

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 302 and 731

RIN 3206–AO17

#### Suitability and Fitness

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final rule revising regulations governing the Federal Government personnel vetting investigative and adjudicative processes for determining suitability and fitness. This final rule establishes requirements and standards for agencies to properly vet individuals to assess risk to the integrity and efficiency of the service. The regulations establish the requirements for when investigations must be conducted for appointments to the civil service, to work as a contractor employee, or to work in a Department of Defense Non appropriated Fund position. This final rule establishes the requirement for enrolling these populations, including low, moderate, and high risk, into continuous vetting. Furthermore, this rule provides adjudicative criteria for assessing suitability and fitness for much of the civil service. Nothing in this rule shall be read in derogation of any individual's rights under Title VII of the U.S. Code.

**DATES:** Effective January 17, 2025.

**FOR FURTHER INFORMATION CONTACT:** Christine Bilunka at (202) 599–0090 or by email at [SuitEA@opm.gov](mailto:SuitEA@opm.gov).

**SUPPLEMENTARY INFORMATION:**

#### Background

Under 5 U.S.C. 3301 and 7301, Congress authorizes the President to prescribe regulations to govern the admission into the civil service in the executive branch. The regulations must “best promote the efficiency” of the executive branch civil service,

“ascertain the fitness of applicants with respect to character, and prescribe rules for the conduct of executive branch employees. In addition to the President’s authority to prescribe standards for suitability and fitness for civil service appointments based on character and conduct, 5 U.S.C. 3301 recognizes the President’s authority to prescribe qualification standards based on applicants’ education and experience and to assess their relative knowledge, skill, and ability.

OPM, as delegated by the President, has the authority to prescribe qualification standards and to conduct examinations of applicants’ qualifications. OPM also has the authority to prescribe suitability standards and to conduct investigations of suitability for appointment and continuing employment. (See 5 U.S.C. 1104(a)(1).) Amendments to the Civil Service Rules made by Executive Order (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*, directed OPM to establish minimum standards of fitness based on character and conduct for appointment to positions in the excepted service of the executive branch. (82 FR 8115.) E.O. 13764 required 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 positions in the excepted service beyond those that could be noncompetitively converted to the competitive service.

As amended by E.O. 13764, E.O. 13488 of January 16, 2009, *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. (74 FR 41111.) As amended by E.O. 13764, E.O. 13467 of June 30, 2008, *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 employee, and nonappropriated fund positions that are included in covered positions as defined in the E.O. 73 FR 38103. Furthermore, E.O. 13467 (section 2.1(c)), as amended by E.O. 13764, requires that, to the extent practicable, the investigative and adjudicative standards for fitness be consistent with the suitability standards.

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” (see <https://www.performance.gov/trusted-workforce/>), 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. This final rule helps advance the goals of the Trusted Workforce 2.0 initiative.

#### Explanation of OPM’s Final Rule

##### Aligned Criteria

OPM is issuing revised suitability criteria at 5 CFR 731.202. The basis for the specific revisions to several of the existing suitability factors is explained in the section discussing § 731.202. Additionally, OPM is revising § 731.202 so that these criteria will be used for making both suitability and fitness

determinations except as otherwise noted in the regulation. Establishing the criteria as the minimum standards of fitness for much of the excepted service is done per the amended Civil Service Rule II (5 CFR 2.1(a)(iii) and (iv), making OPM responsible for setting standards of suitability for most Federal appointments and for setting minimum standards of fitness for positions in the excepted service, with certain exceptions.) Additionally, the aligned factors are consistent with E.O. 13467, as amended by E.O. 13764, which requires standards for suitability for appointment in the competitive service and standards for fitness for appointment in the excepted service be aligned “to the extent possible.” OPM is also revising 5 CFR 731.104 to specify the circumstances under which either a suitability or fitness determination is required. These changes are described in detail in the sections discussing §§ 731.104 and 731.202.

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

This final rule also implements several changes to improve consistency in the vetting process and to enhance mobility of the civil service, contractor employee, and nonappropriated fund workforces. Specifically, the rule aligns the requirements for position designation, investigations, and reciprocal acceptance of investigations and suitability or fitness determinations amongst these populations. Agencies will use the same system for designating position risk (*i.e.*, low, moderate, and high) for civil service, contractor employee 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, which prescribe the investigative checks to be conducted at low, moderate, and high tiers that correlate to position risk. Finally, agencies will apply the same rules for determining whether reciprocal acceptance of prior background investigations and suitability or fitness determinations are required, promoting efficient transfer of trust determinations.

