, OPM delegates to departments and agencies authority to conduct their own suitability adjudications and take suitability actions, which may include imposing an agency-specific debarment. However, in cases involving evidence of material, intentional false statements; deception or fraud in examination or appointment; refusal to furnish testimony; or evidence of other egregious conduct; OPM retains jurisdiction to make the suitability determination and take suitability actions, which may include imposing a government-wide debarment.

#### **What are the current elements of the suitability process?**

In order to properly vet an individual's suitability, agencies will generally follow these steps. First, agencies must properly designate the position an individual will occupy for risk and sensitivity. This is accomplished using the Position Designation System developed by OPM and ODNI. Known as "position designation," this process allows agencies to determine the level of background investigation required of an incumbent. Upon an application and generally after conditional offer, agencies may collect information from the individual that they may use to conduct a suitability screening (*i.e.* Declaration for Federal Employment, Optional Form 306). Once completed, and as appropriate, the agency will validate the need for investigation by assessing whether a previous suitability determination may be reciprocally applied, and if not, whether a previously conducted investigation is available to use in making a suitability determination. If an investigation is needed, the agency will collect the appropriate investigative questionnaire (*e.g.*, Standard Form 85, 85P, or 86) and initiate the investigation with the investigative service provider. Upon receiving the results, the agency will make the suitability determination along with any other determination that may be required for the position (*i.e.* national security or credentialing). Agencies must follow OPM's guidance when making a suitability determination, using the criteria in this regulation as well as the additional considerations established by OPM that the agency deems pertinent to the individual case. With respect to appeals of suitability actions, the MSPB's review is limited to an agency's determination, so the MSPB cannot consider, as aggravating or mitigating, additional considerations

that the agency did not deem pertinent. Therefore, when determining if OPM or an agency has met its burden in demonstrating that a suitability action protects the integrity and promotes the efficiency of the service, the MSPB, with respect to the charges and specifications brought by OPM or an agency as a basis for the suitability action(s) must consider only those additional considerations that were deemed pertinent by OPM or the agency. Subject to the current provisions in this regulation, subsequent to the initial investigation and determination, agencies will initiate re-investigations for public trust positions (*i.e.* moderate and high risk).

#### **Significant Changes Proposed by This Rule**

##### *Aligned Criteria*

Per the amended Civil Service Rule II (5 CFR 2.1(a)), "OPM shall be responsible for . . . (iii) Standards of suitability based on character and conduct for appointment to a position in the competitive service, for appointment to a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and for career appointment to a position in the Senior Executive Service" and "(iv) Minimum standards of fitness based on character and conduct for appointment in any other position in the excepted service of the executive branch, except for (A) positions in any element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent they are not otherwise subject to OPM appointing authorities, and (B) positions where OPM is statutorily precluded from prescribing such standards." Consistent with E.O. 13467 of June 30, 2008, as amended by E.O. 13764, which states that standards for suitability for appointment in the competitive service and standards for fitness for appointment in the excepted service "shall be aligned using consistent standards to the extent possible" and that "[t]he investigative and adjudicative standards for fitness shall, to the extent practicable, be consistent with the standards for suitability," OPM is proposing that the suitability criteria found at 5 CFR 731.202 be used for making both suitability and fitness determinations except as otherwise noted in the regulation.

As is addressed within the proposed regulation at 5 CFR 731.104(b)(2), suitability or fitness determinations are required, as follows: suitability determinations must be made for all

appointments in the competitive service or career Senior Executive Service and fitness determinations must be made for all appointments to excepted service positions, unless an agency is required to reciprocally accept a prior suitability or fitness determination under the conditions prescribed in the proposed § 731.104(b)(2)(ii). In accordance with changes proposed at § 731.104(b)(2)(i) and (ii), agencies may make a new determination under the following conditions: when a prior investigation is reciprocally accepted but the record in the Central Verification System or its successor does not reflect a prior favorable suitability or fitness determination, the agency will need to review the prior investigation for the purpose of making a suitability or fitness determination; or when the investigative record on file was favorably adjudicated for suitability or fitness but shows conduct that is incompatible with the core duties of the relevant covered position; or, for fitness determinations, when the agency has prescribed additional factors under § 731.202(b) that were not addressed in the prior favorable adjudication, and the agency will conduct an adjudication using only those additional factors. In the case of continuous vetting checks, agencies must also make a determination regarding continued employment that is based upon the results of those checks.

##### *Aligned Position Designation Requirements, Investigative Standards, and Reciprocity*

OPM is also proposing a number of changes to improve consistency in the vetting process and to enhance mobility of the civil service, contractor, and nonappropriated fund workforces. Specifically, the proposed changes will align the requirements for position designation, investigations, and reciprocal acceptance of investigations and suitability or fitness determinations amongst these populations. Less the exceptions described below, agencies will use the same system for designating position risk (*i.e.*, low, moderate, and high) for civil service, contractor and nonappropriated fund positions to determine the commensurate level of background investigation. Background investigations conducted for these positions will be done using the same investigative standards. Finally, agencies will apply the same rules for determining whether reciprocal acceptance of prior background investigations and suitability or fitness determinations are required.

Civil Service Rule V (5 CFR 5.2 (a)), as amended by E.O. 13764 section 1,

establishes that for “positions in the excepted service of the executive branch for which the Director has standard-setting responsibility under Civil Service Rule II,” the Director “may cause positions to be designated based on risk to determine the appropriate level of investigation,” “may prescribe investigative standards, policies, and procedures,” and “may prescribe standards for reciprocal acceptance by agencies of investigations and adjudications of suitability and fitness, except to the extent authority to apply additional fitness standards is vested by statute in an agency.” Civil Service Rule VI (5 CFR 6.3(b)), as amended by E.O. 13764 section 1, likewise provides that appointments and position changes in the excepted service are “subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations” as prescribed by the Director.

E.O. 13467, as amended, section 1.1 provides that policies and procedures for suitability and fitness “shall be aligned using consistent standards to the extent possible” and “shall provide for reciprocal recognition.” Further, “agencies shall accept background investigations and adjudications conducted by other authorized agencies unless . . . a particular background investigation or adjudication does not sufficiently address the standards used by that agency in determining the fitness of its excepted service employees who cannot be noncompetitively converted to the competitive service.” E.O. 13467, as amended, section 2.2. The Executive Order assigns responsibility to the Director of OPM, as the Suitability and Credentialing Executive Agent, to give effect to these requirements through regulations, guidance, and standards (E.O. 13467, as amended, section 2.5).

Accordingly, OPM is proposing that agencies use the same system for designating position risk (*i.e.*, low, moderate or high risk) for excepted service positions as is used for assessing risk to the Public Trust for positions in the competitive service, positions in the excepted service that non-competitively convert to the competitive service, and career appointments to the Senior Executive Service. This system is currently used to determine the appropriate level of suitability investigation for employment in the competitive service, and OPM is proposing the same standards, requirements, and reciprocity rules for fitness investigations for employment in the excepted service. As required by E.O. 13467, as amended, OPM is prescribing exceptions from reciprocity

where agencies have additional adjudicative standards or investigative requirements for certain excepted service positions (E.O. 13467, as amended, section 2.2).

E.O. 13488 of January 16, 2009, as amended by E.O. 13764, establishes that “[c]ontractor employee fitness or nonappropriated fund employee fitness is subject to the same position designation requirements and investigative standards, policies, and procedures as fitness determinations for civil service employees, as prescribed by the Office of Personnel Management under the Civil Service Rules” (E.O. 13488, as amended, section 3(b)). Likewise, “[f]itness determinations and investigations for fitness determinations for contractor employees and nonappropriated fund employees are subject to the same reciprocity requirements as those for employment in the civil service, as prescribed by the Office of Personnel Management under the Civil Service Rules” (E.O. 13488, as amended, section 3(c)). Therefore, OPM is proposing that contractor and nonappropriated fund populations, as they are defined in this proposed change, are subject to the same position designation, investigative, and reciprocity requirements as positions in the competitive service, the excepted service (including positions where the incumbent can non-competitively convert to the competitive service), and for career appointments to the Senior Executive Service.

OPM’s proposed rule does not, however, cover contractor populations in any element of the intelligence community or where OPM is statutorily precluded from prescribing standards. Nor does OPM’s proposed rule specifically address investigative requirements for eligibility for access to classified information or for employment in sensitive (national security) positions, matters that are addressed in 5 CFR part 1400 and in issuances by the Director of National Intelligence acting as the Security Executive Agent under E.O. 13467. However, the proposed rule continues the existing requirement (5 CFR 731.106(c)(2)) that a position must be designated based both on its public trust risk and its national security sensitivity so that the appropriate level of investigation is conducted to address both suitability and national security concerns. Complementary language appears in 5 CFR 1400.201.

The position designation, reciprocity, and investigation requirements for contractors that OPM is proposing to codify in part 731 are not new. Since 2009, E.O. 13488 has covered contractor

fitness, giving agency heads the discretion on the fitness criteria, but requiring them to take into account OPM guidance when considering if the criteria was equivalent for the purpose of making a reciprocally acceptable determination. Per E.O. 13488, reciprocity for fitness and suitability determinations applied to contractors, and agencies had to report the nature and results of background investigations and fitness determinations to the government-wide investigations and adjudications index.

Likewise, the requirement for contractor<sup>1</sup> employees to be subject to the same investigative requirements as apply to Federal employees has been in place since 2012. In a December 6, 2012, memorandum issued by the Security, Suitability, and Credentialing Performance Accountability Council<sup>2</sup> (PAC) titled *Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards*, the PAC “in consultation with other affected agencies, including the Department of Defense, determined that contractor employees should be subject to the same Federal Investigative Standards (“Standards”) as apply to Federal employees.” Consistent with E.O. 13467, which authorized the PAC to assign functions related to matters such as alignment and improvement of investigations and contractor employee fitness, the PAC via this memorandum, assigned the Director of OPM the function of prescribing investigative standards for “contractor employee fitness” which at that time was defined in section 1.3(f) of E.O. 13467 as “fitness based on character and conduct for work for or on behalf of the Government as a contractor employee.”