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 for which the OPM Director has standard-setting responsibility under 5 CFR part 2, the Director may require agencies to designate positions based on risk in accordance with OPM guidance to determine the appropriate level of

investigation, and may prescribe investigative standards, policies, and procedures, and reciprocity standards for investigations and adjudications of suitability and fitness, except to the extent statute vests authority to apply additional fitness standards 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.

Policies and procedures for suitability and fitness are required to be “aligned using consistent standards to the extent possible” and to “provide for reciprocal recognition.” (E.O. 13467, as amended, section 1.1.) Further, agencies are required to accept background investigations and adjudications conducted by other agencies except when an agency determines the prior investigation or adjudication does not meet its standards. (E.O. 13467, as amended, section 2.2.) The Director of OPM, as the Suitability and Credentialing Executive Agent, is responsible for establishing these requirements through regulations, guidance, and standards. (E.O. 13467, as amended, section 2.5.)

E.O. 13488, as amended by E.O. 13764, establishes that the same position designation requirements and investigative standards, policies, and procedures used for fitness determinations for civil service employees apply to contractor employee fitness and nonappropriated fund employee fitness. (E.O. 13488, as amended, section 3(b).) Likewise, section 3(c) of E.O. 13488, as amended, provides that fitness determinations for contractor employees and nonappropriated fund employees and their underlying investigations are subject to the same reciprocity requirements as those prescribed by OPM under the Civil Service Rules for employment in the civil service. Therefore, contractor employees, except those for which OPM is statutorily precluded from prescribing standards, and nonappropriated fund populations 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 noncompetitively convert to the competitive service), and for career appointments to the Senior Executive Service.

The position designation, reciprocity, and investigation requirements for

contractor employees that OPM is codifying in part 731 are not new. Since 2009, E.O. 13488 has covered contractor employee fitness, giving agency heads discretion on fitness criteria, but requiring them to take into account OPM guidance when determining 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 contractor employees, and agencies have been required to report the nature and results of background investigations and fitness determinations to the government-wide investigations and adjudications index (Central Verification System or successor). Likewise, the requirement that contractor employees 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 (PAC) titled *Assignment of Functions Relating to Coverage of Contractor Employee Fitness in the Federal Investigative Standards*, the PAC determined, after consulting with the Department of Defense and other affected agencies, that contractor employees should be subject to the same Federal Investigative 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.”

The Federal Investigative Standards, which were issued by the Executive Agents in December 2012, applied “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, 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.

This rule does not specifically address investigative requirements for eligibility for access to classified information or for employment in sensitive (national

security) positions. Those matters 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, this rule continues the existing requirement (5 CFR 731.106(a) and (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.

#### *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, section 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 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.” (Id.) In accordance with section 2.1 of E.O. 13467, as amended, all covered individuals are to be subject to continuous vetting under standards to be established by the Security Executive Agent or the Suitability and Credentialing Executive Agent exercising its Suitability Executive Agent functions, as applicable. Further, the Director of OPM as the Suitability Executive Agent is responsible for prescribing applicable investigative standards, policies, and procedures. With this final rule, any individual occupying a position that is subject to investigation, as described in revised § 731.104(a), including both public trust positions and low risk positions, is subject to continuous vetting. The nature and specificity of continuous vetting checks will be further defined in supplemental issuances, and requirements will account for position risk and sensitivity designations.

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

With this final rule and OPM’s implementation of the continuous vetting requirement set forth in E.O. 13467, as amended, section 2.1, OPM has eliminated the fixed, five-year

periodic reinvestigation requirement for public trust positions.

#### **Digest of Public Comments**

In response to the proposed rule (88 FR 6192, January 31, 2023), OPM received 3,587 comments via the eRulemaking portal, one comment via email, and one comment by phone. All comments were received during the 60-day comment period. Comments received were from individuals, organizations, a labor union, and a Federal agency. Approximately 3,500 identical form comments were submitted by about 3,400 commenters.

In general, the comments ranged from categorical rejection of the proposed regulations to strong support. OPM carefully considered comments and arguments made in support of and in opposition to the proposed amendments. The comments are summarized and discussed in the subsequent sections. Comments are organized by general comments followed by comments specific to each section. A discussion of the suggested revisions that were considered and either adopted, adopted in part, or declined, and the rationale therefore is included. Comments beyond the scope of the proposed changes or which were vague or incomplete are not addressed.

#### **General Comments**

Some commenters offered support for the regulatory changes, believing that the changes to the regulation would serve to improve the Government’s ability to assess the integrity and efficiency of the service and streamline the process, while others suggested that the current process is sufficient and that changes are unnecessary.

Several commenters took issue with the relevant terminology, suggesting that the terms “character,” “suitability and fitness,” and “conduct necessary” are vague and could allow for discrimination, including against individuals who do not have the same educational or cultural background as other job applicants. Others commented more generally that the rule would allow for discrimination without regard to an individual’s qualifications, asserting that hiring managers could determine the level of character required and reject candidates based on their own ideology. Other commenters called the rule unconstitutional and illegal, suggesting it may allow for discrimination based upon political beliefs or protected speech.

In response to these comments, OPM agrees that this final rule advances important goals to strengthen and streamline personnel vetting. This rule

implements vetting reform requirements and initiatives that span three Administrations and were first initiated in 2017 and distilled into the transformational Trusted Workforce 2.0 framework beginning in 2018 with a focus on revamping the fundamental approach and supporting policy framework, overhauling business processes, and modernizing the information technology architecture. Effective Government operations require that the Government’s workforce be trusted to deliver on mission, provide excellent service, and demonstrate effective stewardship of taxpayer funds. Establishing and maintaining trust is a core goal of the Federal personnel vetting program. Further, as addressed in the previous sections (Background and Explanation of OPM’s Final Rule), the rule implements requirements established by the President via Executive orders. Therefore, the scope of the regulations with respect to the populations covered, including the excepted service, adheres to the direction of the Executive orders. As such, OPM will not make any revisions to the rule regarding the scope.

OPM disagrees with comments suggesting the language in the regulation may allow for discrimination. The terms called out by the commenters are well-established and their application to personnel vetting is not changing through this rule. As outlined in the regulation and elaborated upon in a body of guidance, such as the Suitability Processing Handbook, the Trusted Workforce 2.0 policy, and the Investigative Standards, OPM and agencies must base suitability determinations on the presence or absence of one or more of the specific factors in 5 CFR 731.202(b) while considering the additional considerations in § 731.202(c) to the extent they are deemed pertinent. OPM also disagrees that agencies, when acting in accordance with the rule, are at liberty to determine the level of character that applicants must possess arbitrarily, nor do the requirements allow for suitability or fitness decisions that are based upon the decision-maker’s personal ideology.

With respect to the concerns raised that some of the proposed changes are vague and may be illegal or unconstitutional, OPM disagrees that the proposed changes are illegal and unconstitutional. OPM acknowledges the concerns regarding clarity and is not moving forward with some of the proposed changes. This is discussed in subsequent sections.

### Part 302—Employment in the Excepted Service

The final rule adds as an authority E.O. 13764, which amended the Civil Service Rules to extend authority by the OPM Director to establish the minimum standards of fitness for the excepted service, and amends the existing authority citations to comply with 1 CFR part 21, subpart B. This final rule adds § 302.108 to refer readers to part 731 for requirements on fitness determinations for excepted positions. Additionally, the section establishes that an agency must record its reason(s) for making fitness determinations under part 731 and must furnish a copy of those reasons to an applicant upon their request. Section 302.203 is revised to direct readers to part 731 for the minimum standards and criteria for determining fitness for employment based on character and conduct, allowing agencies to prescribe additional factors to protect the integrity and promote the efficiency of the service when job-related and consistent with business necessity.

One commenter wrote that the disqualifying factors in the existing part 302, which the commenter opines address an applicant's ability to effectively work for the Government, their ability to faithfully service the Federal Government, and other possible statutory concerns, are far different from the new factors OPM proposed in part 731. According to the commenter, the new factors in part 731 consider behavior that is entirely unrelated to the applicant's proven history with the law and the Federal Government and the applicant's capacity to perform the job.