In December 2012, the Executive Agents issued the revised Federal Investigative Standards which “apply to all individuals working for or on behalf of the executive branch and individuals with access to federally controlled facilities and information systems.” The Standards were established for investigations to determine eligibility for logical and physical access, suitability for Government employment,

<sup>1</sup> Contractors, were defined in E.O. 13467 when issued on June 30, 2009, as experts or consultants (not appointed under section 3109 of title 5, United States Code, to an agency; an industrial or commercial contractor, licensee, certificate holder, or grantee of any agency, including all subcontractors; a personal services contractor, or any other category of person who performs work for or on behalf of an agency (but not a Federal employee)).

<sup>2</sup> The PAC was previously referred to as the Suitability and Security Clearance Performance Accountability Council.

eligibility for access to classified information, eligibility to hold a sensitive position, and fitness to perform work for or on behalf of the Government as a contractor employee.

When E.O. 13467 was amended in 2017, the definition of “covered individual” was revised to include “a person who performs, or seeks to perform, work for or on behalf of the executive branch (e.g., Federal employee, military member, or contractor).” The definition of “fitness” was also revised to mean “the level of character or conduct determined necessary for an individual to perform work for or on behalf of a Federal agency as an employee in the excepted service (other than a position subject to suitability), or a ‘contractor employee’ or as a ‘nonappropriated fund employee’ as those terms are defined in Executive Order 13488 of January 16, 2009, as amended.” The definition of “contractor employee” in section 2(b) of E.O. 13488, was also amended, and now reads as “an individual who performs work for or on behalf of any agency under a contract and who, in order to perform the work specified under the contract, will require access to space, information, information technology systems, staff, or other assets of the Federal Government, and who could, by the nature of his or her access or duties, adversely affect the integrity or efficiency of the Government. Such contracts include, but are not limited to: (i) personal services contracts; (ii) contracts between any non-Federal entity and any agency; and (iii) sub-contracts between any non-Federal entity and another non-Federal entity to perform work related to the primary contract with the agency.”

Finally, with the amendments to E.O. 13488, agency heads retained the discretion to establish adjudicative criteria for determining fitness of contractor employees but with due regard to OPM prescribed regulations and guidance. Furthermore, the E.O. set forth in section 3(b) and (c) that investigations for contractor employee fitness are subject to the same position designation requirements, investigative standards, policies, and procedures as fitness determinations for civil service employees, as prescribed under the Civil Service Rules and reciprocity of fitness determinations and investigations are subject to the same reciprocity requirements.

#### *Continuous Vetting Requirements*

Continuous vetting refers to the process of “reviewing the background of a covered individual at any time to determine whether that individual

continues to meet applicable requirements.” E.O. 13467, as amended, § 1.3. In the context of suitability and fitness for employment, continuous vetting is used to determine if an individual remains suitable or fit for a position over time. A covered individual, as defined in E.O. 13467, as amended, § 1.3 is, with limited exceptions, “. . . a person who performs, or who seeks to perform, work for or on behalf of the executive branch (e.g., Federal employee, military member, or contractor), or otherwise interacts with the executive branch such that the individual must undergo vetting.” In accordance with E.O. 13467, as amended, section 2.1, “[a]ll covered individuals shall be subject to continuous vetting under standards (including, but not limited to, the frequency of such vetting) as determined by the Security Executive Agent or the Suitability and Credentialing Executive Agent exercising its Suitability Executive Agent functions, as applicable.” Further, E.O. 13467, as amended, section 2.5, requires the Director of OPM as the Suitability Executive Agent, to be responsible for “prescribing applicable investigative standards, policies, and procedures.” OPM is proposing changes in regulation to implement the continuous vetting requirement set forth in E.O. 13467, as amended, section 2.1, as amended. Specifically, any individual occupying a position that is subject to investigation, as described in the proposed § 731.104(a)(1) through (3), will also be subject to continuous vetting. The nature and specificity of continuous vetting checks will be further defined in supplemental issuances, but requirements will account for position risk and sensitivity designations.

#### *Elimination of Fixed, Five-Year Periodic Reinvestigation Requirement for Public-Trust Positions*

E.O. 13467, as amended, section 1.1, directs that, “The Government’s tools, systems, and processes for conducting . . . background investigations and managing sensitive investigative information should keep pace with technological advancements, regularly integrating current best practices to better anticipate, detect, and counter malicious activities, and threats posed by external or internal actors who may seek to do harm to the Government’s personnel, property, and information.” Further, E.O. 13467, as amended, section 1.1, directs that, “Executive branch vetting policies and procedures shall be sustained by an enhanced risk-management approach that facilitates

early detection of issues by an informed, aware, and responsible Federal workforce; results in quality decisions enabled by improved vetting capabilities; and advances Government-wide capabilities through enterprise approaches.” These principles inform the design of continuous vetting, as described above.

E.O. 13488 section 5 directed OPM to prescribe the standards for frequency of reinvestigations but does not itself impose a fixed cycle for reinvestigations.

OPM’s current regulations in 5 CFR 731.106 provide that reinvestigations of individuals in moderate- and high-risk public trust positions should be conducted at least every five years. Further, the 2012 Federal Investigative Standards sections 7.4.1 and 9.4.2 established that individuals in Tier 2 and Tier 4 positions (nonsensitive positions designated as moderate and high-risk public trust) “shall be reinvestigated at least once every five years and as event driven, subject to implementing guidance.” As such, excepted service and contractor employees covered by the Federal Investigative Standards have also been subject to reinvestigation requirements.

Given the direction of E.O. 13467, as amended, section 2.1 that all covered individuals (as defined in the E.O.) undergo continuous vetting, OPM is proposing to amend part 731 to make clear that all individuals covered under this part, regardless of risk level (i.e., low risk, moderate risk, high risk) must undergo continuous vetting for suitability and fitness. At the same time, OPM is proposing to remove the existing requirement for a periodicity of at least once every five years for Public Trust reinvestigations and to establish that continuous vetting for individuals in public trust positions satisfies the requirement for periodic reinvestigations of individuals in public trust positions as directed in E.O. 13488, as amended.

By removing the requirement for a five-year periodicity for Public Trust reinvestigations from the current regulations, OPM will be able to establish, through supplemental guidance, the periodicity of checks to be conducted under a continuous vetting framework based upon position risk and sensitivity. The nature of the continuous vetting checks are established in supplemental guidance issued by OPM, taking into account position risk and sensitivity when establishing the requirements. For example, continuous vetting checks of individuals in low risk positions will be minimal, whereas continuous vetting checks of

individuals in moderate and high risk positions will likely be more involved according to position risk. OPM anticipates that checks will be required at regular intervals as determined by the type of check (*i.e.*, certain checks may be conducted daily while others may be yearly), with developed information being subject to expansion or follow-up, depending on the adjudicative relevance or significance. With this new model, the expectation is that checks will be conducted by authorized Investigative Service Providers (ISP) while other information may come from within the agency from complementary mission areas (*e.g.*, Employee Relations, Counterterrorism/Counterintelligence units, etc.).

The proposed change to implement continuous vetting for covered positions and in place of existing Public Trust reinvestigations has no bearing on requirements for agencies to conduct initial investigations as is prescribed in the regulations. OPM describes the major proposed changes in a section-by-section analysis below.

This proposal parallels a separate forthcoming rulemaking by OPM and the Office of the Director of National Intelligence (ODNI) to amend 5 CFR 1400.203 to remove a current requirement, parallel to the requirement in 5 CFR 731.106, that persons in sensitive positions must undergo a national security reinvestigation at least once every five years, thereby aligning the periodic reinvestigation requirements for public trust positions and for national security positions. Under 50 U.S.C. 3352b, the Director of National Intelligence, as the Security Executive Agent, has the authority to prescribe a strategy such that individuals in national security sensitive positions are continuously vetted and reinvestigations for persons requiring security clearances will be conducted only as needed based on risk, with exceptions for designated national security populations requiring reinvestigation at more regular intervals.

## Section by Section Analysis

### Authorities

OPM is proposing to add Civil Service Rule 6 and E.O. 13764 to the list of authorities and to address Presidential Memorandum—Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulty Through no Fault of Their Own that resulted in previous changes to the regulation. OPM is anticipating additional changes to the authorities through a separate rule

implementing provisions of 5 U.S.C. 9201–9206 (The Fair Chance to Compete for Jobs Act).

### Part 302

#### *Section 302.108 Determinations of Fitness for Employment in an Excepted Service Position Based on Character and Conduct*

OPM is proposing to add section 302.108 to Subpart A to incorporate the requirements of E.O. 13764 section 1. This proposed section clarifies that positions filled in the excepted service are subject to the provisions of part 731. The title of the section emphasizes that the provision does not address qualifications for excepted service positions based on, for example, education and experience. Under Civil Service Rule VI (5 CFR 6.3), these matters are prescribed “in accordance with such regulations and practices as the head of the agency concerned finds necessary,” subject to general requirements of Federal employment law (*e.g.*, that hiring practices be job-related and consistent with business necessity). Rather, this provision concerns fitness of character for appointment for a position in the excepted service.

#### *Section 302.203 Standard and Criteria for Determining Fitness for Employment in an Excepted Service Position Based on Character and Conduct*

OPM is proposing to revise this section by replacing the non-exclusive list of disqualifying factors for an excepted-service appointment with the minimum fitness standards that must be used when making fitness determinations under part 731 of this chapter. The current list of disqualifying factors in section 302.203 is not consistent with those in section 731.202 and includes obsolete criteria derived from E.O. 10450 of April 27, 1953 (revoked in 2017).

### Part 731

#### *Section 731.101 Purpose*

OPM is proposing to amend this section by reordering information and placing the definitions up front, and to revise the purpose to encompass the new requirements with respect to position designation, investigations, continuous vetting, and reciprocity for the excepted service, for contractor employees, and for nonappropriated fund employees under the jurisdiction of the Armed Forces. OPM is proposing to amend the definition for “covered positions” to make the distinction between (1) positions in the competitive service, positions in the excepted

service where the incumbent can non-competitively convert to the competitive service, and career appointments in the Senior Executive Service, from (2) other positions that will now also be covered by the rule. The term “covered positions” is replaced with “competitive service or career Senior Executive Service” positions throughout the regulation. As was explained in a prior **Federal Register** notice (72 FR 2203, January 18, 2007), positions that begin with an initial appointment in the excepted service when that appointment can lead to conversion to the competitive service through a continuous process are subject to OPM’s suitability authority and are treated in the same manner as positions in the competitive service.

OPM is proposing to define the “excepted service,” for purposes of its authority under part 731, as any position excepted from the competitive service or the Senior Executive Service of the of the executive branch, except for (A) positions in any element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent they are not otherwise subject to OPM appointing authorities, (B) positions where OPM is statutorily precluded from prescribing such standards, and (C) positions when filled by political appointment. These exceptions are in Civil Service Rule II, 5 CFR 2.1(a)(iv), as added by E.O. 13764. OPM is also excluding noncareer, limited term, and limited emergency appointments in the SES. These appointments are not currently subject to OPM’s suitability jurisdiction under part 731 or under E.O. 13764.

OPM is also excluding political appointees from its definition of the “excepted service” for purposes of suitability and fitness under part 731. OPM has determined that the Director of OPM does not have the authority to prescribe standards of fitness and related vetting requirements for political appointments. See *Review of Agency Schedule C Appointments by the Exec. Office of the President*, 6 U.S. Op. O.L.C. 114, 116 (1982).

OPM is proposing to also amend the definitions for “appointee” and “employee” to establish that individuals who meet the definition of appointee and who are also serving a probationary or trial period, will remain an “appointee” until the probationary or trial period ends. The proposed changes to the definition for “employee” are to reconcile with the proposed changes to the definition of “appointee.” OPM is also proposing to add definitions for “contractor employee,” “employment subject to investigation,” “fitness,”

“fitness determinations,” and “nonappropriated fund employees.” Finally, OPM is proposing to amend the definitions for “suitability action” and “suitability determination” to reflect their application to positions in the “competitive service or career appointments to the Senior Executive Service.”

#### *Section 731.102 Implementation*

OPM is proposing to add a reference to “fitness” investigations and to clarify that policies, procedures, criteria, standards, quality control procedures, and supplementary guidance for implementation of this part may come in the form of OPM or joint Executive Agent issuances. OPM is also proposing to remove current § 731.102(b), which refers to screening requirements for access to automated information systems that are no longer current. Under Office of Management and Budget (OMB) Circular A–130, as recently amended, agencies must follow OMB information security policies, and requirements issued by OPM, the Departments of Commerce and Homeland Security, and the General Services Administration on access to federally-controlled information systems, including personal identity verification. OPM will address personal identity verification in its role as Credentialing Executive Agent in separate rulemaking. OPM is adding a reference to section 1.1(e) of E.O. 13467, which addresses control and appropriate uses of reports of investigation and other material developed during the vetting process.

#### *Section 731.103 Delegation to Agencies for Competitive Service Positions*

OPM is proposing to move the information currently in § 731.103(d) and (e) to § 731.106 as it applies to all positions subject to position designation, investigation, continuous vetting, and reciprocity as defined in the proposed rule.

OPM is also proposing to revise the delegation to agencies for making suitability determinations and taking suitability actions in the case of positions in the competitive service, positions in the excepted service that convert non-competitively to the competitive service, and career appointments to the Senior Executive Service. For such positions, OPM proposes to retain jurisdiction in cases where there is evidence of conduct that falls within any of four new suitability factors at § 731.202(b)(7) (“Knowing engagement in an act or activity with the purpose of overthrowing Federal,

State, local, or tribal government”), (8) (“An act of force, violence, intimidation, or coercion with the purpose of denying another individual the free exercise of rights under the U.S. constitution or any state constitution”), (9) (“Attempting to indoctrinate another or to incite another to action in furtherance of an illegal act”), and (10) (“Active membership or leadership in a group with knowledge of its unlawful aim, or participation in such a group with a specific intent to further its unlawful aim”), as proposed to be added further below. These four new factors would replace the current § 731.202(b)(7), “Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.”

In addition, OPM is proposing to add language to clarify that OPM retains jurisdiction under this part regardless of whether an agency may adjudicate the issue(s) under another authority.

#### *Section 731.104 Investigation and Reciprocity Requirements*

OPM is proposing to address the subject-to-investigation requirement for “competitive service or career Senior Executive Service” and “excepted service” positions, as well as for “contractor employees” and “nonappropriated fund employees,” in this section, and to move the requirements for reciprocity to this section. With respect to investigation and reciprocity requirements, OPM is proposing to amend the rule to reflect that a new investigation is not required when the individual appointed has undergone a background investigation that is at or above the level required for the position, removing existing provisions that have limited the ability of agencies to reciprocally accept prior investigations that were done for certain position types and/or were not adjudicated under suitability or equivalent criteria. OPM is also proposing to remove the 24-month break-in-service provision for applying reciprocity. A policy, issued by the Executive Agents as part of the Trusted Workforce 2.0 effort, establishes a new process for applying reciprocity to prior investigations upon a return to service. The new requirement will expand the window of time for which a break in service may last without requiring the individual to undergo a new investigation upon returning to service. OPM proposes that upon reentry into Federal service, individuals will need to be enrolled in continuous vetting consistent with new requirements that are being proposed in § 731.106(d). With the implementation of continuous vetting, agencies can accept the return

to service of an individual, without requiring another full background investigation, with a reduced amount of risk.

In § 731.104(a)(3), OPM proposes to remove “seasonal” positions from the list of positions that do not require a background investigation for suitability or fitness as described in § 731.106(c)(1). According to 5 CFR 340.401(a), “(s)easonal employees are permanent employees who are placed in a nonduty/nonpay status and recalled to duty in accordance with preestablished conditions of employment.” Because of the positions’ permanent character, they implicate different risks than temporary appointments, and should not be treated the same.

#### *Section 731.105 Authority To Take Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service*

OPM proposes a change to clarify that OPM, or agencies with delegated authority, have authority to take suitability actions, in accordance with the procedures and provisions outlined elsewhere in this part, in cases where an applicant for or appointee to a “competitive service or career Senior Executive Service” position is moving from another type of position, even if the applicant or appointee is not required to undergo a new investigation because a prior one is reciprocally accepted in accordance with the requirements outlined in § 731.104(a).

In § 731.105(a), OPM proposes a clarifying edit in reference to the ability of OPM or an agency to pursue a suitability action against an individual whose status may change in the course of the suitability action process (for example, OPM or the agency may pursue an action against an appointee who resigns after receipt of the notice of proposed action).

In § 731.105(c), OPM proposes changes for correctness, and in § 731.105(d), a change is proposed related to OPM’s retained jurisdiction to make determinations and take actions against an “employee” based upon conduct under the suitability factors proposed to replace the current factor at § 731.202(b)(7).

#### *Section 731.106 Designation of Public Trust Positions and Investigative Requirements*

OPM proposes a clarifying edit to § 731.106(c) with regard to the timing of the initiation of investigations, which should be prior to appointment. In § 731.106(c)(2), OPM proposes to update references to 5 CFR part 1400 for guidance on designating position



sensitivity. The current references to part 732 are obsolete.

OPM proposes to move information from § 731.103 that addresses the timing of collection of criminal and credit history to this section. In a separate notice, OPM is proposing to revise this language to implement changes required by the Fair Chance to Compete for Jobs Act (Pub. L. 11–92–Dec. 20, 2019). Finally, OPM proposes changes to implement continuous vetting for low-risk and public trust positions.

In § 731.106(f), OPM proposes edits to make the information current.

*Subpart B—Determinations of Suitability or Fitness; Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service*

OPM proposes changes to this subpart to implement the minimum standards of fitness for excepted service positions (those not subject to suitability determinations and actions) and to make changes aimed at increasing alignment between suitability and fitness criteria and those for other vetting domains. The minimum standards of fitness in part 731 will supersede the disqualifying factors in part 302. While agencies may supplement the minimum standards of fitness when job-related and consistent with business necessity, OPM is proposing that agencies must make the additional factors a matter of record.

*Section 731.201 Standard*

OPM proposes a change to reflect that the standard for both suitability and fitness determinations and for suitability actions is to protect the integrity and promote the efficiency of the service.

*Section 731.202*

OPM proposes edits to clarify that the criteria in this section apply also to fitness determinations for excepted service positions covered by this part, unless otherwise noted, and that when used to make determinations for eligibility to hold a Personal Identity Verification Credential, agencies must also ensure they have verified the individual's identity as specified in OPM's credentialing procedures or subsequent regulation. Further, OPM proposes that while the factors will establish the minimum standards of fitness for the excepted service, agencies may prescribe additional factors to protect the integrity and promote the efficiency of the service when job-related and consistent with business necessity. Additional factors shall be

made a matter of record and furnished to the applicant, upon request.