OPM agrees that the disqualifying factors in part 302, although similar, were not entirely consistent with those in § 731.202. OPM disagrees with the commenter's notion that the intent of the disqualifying factors was far different than consideration of behavior as specified in part 731. As was explained in the notice of proposed rulemaking, the inconsistency is, in part, a basis for making the change in this rulemaking, as the President has called for an executive branch-wide vetting enterprise to use, to the greatest extent practicable, aligned and consistent vetting policies, procedures, and standards for determining suitability or fitness for Government employment. (See E.O. 13467, as amended.) Specifically, the President directed that the investigative and adjudicative standards for fitness must, to the extent practicable, be consistent with the standards for suitability. (E.O. 13467, sec. 2.1(c).) Therefore, OPM is

necessarily changing the way in which fitness is determined by aligning the factors and additional considerations used for fitness determinations with those used for suitability. OPM agrees that the President intended for the OPM Director to establish the minimum standards of fitness based upon character or conduct (see E.O. 13764, sec. 1(a)(iii), revising 5 CFR 2.1(a)(vi).); however, OPM disagrees with the suggestion that the fitness factors as aligned with the suitability factors evaluate fitness based on something other than an assessment of an individual's character or conduct. Each of the factors is designed to allow agencies to consider different aspects of an individual's past conduct, as identified during the vetting process, and how that conduct illustrates the individual's character. See discussion of § 731.202 for more information about the factors.

This same commenter suggested that permitting agencies to prescribe additional fitness factors is an extreme change that grants agencies near limitless power. The commenter suggested that this delegation to agencies is inconsistent with the direction of E.O. 13764 to promote consistency between agencies. The commenter suggested the terms "job-related" and "business necessity" must be defined very clearly, agencies must be required to publicly post and explain potential factors, and OPM must oversee and assess these factors.

OPM agrees that E.O. 13764 seeks to promote consistency between agencies. By aligning the minimum fitness factors with the suitability standards, application of reciprocity between agencies based on fitness determination should increase. Under the existing regulations, an agency has latitude for establishing reasons to deem an applicant unfit for an excepted service appointment. OPM regulations have provided a list of potential disqualifying reasons (which are referenced by the commenter) but have not required the use of any particular factors. This final rule, in establishing a specific list of factors that can be supplemented by an agency in making a fitness determination, is not a vast expansion of authority for agencies. Commenter's suggestion to the contrary is simply incorrect.

Nonetheless, the President amended the Civil Service Rules to make OPM responsible for the *minimum* standards of fitness based on character and conduct, and thus allowed agencies to supplement the fitness standards, where appropriate. (See E.O. 13764, amending 5 CFR 2.1(a)(i) and (ii) to state that OPM

is responsible for "Standards of suitability" for the competitive service but is responsible for "Minimum standards of fitness" for the excepted service.) The President also made clear that each agency is authorized to "determine[ ] that 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. (E.O. 13467, sec. 2.2, as amended (emphasis added).) Accordingly, OPM is not responsible for, nor is it required to approve or oversee, the establishment of additional fitness factors used by an agency in determining fitness for its excepted service positions.<sup>1</sup> OPM agrees, however, that additional fitness factors should be made known to applicants when such factors are used in making an unfavorable fitness determination, and therefore has included a requirement in § 302.108(b) for agencies to make additional factors a matter of record and furnish them to an applicant, upon request, in such circumstances.

OPM is not accepting the request to define what *job-related and consistent with business necessity* means because we do not agree it is needed in this context. This terminology is not unique to personnel vetting and is generally understood as the standard that agencies must meet to justify unique hiring requirements. These concepts appear in civil service hiring policy at least as early as the Uniform Guidelines on Employee Selection Procedures (1978), which the Civil Service Commission, the Equal Employment Opportunity Commission, the U.S. Department of Justice, and the U.S. Department of Labor helped develop. (See sec. 60–3, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR 38295 (Aug. 25, 1978).) OPM and agencies are well-versed in applying these concepts. (See, e.g., OPM's Delegated Examining

<sup>1</sup> See E.O. 13764, sec. 3(q), adding a new section 2.2 "Reciprocity" to E.O. 13467. The provision cited by the commenter ("Any additional requirements approved by the appropriate Executive Agent shall be limited to those that are necessary to address significant needs unique to the agency involved, to protect national security, or to satisfy a requirement imposed by law.") does not indicate that agency *fitness* factors are subject to this Executive Agent oversight. The preceding sentence states: "Except as *described above* and except to the extent authority to apply additional requirements is vested by statute in an agency, an agency may not establish additional . . . requirements . . . without the approval of the [appropriate Executive Agent]." This sentence applies to the suitability factors but does not apply to the fitness factors, which were "described above." Accordingly, the "additional requirements approved by the appropriate Executive Agent" refers only to suitability factors.