OPM proposes changes to the suitability factors at § 731.202(b), as follows:

- Separate *criminal and dishonest conduct* into two separate factors. Separating these considerations into two distinct factors will provide clarity that dishonest conduct need not be criminal to be considered relevant to a determination of suitability or fitness;
- Adjust the punctuation in factor (3) to clarify that falsification or deception or fraud occurs in connection with the examination or appointment process;
- Eliminate current factor (4) *Refusal to furnish testimony as required by § 5.4 of this chapter*. Use of this factor was reserved by OPM. If eliminated, this change does not otherwise affect requirements established by § 5.4 nor does it limit an agency's ability to appropriately deal with an employee's refusal to furnish testimony under other applicable authorities.
- Revise factors (5) and (6), by striking the requirement that evidence of rehabilitation must be "substantial." The requirement that agencies must consider whether there is evidence of rehabilitation prior to making a determination that one is unsuitable based upon alcohol abuse or illegal drug use is long standing. The suitability criteria contain an additional consideration for rehabilitation at § 731.202(c)(7) that must be considered along with the alcohol and drug factors. However, that consideration, the absence or presence of rehabilitation or efforts toward rehabilitation, does not qualify or emphasize the rehabilitation must be "substantial"; therefore, the change is to align the factor and additional consideration.
- Revise factor (5), to change "*alcohol abuse*" to "*excessive alcohol use*." OPM is proposing to revise the factor to address "excessive alcohol use" rather than "alcohol abuse." We believe this change better represents the intent of the factor which is to account for an individual's problematic misuse of alcohol, such as by binge drinking or heavy drinking, over a period of time, and suggesting that the individual would be prevented from performing the duties of the position or would constitute a direct threat to the property or safety of themselves or others as a result.
- Replace factor (7), which currently reads: *Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force* with four distinct factors:
  - *Knowing engagement in acts or activities with the purpose of*

*overthrowing Federal, State, local, or tribal government.*

- *Acts of force, violence, intimidation, or coercion with the purpose of denying others the free exercise of their rights under the U.S. constitution or any state constitution.*
- *Attempting to indoctrinate others or to incite them to action in furtherance of illegal acts.*
- *Active membership or leadership in a group with knowledge of its unlawful aims, or participation in such a group with specific intent to further its unlawful aims.*

This proposed change is to broaden the types of conduct covered to include not only acts to attempt to overthrow the Federal Government but also to overthrow state, local, or tribal governments, to engage in violent and unlawful civil rights offenses, and to engage in association or advocacy to commit illegal acts. These more nuanced factors are narrowly tailored to address conduct that is not protected by the First Amendment, that has a clear nexus to the integrity and efficiency of the civil service, and that poses significant insider threat risks to Federal agencies and to the public they serve. Updating the suitability factors will help OPM fulfill the requirement of E.O. 13467, as amended, section 1.1, that "Executive branch vetting policies and procedures shall be sustained by an enhanced risk-management approach that facilitates early detection of issues by an informed, aware, and responsible Federal workforce."

Adoption of the new factors also furthers Strategic Goal 3.3 of the National Strategy for Countering Domestic Terrorism to "ensure that screening and vetting processes consider the full range of terrorism threats" and to "augment the screening process for . . . any government employee who receives a security clearance or holds a position of trust."<sup>3</sup> Adoption of the factors will permit OPM to update related information collections consistent with Strategic Goal 3.3, and to better address risks associated with, for example, racially- or ethnically-motivated unlawful acts of violent extremism and anti-government or anti-authority domestic terrorism.<sup>4</sup>

<sup>3</sup> National Security Council, National Strategy for Countering Domestic Terrorism, Strategic Goal 3.3, at 26 (June 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

<sup>4</sup> A provision of Federal law, 18 U.S.C. 2331, defines domestic terrorism "as "activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State ; appear to be intended to intimidate



which have been identified as emergent threats posing a significant public safety challenge.<sup>5</sup>

- Add a factor for *Violent behavior*. This proposed change is for clarity and specificity, to account for violent behavior that does not squarely fall under another factor, such as violent behavior that occurs outside of the workplace and may not be considered criminal or dishonest in nature. We believe that the current suitability factors for “misconduct or negligence in employment” and for “criminal or dishonest conduct” do not convey the gravity of the risk posed by violent behavior, particularly for positions in, for example, law enforcement, patient care, childcare, and front-line customer service. For the purposes of this regulation, the term “violent” means using or involving physical force intended to hurt, damage, or kill someone or something. Guidance for considering what may constitute violent behavior will be provided via supplemental issuance.

- Renummer the factors in accordance with the proposed changes.

#### *Section 731.203 Suitability Actions by OPM and Other Agencies for the Competitive Service or Career Senior Executive Service*

The proposed change is to limit jurisdiction only to OPM for suitability determinations and actions in the case of “competitive service or career Senior Executive Service” positions that are based upon the factors proposed to replace the current factor at § 731.202(b)(7). Agencies must refer these cases to OPM for suitability determinations and suitability actions under this authority (though agencies are not prohibited from taking appropriate action under separate authorities). Conduct of this nature, if substantiated, would make one unsuitable for any position in the competitive service or for a career appointment to the Senior Executive Service. As such, OPM is reserving jurisdiction for taking suitability actions in these cases. The proposed changes also seek to clarify that OPM may take an action under this part even when an agency takes an action based upon another authority and to specify that agencies must report suitability determinations and actions on

investigated individuals into the government-wide repository.

#### *Section 731.204 Debarment by OPM in Cases Involving the Competitive Service and Career Senior Executive Service*

The proposed change clarifies that OPM may impose an additional period of debarment concurrent to an existing debarment when new conduct arises. OPM may pursue suitability actions, in accordance with the procedures outlined in this part, as appropriate when there is new conduct of suitability concern, even when the individual is already serving a period of debarment. For example, if an individual who is barred from applying to the competitive service and career Senior Executive Service makes application for a covered position and does not report the debarment, when required, OPM may consider imposing an additional period of debarment due to a material, intentional false statement.

#### *Section 731.206 Reporting Requirements for Investigations and Suitability and Fitness Determinations*

The proposed change reflects that agencies must report the level, nature, and completion date of investigations and reinvestigations, as well as continuous vetting enrollment, into the government-wide central repository.

#### *Section 731.302 Notice of Proposed Action and 731.402 Notice of Proposed Action*

OPM is proposing to expand the methods for delivery of a notice of proposed action to include secure email.

#### *Subpart F—Savings Provision*

OPM is proposing to eliminate this Subpart as obsolete.

### **Expected Impact of This Proposed Rule**

The expected benefits of the proposed rule are to further establish standards and processes by which OPM and agencies efficiently and appropriately vet individuals to assess risk to the integrity and efficiency of the service. These changes promote a more trusted workforce to serve the American public through an enhanced risk management approach for personnel vetting, one which advances the mobility of the workforce to support agency mission needs. Establishing a continuous vetting approach for all populations subject to personnel vetting provides a framework for modernized investigative and adjudicated processes that leverage available, appropriate technology to replace costly and time-consuming labor-intensive processes that have burdened efforts by agencies to acquire

top talent in a timely manner. Further, the new model assists agencies in managing and reducing risk by providing more timely information than was possible under the prior investigative model.

This proposed rule provides greater consistency in vetting processes and where possible, is cost saving by reducing redundancy and duplication and using modernized processes for collecting information. By establishing minimum standards of fitness for the excepted service that align to OPM’s suitability standards, there is a greater likelihood that individuals will be assessed using consistent standards, thus providing the basis for application of reciprocity when moving between positions. The impact to agencies’ personnel vetting programs is reduced when they can reciprocally apply prior determinations rather than making new determinations or requesting new investigations.

In particular, OPM anticipates reduced impacts to agencies as they transition from a full reinvestigation of every public trust employee every five years to reinvestigation only as needed and to continuous vetting that relies extensively on automated sources. Although agencies will also need to enroll their low risk population, which is not currently subject to reinvestigation requirements, into continuous vetting, the cost impacts may be offset by savings associated with the move from periodic reinvestigations to continuous vetting for their sensitive and nonsensitive public trust populations. Under the Trusted Workforce 2.0 initiative, the Security Executive Agent and the Suitability and Credentialing Executive Agent have directed agencies to begin enrolling the national security sensitive population into continuous vetting in lieu of the traditional periodic reinvestigations. Through a phased process, agencies are initiating their national security sensitive populations into continuous vetting and eventually, individuals will be enrolled into continuous vetting at the onset of their initial background investigation. We envision following a similar iterative approach for low risk and public trust populations, upon implementation.

Further, since each individual’s investigation will always be up to date through the continuous vetting approach, agencies will no longer need to await results of a new background investigation and will instead be able to onboard individuals more quickly into new positions, while only having to request investigation necessary to cover any investigative gaps that may be due

or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.”

<sup>5</sup> See National Strategy for Countering Domestic Terrorism at pages 8–11.

to changes in position risk and/or sensitivity.

Agencies' populations of individuals subject to continuous vetting are those populations already subject to Federal personnel vetting investigative standards as described previously, including contractor employees with long term access to Federal facilities and information systems. Even prior to more recent Executive Orders and policy requirements requiring personnel vetting investigations and determinations on contractors, the FAR Council published a final rule in November 2006, amending the Federal Acquisition Regulation to require contracting officers to incorporate the requirement for contractors to comply with agency verification procedures—implementing Homeland Security Presidential–12 (HSPD–12), Office of Management and Budget (OMB) guidance M–05–24, and Federal Information Processing standards Publication (FIPS PUB) number 201 when applicable to be performed under the contract. Aside from the new requirement for individuals in low risk positions to be continuously vetted, agencies and contractor employees supporting agencies when long term access to Federal facilities and information systems is required should be familiar with personnel vetting requirements.

#### Cost

This proposed rule will affect the operations of most Federal agencies in the Executive branch—ranging from cabinet-level departments to small independent agencies. In order to comply with the regulatory changes in this proposed rule, affected agencies will need to review the rule and update their policies and procedures. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2023 for GS–14, step 5, from the Washington, DC, locality pay table (\$150,016 annual locality rate and \$71.88 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$143.76 per hour. We estimate that, in the first year following publication of the final rule, the effort to update policies and procedures will require an average of 250 hours of work by employees with an average hourly cost of \$143.76. This effort would result in estimated costs in the first year of implementation of about \$35,940 per agency, and about \$2,875,200 in total Government-wide.

The ongoing administrative costs to agencies for continuous vetting enrollment of existing and new individuals working for or on behalf of the Government will vary depending on the makeup of each agency's populations with regard to their affected Federal and contract positions and the risk levels of those positions. As noted, agencies' populations of individuals subject to continuous vetting are those populations already subject to Federal personnel vetting investigative standards as described previously, including contractor employees with long term access to Federal facilities and information systems. The extent to which such individuals have previously been subject to periodic reinvestigation requirements depended on the nature of their access or duties. Those in national security sensitive positions have long been subject to periodic reinvestigation requirements and more recently to continuous vetting requirements. Those in nonsensitive public trust positions have been subject to periodic reinvestigations for suitability, as described previously. Each agency is responsible for assessing the risk level at the low, moderate, or high level for each position within their agency. Each agency is therefore best positioned to know the number of employees in positions at each level and the number of individuals associated with the personnel vetting requirements at each respective investigative tier. Each agency will have different numbers of positions at each risk level and the proportion of low, moderate, and high risk positions will vary. Subsequently, the cost of continuous vetting for the low risk and public trust population will vary amongst the Federal agencies.<sup>6</sup> To assist Federal agencies in budget development, the Defense Counterintelligence and Security Agency (DCSA) has released its fiscal year 2024 price estimates, including pricing for the initial continuous vetting capability for low risk and non-sensitive public trust positions. For fiscal year 2024, agencies can expect to pay a \$3 monthly subscription fee for active enrollees in low risk and nonsensitive public trust continuous vetting. By comparison, DCSA's price for a standard service, nonsensitive high risk public trust reinvestigation (Tier 4) in FY 2024 is \$2400, which amortized over five years equates to approximately \$40

<sup>6</sup> Federal agencies are responsible for appropriate vetting of their personnel according to standards set by the Security and Suitability & Credentialing Executive Agents and pay for background investigations and continuous vetting checks on contractor personnel as well as federal appointees and employees.

monthly. Agencies utilizing continuous vetting in FY 2024 for their nonsensitive high risk public trust populations would avoid \$2,220 in personnel vetting costs over five years for each such position. The delta between reinvestigation costs and initial continuous vetting checks for nonsensitive moderate risk positions is not as significant; still, agencies would avoid \$180 in personnel vetting costs over five years for such positions given the FY 2024 cost of \$360 for each nonsensitive moderate risk public trust reinvestigation. Conversely, agencies enrolling low risk populations will pay \$36 yearly, based upon DCSA's FY 2024 price estimates, for continuous vetting on a population that to date has not been subject to reinvestigation requirements. While DCSA's FY 2024 pricing reflects initial pricing for continuous vetting for this population, future costs for continuous vetting for the low risk population are not expected to rise to the cost of checks for the national security population, since checks on the low risk population will be much less expansive than those on the national security population. An additional factor that agencies will need to consider when assessing budget impacts of continuous vetting is the cost avoidance realized by the move from periodic reinvestigations to continuous vetting of their sensitive populations. To illustrate how the impacts to agency budgets will vary, the following examples are provided of a department, the Department of Veterans Affairs (VA), that is comprised mainly of nonsensitive positions and a department that is comprised mainly of sensitive positions, the Department of Defense (DoD). The VA has vastly more nonsensitive positions—approximately 513,400—than sensitive positions—approximately 9,000. Their positions are largely nonsensitive low risk, with approximately 455,000 Federal and contractor personnel in low risk positions, with some nonsensitive public trust positions, 41,200 in nonsensitive moderate risk public trust positions, and 17,200 in nonsensitive high risk public trust positions. Under the current requirement to request a reinvestigation for public trust positions every five years and considering FY 2024 DCSA pricing, the VA should anticipate paying \$56,112,000<sup>7</sup> in total for nonsensitive public trust reinvestigations over five years. With continuous vetting, the annual cost of enrolling the public trust population for fiscal year 2024 would be \$2,102,400, or \$10,512,000 over five years, equating to

<sup>7</sup> This is based upon DCSA's FY24 pricing estimate.

\$45,600,000 in cost avoidance for the nonsensitive moderate and high risk positions over the five year cycle. For continuous vetting of the low risk population, VA would expect to pay DCSA \$16,380,000 annually or \$81,900,000 over five years. For any sensitive positions the VA has, they may also recognize the cost savings between the periodic reinvestment products and continuous vetting product for sensitive positions. The cost implications for enrollment of VA's 9,000 sensitive positions into continuous vetting could range from an additional cost of \$810,000 over five years to cost avoidance of \$21,285,000 depending on the proportion of noncritical sensitive positions (Tier 3) and critical sensitive/special sensitive positions (Tier 5). Thus the total cost of the shift to continuous vetting for all of VA's populations subject to this requirement, using VA's anticipated payments to DCSA for these services, will depend on the makeup of VA's population. Compare this to the Department of Defense (DOD), which has a much higher sensitive population than non-sensitive, approximately 3.5 million individuals in sensitive positions and approximately 283,000 in non-sensitive positions. With approximately 3,000 nonsensitive moderate risk positions and 560 nonsensitive high risk position, the DOD could plan to spend \$2,424,000 on periodic reinvestigations over five years for their nonsensitive public trust positions whereas continuous vetting would result in a total cost of \$640,800 and therefore \$1,783,200 in cost avoidance over that same period. The cost of enrolling DoD's 280,000 Federal and contractor low risk positions subject to the requirement would equate to an annual cost of \$10,080,000 or \$50,400,000 over five years; however, this cost would be offset not only by the cost avoidance of \$1,783,200 for the nonsensitive public trust population but also by the cost savings associated with the shift to continuous vetting from periodic reinvestigations for the sensitive population. Given that the DoD has approximately 3.5 million individuals in national security positions undergoing continuous vetting in lieu of periodic reinvestigations, the expected cost savings would be expected to offset the cost for enrollment of their low risk populations into continuous vetting.

Thus, with respect to continuous vetting, agencies may recognize a cost savings by using continuous vetting rather than the traditional reinvestment product that is currently

required for public trust positions at a five-year periodicity, and the extent of the cost savings will vary depending on the proportion of their populations with regard to risk and sensitivity levels. Additionally, cost savings may be realized since continuous vetting provides that the vetting of enrolled individuals will always be up-to-date. This will result in further cost avoidance whenever an individual requires an upgrade of their vetting level or when an individual returns to a vetted position after a break in service. Agencies will be able to onboard individuals more quickly into new positions while requesting only the investigative elements necessary to cover any investigative gaps that may be due to changes in position risk and/or sensitivity. This cost avoidance will be borne out as agencies begin to implement the new TW 2.0 policies that leverage continuous vetting for risk management. On balance, while we anticipate there may be additional costs to agencies with much greater proportions of low risk positions than nonsensitive public trust or national security positions, we do not believe that this proposed rule will substantially increase the ongoing costs to most agencies, and the benefits outweigh the costs in providing agencies greater opportunities for timely talent acquisition and reduced risk to people, property, information systems, and mission through timely delivery of relevant information.

#### *Alternatives*

OPM must comply with Executive Order direction, as previously described, to establish minimum standards of fitness based on character and conduct for appointment to positions in the excepted service of the executive branch that are to the extent practicable consistent with the standards for suitability. OPM is likewise responsible for establishing in its regulations that excepted service employee, nonappropriated fund DoD employee, and contractor employee fitness is subject to enterprise position designation requirements, investigative standards, and reciprocity requirements. Similarly, continuous vetting for all populations subject to personnel vetting has been directed by Executive Order to sustain an enhanced risk-management approach. Ultimately, the cost to agencies for establishing policies and procedures to conform to OPM's regulation in this regard are unavoidable. Such costs are offset, however, by savings and cost avoidance resulting from policy implementation. The expected impact of aligned

investigative and adjudicative standards of fitness for excepted and competitive service positions is the increased application of reciprocity, which eliminates the need for a new investigation or new adjudication. Similarly, individuals enrolled in continuous vetting will not require periodic reinvestigations, nor will they require a repeat of initial vetting, as they have to date, when moving from one position level to a higher level or when returning to a vetted position after a break in service.

Still, agencies with a greater proportion of individuals in low risk positions will incur costs as a result of the requirement for continuous vetting of this population when periodic reinvestigations were not previously required. As noted above, these costs may be offset by cost savings realized as agencies implement continuous vetting across all populations, particularly for agencies with large populations of individuals in high risk positions. However, not all agencies will realize cost savings. While there is no alternative to the policy requirement, agencies may realize some cost in the near term through phased implementation of continuous vetting for low risk populations. Such phased implementation could be accomplished through two approaches. First, implementation of the required continuous vetting checks for enrolled individuals could be eased through a phased introduction of the required checks over time. OPM anticipates utilizing this approach. Second, phased implementation could be accomplished through a phased implementation of the percent of the population required to be enrolled over time. This will enable agencies to adopt the necessary policy and procedural infrastructure necessary to execute requirements. OPM will consider this approach in developing requirements for the ongoing roll out of the Trusted Workforce 2.0 Implementation Strategy, which the PAC has established to guide agencies in developing their agency-specific implementation plans under the direction of each agency's Senior Implementation Official. Currently, enrollment of all positions subject to personnel vetting in a continuous vetting capability is targeted by the end of FY 2024.

#### **Executive Orders 13563 and 12866, Regulatory Review**

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget as a significant, but not economically significant, rule as it does not meet the annual effect of \$100 million.

### Regulatory Flexibility Act

OPM certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

### 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 proposed 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 proposed rule 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

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

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

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

Depending on the population, currently suitability and vetting information is collected through the following OMB Control Numbers.

- 3206–0261 (Standard Form 85, Questionnaire for Non-Sensitive Positions)
- 3206–0258 (Standard Form 85P, Questionnaire for Public Trust Positions and SF 85P–S, Supplemental Questionnaire for Selected Positions)
- 3206–0005 (SF 86, Questionnaire for National Security Positions)

Additional information regarding these collections of information—including all current supporting materials—can be found at <https://www.reginfo.gov/public/do/PRAMain> by using the search function to enter either the title of the collection or the OMB Control Number. Data gathered through the information collection falls under the following systems of record notice: Personnel Vetting Records System, DUSDI 02–DoD.