Operations Handbook, available at [https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo\\_handbook.pdf](https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo_handbook.pdf).) Agencies also apply these concepts in administering Section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791), which prohibits selection criteria and standards that tend to screen out people with disabilities unless the procedures have been determined through a job analysis to be job-related and consistent with business necessity.

### Part 731—Suitability and Fitness

This final rule revises the authorities by adding E.O. 13764, Civil Service Rule 6, and Presidential Memorandum—Enhancing Safeguards to Prevent the Undue Denial of Federal Employment Opportunities to the Unemployed and Those Facing Financial Difficulties Through no Fault of Their Own, January 31, 2014. This rule also revises the formatting of existing authorities to comply with 1 CFR part 21, subpart B.

#### Section 731.101 Purpose

This section describes the purposes for this regulation, which are to establish investigation, continuous vetting, and reciprocity requirements; suitability requirements and the minimum standards of fitness; and the procedures for taking suitability actions. This section also provides definitions necessary for administration. Notably, OPM is adopting its proposed definition for the term “employment subject to investigation,” which is used throughout the revisions to part 731. This term captures the range of individuals subject to investigation by virtue of their 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.

OPM received no comments on this section; however, OPM is making several changes in the final rule to improve clarity and readability. For example, OPM has made minor wording changes to the definition of excepted service (e.g., moving the clause “of the executive branch” to follow the word “position,” which is the noun that the clause modifies). OPM is also revising the definition of suitability action, which referenced the list of actions in § 731.203. OPM has moved that list into the definition. Conversely, the definition of a suitability action included regulatory information of relevance in Subpart B and included information that was redundant with § 731.203(a); therefore, OPM has deleted

the redundant information from the definition and moved the remaining language to § 731.203(b). OPM is adopting minor clarifying edits to the proposed definitions of appointee, contractor employee, and employee.

OPM also is correcting a numbering error from the proposed rule. Proposed paragraph (b)(4) is not part of the “purpose” sentence in paragraph (b) and is renumbered as paragraph (c). Proposed paragraph (c) is codified at paragraph (d) in this final rule.

#### Section 731.102 Implementation

This section addresses the requirement to use investigations conducted under part 731 only in accordance with the Privacy Act and section 1.1(e) of E.O. 13467, as amended, and it establishes that OPM may issue requirements for implementing the rule. OPM received no comments on this section and is adopting the language as proposed.

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

This section describes the limited delegation and related requirements that OPM makes to agency heads for adjudicating the suitability of applicants or appointees for competitive service and career Senior Executive Service positions (as defined in § 731.101) within the agency.

A commenter suggested OPM revise the rule to allow an agency head with delegated suitability authority to redelegate or convey outside of their agency the authority for making suitability adjudicative determinations for positions within their agency. OPM is not accepting this change. For the reasons described in the following paragraphs, OPM delegates limited authority for adjudicating suitability to agency heads. Agency heads may redelegate the function within their own agency, and agency records must show any redelegation.

Congress and the President have assigned to OPM the responsibility for adjudicating the suitability of certain individuals applying to or holding positions in the competitive service. (See 5 CFR parts 2 and 5; see generally 5 U.S.C. 3301 and 7301 and the Civil Service Rules established in E.O. 10577, as amended by E.O.s 12107 and 13764.) Congress has authorized the OPM Director to delegate any function vested in or delegated to the Director to heads of executive branch agencies and other agencies employing persons in the competitive service. (5 U.S.C. 1104(a)(2).) When OPM delegates functions, it must establish standards

that apply to OPM as well as to any agency under delegated authority, and OPM must oversee the performance of those delegated functions. And, when an agency does not wish to perform the function(s) delegated, the head of the agency may ask OPM to assist in performing the function on a reimbursable basis. (See 5 U.S.C. 1104(b)(4).) Additionally, section 2.5(b)(v) of E.O. 13467, as amended, requires the OPM Director, as the Suitability Executive Agent, to review agency suitability and fitness vetting programs on a continuous basis to determine whether they are meeting the executive order’s requirements.

Suitability determinations are case-by-case decisions based upon the nature of the conduct, as applicable, and the functions and responsibilities of the position. In making the delegation for suitability adjudications to agency heads, OPM recognized the important role an agency plays in comparing the nature of the position against the issues in an individual’s background. The agency, armed with the understanding of the job duties and agency mission, is best positioned to determine when conduct warrants a finding of unsuitability and, in that instance, determine the best course of action—whether it be taking suitability action in accordance with the agency’s delegated authority or looking to another authority more appropriate or applicable to the situation.