In a parallel effort to this proposed rule, and as part of its work with the PAC, OPM proposed a new information collection, Personnel Vetting Questionnaire (PVQ) to streamline the existing information collections, as well as the renewal cycle for them, commensurate with on-going efforts to improve personnel vetting processes and the experience of individuals undergoing personnel vetting. OPM published a **Federal Register** Notice regarding the proposed collection on November 23, 2022, and accepted comments until January 23, 2023. OPM plans to publish a **Federal Register** Notice in February 2023 announcing a thirty-day period for public comment on the proposed collection. Once the new collection is finalized, OPM plans to discontinue the current information collections.

For the populations subject to the existing collections that will be replaced by the Personnel Vetting Questionnaire, OPM does not anticipate any changes to the current total cost or burden estimates as a result of the changes in this proposed rule.

However, some individuals or populations may be required to complete an updated questionnaire in order for continuous vetting to be conducted. OPM is interested in public comment on the cost and burden implications for this potential new population.

### List of Subjects in 5 CFR Parts 302 and 731

Administrative practices and procedure, Authority delegations (government agencies), Government contracts, Government employees, Investigations.

U.S. Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM is proposing to revise parts 302 and 731 of title 5, Code of Federal Regulations as follows:

### PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

- 1. Revise the authority citation to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*; § 302.107 also issued under 5 U.S.C. 9201–9206 and Pub. L. 116–92, sec. 1122(b)(1); § 302.108 and 302.203 also issued under E.O. 13764, 3 CFR, 2017 Comp., p. 243.

- 2. Add § 302.108 to subpart A to read as follows:

#### § 302.108 Determinations of fitness for employment in an excepted service position.

(a) An agency must make fitness determinations for excepted positions in accordance with the applicable requirements of part 731 of this chapter.

(b) An agency must record its reasons for making fitness determinations under part 731 of this chapter and shall furnish a copy of those reasons to an applicant upon their request.

- 3. Revise § 302.203 to read as follows:

#### § 302.203 Standard and criteria for determining fitness for employment in an excepted service position.

(a) The minimum standard and criteria for determining fitness for employment based on character and conduct are prescribed in part 731, subpart B of this chapter.

(b) Agencies may prescribe additional factors to protect the integrity and promote the efficiency of the service, when job-related and consistent with business necessity.

## PART 731—SUITABILITY AND FITNESS

■ 4. 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, as amended; E.O. 13488, 3 CFR, 2010 Comp., p. 189, as amended; E.O. 13764, 3 CFR, 2017 Comp. p. 243; 5 CFR, parts 1, 2, 5, and 6; Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340.

■ 5. Revise subpart A to read as follows:

### Subpart A—Scope

Sec.

731.101 Purpose.

731.102 Implementation.

731.103 Delegation to agencies for the competitive service and career Senior Executive Service.

731.104 Investigation and reciprocity requirements.

731.105 Authority to take suitability actions in cases involving the competitive service and career Senior Executive Service.

731.106 Designation of public trust positions and investigative requirements.

#### § 731.101 Purpose.

(a) *Definitions.* In this part:

*Applicant* means an individual who is being considered or has been considered for employment in the *competitive service* or *career Senior Executive Service*.

*Appointee* means an individual who has entered on duty and is in the first year of employment in a *competitive service* or *career Senior Executive Service* position when it is *employment subject to investigation*. When the individual is serving a probationary or trial period, their status as an appointee will extend through the end of their initial probationary/trial period, if longer than one year.

*Core Duty* means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission.

*Competitive Service* or *career Senior Executive Service*—For the purposes of this part, “Competitive Service or career Senior Executive Service” refers to a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.

*Contractor Employee* means an individual who performs work for or on behalf of any agency under a contract and who, in order to perform the work specified under the contract, will require access to space, information,

information technology systems, staff, or other assets of the Federal Government, and who could, by the nature of their access or duties, adversely affect the integrity or efficiency of the Government. Such contracts include but are not limited to: personal service contracts; contracts between any non-Federal entity and any agency; and subcontracts between any non-Federal entity and another non-Federal entity to perform work related to the primary contract with the agency. The term contractor includes grantees of any agency or any other category of person who performs work for or on behalf of an agency (but not a Federal employee).

*Days* means calendar days unless otherwise noted in this part.

*Employee* means an individual who has completed the first year of an appointment in the Civil Service when it is *employment subject to investigation* and is no longer serving the initial probation or trial period, if applicable. In the case of an appointee whose initial probation or trial period is for more than one year, the individual will be considered an *employee* at the completion of their initial probation or trial period.

*Employment Subject to Investigation*, except as described elsewhere in this part, includes an appointment to the *competitive service* or *career senior executive service*, an appointment to the *excepted service*, employment as a *contractor employee*, or employment as a *nonappropriated fund employee*.

*Excepted Service* means any position excepted from the competitive service or the Senior Executive Service of the executive branch. For the purposes of this regulation, excepted service does not include:

(1) positions in any element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent they are not otherwise subject to Office of Personnel Management (OPM) appointing authorities;

(2) positions where OPM is statutorily precluded from prescribing such standards; and

(3) positions when filled by *political appointment*. Senior Executive Service noncareer, limited term, and limited emergency appointments are excepted from the competitive service in this part. Excepted service does not mean any position excepted from the competitive service of the executive branch that could be noncompetitively converted to the competitive service.

*Fitness* is the level of character or conduct determined necessary for an individual to perform work for a Federal agency as an employee in the *excepted*

*service*, as a *contractor employee*, or as a *nonappropriated fund employee*.

*Fitness Determination* means a decision by an agency that an individual has or does not have the required level of character and conduct necessary to perform work for a Federal agency as an *excepted service* employee. These determinations are based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

*Material* means, in reference to a statement, one that affects, or has a natural tendency to affect, or is capable of influencing, an official decision even if OPM or an agency does not rely upon it.

*Nonappropriated fund employee* means an employee paid from non-appropriated funds of an instrumentality of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces as described in section 2105 of title 5, United States Code.

*Political Appointment* means an appointment by Presidential nomination for confirmation by the Senate, an appointment by the President without Senate confirmation (except those appointed under 5 CFR 213.3102(c)); an appointment to a position compensated under the Executive Schedule (5 U.S.C. 5312 through 5316); an appointment of a White House Fellow to be assigned as an assistant to a top-level Federal officer (5 CFR 213.3102(z)); a Schedule C appointment (5 CFR 213.3301, 213.3302); a noncareer, limited term, or limited emergency Senior Executive Service appointment (5 CFR part 317, subpart F); an appointee to serve in a political capacity under agency-specific authority; and a provisional political appointment.

*Suitability action* means an outcome described in § 731.203 and may be taken only by OPM or an agency with delegated authority in the case of the *competitive service* or *career Senior Executive Service* under the procedures in subparts C and D of this part.

*Suitability determination* means a decision by OPM or an agency with delegated authority that an individual is suitable or is not suitable for employment in the *competitive service* or *career Senior Executive Service* in the Federal Government or a specific Federal agency. A determination is based on whether an individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

(b) The purpose of this part is as follows:

(1) To establish investigation, continuous vetting, and reciprocity requirements for an appointment to a position in the competitive service and excepted service, and for career appointment in the Senior Executive Service. Contractor employee fitness and nonappropriated fund employee fitness, as addressed in sections 3(b) and 3(c) of Executive Order (E.O.) 13488, are also subject to these position designation requirements, investigative standards, and reciprocity-requirements.

(2) To establish the criteria for making a determination of suitability for the competitive service or career Senior Executive Service and a minimum standard of fitness for the excepted service.

(3) To establish the procedures for taking suitability actions in the case of the competitive service or career Senior Executive Service.

(4) An Agency shall exercise due regard to this regulation and supplemental guidance if determining fitness for employment as a contractor employee or as a nonappropriated fund employee.

(c) Any determination made and action taken under this part are distinct from: an objection to an eligible or pass over of a preference eligible; OPM's or an agency's decision on a request, made under 5 U.S.C. 3318 and 5 CFR 332.406; and any determination of eligibility for access to classified information or for assignment to, or retention in, sensitive national security positions made under, E.O. 12968, E.O. 10865, or E.O. 13467, as amended, or similar authorities.

#### **§ 731.102 Implementation.**

(a) An investigation conducted under this part may not be used for any other purpose except as provided in a Privacy Act system of records notice published by the agency conducting the investigation and section 1.1(e) of Executive Order 13467, as amended.

(b) OPM may set forth any policy, procedure, criteria, standard, quality control procedure, and supplementary guidance to implement this part in an OPM or joint Executive Agent issuance.

#### **§ 731.103 Delegation to agencies for the competitive service and career Senior Executive Service.**

(a) Subject to the limitations and requirements of paragraphs (b), (d), and (f) of this section, OPM delegates to the head of an agency authority for making a suitability determination and taking a suitability action (including limited, agency-specific debarments under § 731.205) in a case involving an *applicant* or *appointee*.

(b) When an agency, acting under delegated authority from OPM, determines that a Government-wide debarment by OPM under § 731.204(a) may be an appropriate action, it must refer the case to OPM for debarment consideration. An agency must make a referral prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s) to determine if a Government-wide debarment appears warranted.

(c) An agency exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and issuances described in § 731.102(b). An Agency must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these issuances.

(d) OPM reserves the right to undertake a determination of suitability based upon evidence of falsification or fraud relating to an examination or appointment at any point when information giving rise to such a charge is discovered. OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud, in examination or appointment, and OPM will take a suitability action where warranted.

(e) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(b).

(f) OPM retains sole jurisdiction to make a final suitability determination and take an action under this part in any case where there is evidence that there has been a material, intentional false statement, or deception or fraud, in examination or appointment. OPM also retains sole jurisdiction to make a final suitability determination and take an action under this part in any case when there is evidence of an action or conduct that falls within any or all of the following factors: Knowing engagement in an act or activity with the purpose of overthrowing Federal, State, local, or tribal government by an unconstitutional means; an Act of force, violence, intimidation, or coercion with the purpose of denying others the free exercise of their rights under the U.S. Constitution or any state constitution; Attempting to indoctrinate another or to incite another to action in furtherance of an illegal act; Active membership or leadership in a group with knowledge of its unlawful aim, or participation in such a group with a specific intent to further its unlawful aim. An Agency must refer these cases to OPM for suitability determinations and

suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (such as 5 CFR parts 315, 359, or 752) in cases involving conduct fitting within any of these factors. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary regardless of whether the agency may adjudicate under another authority.

#### **§ 731.104 Investigation and reciprocity requirements.**

(a) To establish an individual's suitability or fitness, employment subject to investigation identified in § 731.101 requires the individual to undergo investigation by an agency with authority to conduct investigations, except as described in paragraphs (a)(1) through (3) of this section.

(1) Promotion, demotion, reassignment, or transfer from employment subject to investigation to other employment subject to investigation without a break in service does not require the person to undergo a new investigation if the person has already undergone an investigation, unless the new employment is at a higher risk level.

(2) When the person entering employment subject to investigation has undergone a background investigation that is at or above the level required for the position as determined by position designation and has a qualifying break in service specified in supplemental guidance, a new investigation need not be conducted unless the agency obtains new information in connection with the person's employment that calls into question the person's suitability or fitness under § 731.202. Agencies will need to enroll individuals re-entering service after a break in service into continuous vetting, consistent with the requirements in § 731.106(d).

(3) Positions that are intermittent, per diem, or temporary in nature, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation for suitability or fitness. The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability or fitness of the person. The employing agency must conduct such vetting as required under OPM issuances.

(b)(1) An individual does not have to serve a new probationary or trial period in the Civil Service merely because the individual's employment is subject to

investigation under this section. An individual's probationary or trial period in the Civil Service is not extended because the individual's employment is subject to investigation under this section.

(2) A suitability determination must be made for each appointment in the competitive service or career Senior Executive Service and a fitness determination must be made for each appointment in the excepted service, except as described in paragraph (b)(2)(ii) of this section.

(i) In the case of a prior investigation that is reciprocally accepted, if the record in the Central Verification System or its successor does not reflect a prior favorable suitability or fitness determination, the agency will need to review the prior investigation for the purpose of making a suitability or fitness determination.

(ii) In the case of a prior investigation that is reciprocally accepted, if the prior investigation was favorably adjudicated for suitability or fitness, the agency shall accept the prior determination unless:

(A) The investigative record on file for the individual shows conduct that is incompatible with the core duties of the relevant covered position; or

(B) The agency has prescribed additional factors under section 731.202(b) that were not addressed in the prior favorable adjudication, and the agency will conduct an adjudication using only those additional factors.

(C) Reinvestigation or continuous vetting requirements under § 731.106 are not affected by this section.

**§ 731.105 Authority to take suitability actions in cases involving the competitive service or career Senior Executive Service.**

(a) OPM or an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, the competitive service or career Senior Executive Service.

(1) OPM's or an agency's authority to take a suitability action continues when an application is withdrawn, when an offer of employment is withdrawn, or when an individual appointed separates from employment.

(2) OPM's or an agency's authority to take a suitability action includes the case of an application for or appointment to the competitive service or career Senior Executive Service from another type of position when a prior investigation is being reciprocally accepted as described in § 731.104(a).

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on the criteria in § 731.202.

(c) Except as limited by § 731.103(b), (d), and (f), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202;

(d) Only OPM may take a suitability action under this part against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202(b)(3), (7), (8), (9), (10), or (11).

(e) An agency may not take a suitability action against an *employee* in the competitive service or career Senior Executive Service. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter or under agency specific authorities. An agency must notify OPM to the extent required in § 731.103(d) and (f) if it wants to take, or has taken, action under these authorities. OPM retains the right to take a suitability action even in those cases where the agency makes an adjudicative determination under another authority.

**§ 731.106 Designation of public trust positions and investigative requirements.**

(a) *Risk designation.* An agency head must designate at high, moderate, or low risk level, as determined by the position's potential for adverse impact to the efficiency or integrity of the service, every position: in the competitive service; in the excepted service; to be filled with a career appointment in the Senior Executive Service; and in which the occupant performs a service as a contractor employee or as a nonappropriated fund employee. OPM provides a risk designation system for agency use in an issuance as described in § 731.102(b).

(b) *Public Trust position.* A position at the high or moderate risk level is designated as a "Public Trust" position. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.* (1) An individual entering employment subject to investigation under this part must undergo a background investigation as described in § 731.104. OPM establishes minimum investigative requirements

correlating to the risk level. An investigation should be initiated before the individual is appointed or otherwise becomes employed by or on behalf of the agency; however, where an agency does not timely initiate the investigation, it must do so as soon as possible, even if the appointment has already occurred.

(2) Any position subject to risk designation under this section must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, Noncritical-Sensitive, or Nonsensitive, as appropriate. This designation is complementary to the risk designation and may have an effect on the position's investigative requirement. Part 1400 of this chapter details the various sensitivity levels and investigative requirements for positions designated as sensitive. Procedures for determining investigative requirements for a position based upon risk and sensitivity will be published in issuances, as described in § 731.102(b) and part 1400 of this chapter.

(3) If a suitability or fitness issue develops prior to the required investigation, OPM or the agency may request investigation from an authorized investigative service provider sufficient to resolve the issue and support an unfavorable suitability or fitness determination. However, inquiries into criminal or credit history cannot occur until a conditional offer has been made, as specified in § 731.106(g). If warranted for positions in the competitive service or career Senior Executive Service, an agency may also take suitability action, in accordance with the authorities described in this part. If the individual is then appointed or otherwise becomes employed by or on behalf of the agency, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Continuous vetting requirements.*

(1) Individuals occupying positions of employment subject to investigation are also subject to continuous vetting through periodic checks of their background at any time in accordance with standards issued by OPM. The nature of a continuous vetting check, and any additional requirement and parameter will be established in supplemental issuances as described in § 731.102(b). These requirements will take into account position risk and sensitivity, with a check being required at regular intervals depending on the type of check. An individual may be subject to continuous vetting only if they have signed an authorization for release of information permitting a disclosure for continuous vetting purposes. Continuous vetting for an



individual in a public trust position satisfies the requirement for a periodic reinvestigation of an individual in a public trust position as directed in E.O. 13488, as amended. An agency must ensure that each continuous vetting check is conducted and a determination made regarding continued employment.

(2) An individual in a sensitive position who is continually vetted to standards established by the Security Executive Agent for satisfying periodic reinvestigation and/or continuous vetting requirements meets the continuous vetting requirements for a public trust position.

(3) An agency must notify each employee covered by this section of the continuous vetting requirements under paragraph (d) of this section.

(e) *Risk level changes.* If an individual in employment subject to investigation experiences a change to a higher position risk level due to promotion, demotion, reassignment, or transfer, or the risk level of the individual's position is changed to a higher level, the individual may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 days after the promotion, demotion, reassignment, transfer or new designation of risk level is final or as otherwise required by part 1400 of this chapter.

(f) *Completed investigations.* An investigation or continuous vetting check under paragraphs (c), (d), and (e) of this section supports 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.

(g) With respect to Civil Service employment, a hiring agency may not make specific inquiries concerning an applicant's criminal or credit background of the sort asked on the OF-306 or other forms used to conduct suitability investigations for Federal employment (*i.e.*, inquiries into an applicant's criminal or adverse credit history) unless the hiring agency has made a conditional offer of employment to the applicant. An agency may make an inquiry into an applicant's Selective Service registration, military service, citizenship status, or previous work history, prior to making a conditional offer of employment to an applicant. However, in certain situations, an agency may have a business need to

obtain information about the suitability or background of an applicant earlier in the process. If so, an agency must request an exception from the Office of Personnel Management, in accordance with the provisions of 5 CFR part 330, subpart M.

(h) When an agency makes a suitability or fitness determination based on an investigation, the agency must:

(1) Ensure that any record used in making the determination is accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the individual in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, including the regulations in this part and issuances as described in § 731.102(b) have been observed;

(3) Consider all available information in reaching its final decision on a suitability or fitness determination or suitability action, except information furnished by a non-corroborated confidential source, which may be used only for limited purposes, such as information used to develop a lead or in interrogatories to a subject, if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency determination or action as required by issuances as described in § 731.102(b).

■ 6. Revise subpart B to read as follows:

**Subpart B—Determinations of Suitability or Fitness; Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service**

Sec.

731.201 Standard.

731.202 Criteria for making suitability and fitness determinations.

731.203 Suitability actions by OPM and other agencies for the competitive service or career Senior Executive Service.

731.204 Debarment by OPM in cases involving the competitive service or career Senior Executive Service.

731.205 Debarment by agencies in cases involving the competitive service or career Senior Executive Service.

731.206 Reporting requirements for investigations and suitability and fitness determinations.

**§ 731.201 Standard.**

The standard for a suitability and fitness determination and for a suitability action defined in § 731.203 is that the action will protect the integrity or promote the efficiency of the service.

**§ 731.202 Criteria for making suitability and fitness determinations.**

(a) *General.* OPM, or an agency to which OPM has delegated suitability authority, must base its suitability determination on the presence or absence of one or more of the specific factors in paragraph (b) of this section. An agency is responsible for making a fitness determination for an excepted service position covered by this part but must apply the specific factors in paragraph (b) of this section as the minimum standards for making the determination. When applying these criteria, an agency must also apply guidance in supplemental issuances, as described in § 731.102(b). If using these factors to also make a Personal Identity Verification (PIV) Credential determination as outlined in OPM issuances regarding PIV credentialing eligibility, an agency must also ensure they have verified the individual's identity.

(b) *Specific factors.* When making a suitability determination, OPM or an agency will consider only the following factors to determine if one is suitable. Only OPM may take a suitability action considering the factors in paragraphs (b)(3), (b)(7), (b)(8), (b)(9), or (b)(10) of this section. Agencies may use the factor in paragraph (b)(11) in applicant and appointee cases but not employee cases; however, OPM may use this factor in employee cases. When making fitness determinations, an agency must consider these factors as a minimum standard, but it may prescribe additional factors to protect the integrity and promote the efficiency of the service, when job-related and consistent with business necessity:

(1) Misconduct or negligence in employment;

(2) Criminal conduct;

(3) Material, intentional false statement, or deception or fraud, in examination or appointment;

(4) Dishonest conduct;

(5) Excessive alcohol use, without evidence of rehabilitation, of a nature and duration that suggests the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant, appointee, or others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of rehabilitation;

(7) Knowing engagement in an act or activity with the purpose of overthrowing Federal, State, local, or tribal government;

(8) An act of force, violence, intimidation, or coercion with the purpose of denying another individual

the free exercise of rights under the U.S. constitution or any state constitution;

(9) Attempting to indoctrinate another or to incite another to action in furtherance of an illegal act;

(10) Active membership or leadership in a group with knowledge of its unlawful aim, or participation in such a group with a specific intent to further its unlawful aim;

(11) Any statutory or regulatory bar that prevents the lawful employment of the individual involved in the position in question; and

(12) Violent conduct.

(c) *Additional considerations.* OPM and an agency must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(1) The nature of the position for which the individual is applying or in which the individual is employed;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the individual involved at the time of the conduct;

(6) Contributing societal conditions; and

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

**§ 731.203 Suitability actions by OPM and other agencies for the competitive service or career Senior Executive Service.**

(a) This section pertains only to the competitive service or career Senior Executive Service as defined in § 731.101.

(b) For purposes of this part, a suitability action is one or more of the following:

(1) Cancellation of eligibility;

(2) Removal;

(3) Cancellation of reinstatement eligibility; and

(4) Debarment.

(c) A non-selection, or cancellation of eligibility for the competitive service based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(d) A suitability action may be taken against an applicant or an appointee to the competitive service or career Senior Executive Service when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(b), (d), and (f).

(e) OPM may require that an employee in the competitive service or career Senior Executive Service be removed on the basis of one or more of the following:

(1) A material, intentional false statement, deception or fraud in examination or appointment;

(2) Knowing engagement in an act or activity with the purpose of overthrowing Federal, State, local or tribal government;

(3) An act of force, violence, intimidation, or coercion with the purpose of denying another individual the free exercise of their rights under the U.S. constitution or any state constitution;

(4) Attempting to indoctrinate another or to incite them to action in furtherance of an illegal act;

(5) Active membership or leadership in a group with knowledge of its unlawful aim, or participation in such a group with a specific intent to further its unlawful aim; or

(6) Statutory or regulatory bar that prevents the individual's lawful employment.

(f) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception, or fraud in examination or appointment.

(g) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 315, 359, or 752 of this chapter. Where conduct covered by this part may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. An agency must notify OPM to the extent required in § 731.103(f) if it wants to take, or has taken, action under these authorities. OPM reserves the right to also take an action under this part.

(h) An agency does not need approval from OPM before taking an unfavorable suitability action. However, it is required to report to the Central Verification System or its successor, each unfavorable suitability action taken under this part within 30 days after they take the action. Also, each suitability determination based on an investigation must be reported to the Central Verification System or its successor as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

**§ 731.204 Debarment by OPM in cases involving the competitive service and career Senior Executive Service.**

(a) When OPM finds an individual unsuitable for any reason listed in

§ 731.202, OPM, in its discretion, may, for a period of not more than three calendar years from the date of the unfavorable suitability determination, deny that individual examination for, and appointment to, the competitive service and career appointment in the Senior Executive Service.

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

(c) OPM, in its sole discretion, determines the duration of any period of debarment imposed under this section.

**§ 731.205 Debarment by agencies in cases involving the competitive service and career Senior Executive Service.**

(a) Subject to the provisions of § 731.103, when an agency finds an applicant or appointee unsuitable based upon reasons listed in § 731.202, the agency may, for a period of not more than 3 years from the date of the unfavorable suitability determination, deny that individual examination for, and appointment to, either all, or specific competitive service positions and career appointment to all, or specific Senior Executive Service positions within that agency.

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

(c) The agency, in its sole discretion, determines the duration of any period of debarment imposed under this section.

(d) The agency is responsible for enforcing the period of debarment and taking appropriate action if an individual applies for a position at that agency during the debarment period, or is examined for or appointed to a position at that agency during the debarment period. This responsibility

does not limit OPM's authority to exercise jurisdiction itself and take any action OPM deems appropriate.

**§ 731.206 Reporting requirements for investigations and suitability and fitness determinations.**

An agency must report to the Central Verification System or its successor the level or nature, result, and completion date of each background investigation, reinvestigation, or enrollment in Continuous Vetting; each agency decision based on such investigation, reinvestigation, or Continuous Vetting; and any personnel action taken based on such investigation or reinvestigation, as required in supplemental guidance.

■ 7. Revise the subpart heading of subpart C to read as follows:

**Subpart C—OPM Suitability Action Procedures for the Competitive Service or Senior Executive Service**

■ 8. Amend § 731.302 by revising paragraph (c) to read as follows:

**§ 731.302 Notice of proposed action.**

\* \* \* \* \*

(c) OPM will serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

\* \* \* \* \*

■ 9. Revise the subpart heading of subpart D to read as follows:

**Subpart D—Agency Suitability Action Procedures for the Competitive Service or Career Senior Executive Service**

■ 10. Amend § 731.402 by revising paragraph (c) to read as follows:

**§ 731.402 Notice of proposed action.**

\* \* \* \* \*

(c) The agency must serve the notice of proposed action upon the respondent by mail, secure email, or hand delivery no less than 30 days prior to the effective date of the proposed action to the respondent's last known residence or duty station.

\* \* \* \* \*

■ 11. Revise the subpart heading of subpart E to read as follows:

**Subpart E—Appeal to the Merit Systems Protection Board of Suitability Actions in Cases Involving the Competitive Service or Career Senior Executive Service**

[FR Doc. 2023-01650 Filed 1-30-23; 8:45 am]

BILLING CODE 6325-66-P

**DEPARTMENT OF AGRICULTURE**

**Rural Housing Service**

**7 CFR Part 3565**

[Docket No. RHS-19-MFH-0024]

RIN 0575-AD31

**Section 538 Guaranteed Rural Rental Housing Program Change in Priority Projects Criteria**

**AGENCY:** Rural Housing Service, Department of Agriculture (USDA).

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Housing Service (RHS or the Agency), a Rural Development agency of the United States Department of Agriculture (USDA), proposes to amend the current regulation for the Multifamily Family Housing (MFH) Section 538 Guaranteed Rural Rental Housing Program (GRRHP). The intent of this proposed rule is to align the current criteria of priority projects with the Housing Act of 1949. This change is expected to improve the customer experience with more timely and proactive responses to housing market demands and Administration priorities.

**DATES:** Comments on the proposed rule must be received on or before April 3, 2023.

**ADDRESSES:** Comments may be submitted electronically by the Federal eRulemaking Portal: Go to <https://www.regulations.gov> and, in the "Search Field" box, labeled "Search for Rules, Proposed Rules, Notices, or Supporting Documents," enter the following docket number: (RHS-19-MFH-0024) or RIN# 0575-AD31. To submit or view public comments, click the "Search" button, select the "Documents" tab, then select the following document title: (Rural Rental Housing Change in Priority Projects Criteria) from the "Search Results," and select the "Comment" button. Before inputting your comments, you may also review the "Commenter's Checklist" (optional). Insert your comments under the "Comment" title, click "Browse" to attach files (if available). Input your email address and select "Submit Comment." Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "FAQ" link.

**Other Information:** Additional information about Rural Development and its programs is available on the internet at <https://www.rurdev.usda.gov/index.html>.

All comments will be available for public inspection online at the Federal eRulemaking Portal (<https://www.regulations.gov>).

**FOR FURTHER INFORMATION CONTACT:**

Tammy Daniels, Finance and Loan Analyst, Multi-Family Housing Production and Preservation Division, Rural Housing Service, United States Department of Agriculture, STOP 0781, 1400 Independence Avenue SW, Washington, DC 20250-0781, Telephone: (202) 720-0021 (this is not a toll-free number); email: [tammy.daniels@usda.gov](mailto:tammy.daniels@usda.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The RHS offers a variety of programs to build or improve housing and essential community facilities in rural areas. RHS offers loans, grants, and loan guarantees for single- and multifamily housing, childcare centers, fire and police stations, hospitals, libraries, nursing homes, schools, first responder vehicles and equipment, housing for farm laborers. RHS also provides technical assistance loans and grants in partnership with non-profit organizations, Indian tribes, state and federal government agencies, and local communities.

RHS administers the Section 538 Guaranteed Rural Rental Housing Program (GRRHP) under the authority of the Housing Act of 1949, as amended (42 U.S.C. 1490p-2). Under the GRRHP, RHS guarantees loans for the development of housing and related facilities in rural areas.

As mandated by Title V of the Housing Act of 1949, the Agency must give priority to rural areas in which borrowers can best use and need guaranteed loans. 42 U.S.C. 1490p-2(l)(2). 7 CFR 3565.5(b) currently defines "priority projects" as those: in smaller rural communities, in the neediest communities having the highest percentage of leveraging, having the lowest interest rate, having the highest ratio of 3-to-5-bedroom units to total units, or on tribal lands. Some of these specific priorities are no longer relevant.

**II. Discussion of the Proposed Rule**

RHS is issuing a proposed rule to amend the MFH GRRHP regulation, 7 CFR 3565.5(b) to align the current criteria of priority projects with 42 U.S.C. 1490p-2(l)(2).

Amendments proposed in this rule are designed to increase the supply of affordable rural rental housing by using loan guarantees to encourage partnerships between the RHS, private