OPM retained the authority to adjudicate suitability in cases where the nature of the conduct causes the individual to be unsuitable for any position. Through suitability reviews, agency officials may identify cases that warrant referral to OPM for suitability review and action and can make those referrals as is required by the regulation. OPM proposed to retain authority to adjudicate suitability where there was evidence of conduct that fell within several proposed, new suitability factors. As addressed further in the pertinent section of this final rule, OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7) through (10) and is instead retaining the current factor at § 731.202(b)(7). Accordingly, OPM is modifying its proposed language at § 731.103(f) to specify that OPM has sole jurisdiction to adjudicate cases involving evidence of conduct that falls within § 731.202(b)(7).

#### Section 731.104 Investigation and Reciprocity Requirements

This section establishes investigation requirements and reciprocity requirements for investigations and for

suitability and fitness determinations. As an initial matter, a Federal agency recommended reorganizing the paragraphs in § 731.104(b) for clarity. OPM agrees and has made the following adjustments from the notice of proposed rulemaking:

- Section 731.104(b)(1) is now § 731.104(b).
- Section 731.104(b)(2) is now § 731.104(c).
- Section 731.104(b)(2)(i) is now § 731.104(c)(1).
- Section 731.104(b)(2)(ii) is now § 731.104(c)(2).
- Section 731.104(b)(2)(ii)(C) is now § 731.104(d).

In addition, OPM has edited the proposed regulatory language to improve clarity and readability. For example, OPM modified paragraphs (a)(1) and (2) from the proposal to use more consistent terminology throughout the section. Specifically, paragraphs (c)(1) and (2) (as renumbered) referred to a prior investigation being reciprocally accepted. In contrast, paragraphs (a)(1) and (2) discussed the concept of reciprocal acceptance of a prior investigation but did not use that phrasing. In rephrasing paragraphs (a)(1) and (2) to use more consistent language, OPM has also restated the requirement in terms of providing direction to the employing agency. OPM also revised paragraph (c)(2)(ii) (as renumbered) to make clear that the additional factors are permitted, but not required, by § 731.202(b). Finally, OPM revised paragraph (d) (as renumbered) to remove an inadvertent reference to reinvestigation. (See prior discussion in the Elimination of Fixed, Five-Year Periodic Reinvestigation Requirement for Public-Trust Positions section.)

Section 731.104 explains the requirements for employment subject to investigation (see § 731.101 discussion of definitions) and reciprocity requirements for populations covered. OPM's proposed revisions, which are adopted in this final rule, extend these requirements to include the "excepted service," "contractor employees," and "nonappropriated fund employees" in addition to appointments in the competitive service, appointments to the excepted service that can noncompetitively convert to the competitive service, and career appointments to the career Senior Executive Service. In general, these types of employment are subject to background investigations for suitability or fitness. However, as described in the new § 731.104(a)(3), certain short-term positions are not subject to background investigations for suitability and fitness

but checks to ensure suitability or fitness are still required.

Per revised 5 CFR 731.104(c), suitability determinations must be made for all appointments in the competitive service, excepted service when the position can noncompetitively convert to the competitive service, or career Senior Executive Service; and fitness determinations must be made for all appointments to excepted service positions, except under specified circumstances. Under § 731.104(c)(2), however, an agency is generally required to reciprocally accept a prior favorable determination, except under certain circumstances. The conditions under which an agency is not required to reciprocally accept a prior favorable suitability or fitness determination are addressed in the new § 731.104(c)(2)(i) and (ii). Additionally, OPM clarifies that agencies may reciprocally accept a prior *investigation* that is at or above the appropriate tier but for which a new suitability or fitness determination is needed. Prior to this change, the regulation could be misread to require a new investigation in this scenario.

The following are examples where an agency will reciprocally accept an existing background investigation while making a new suitability or fitness determination.

*Example 1:* An individual is employed with Agency A in a position that required a Tier 5 level background investigation. Agency A reported a favorable national security determination for the Tier 5 investigation and did not report a suitability determination. The individual is transferring to a position with Agency B which also requires a Tier 5 level background investigation. The new position is in the competitive service, so the agency is also required to make a suitability determination. Because there is no record of a favorable suitability or fitness determination, Agency B will request a copy of the existing Tier 5 background investigation and will review it to make a suitability determination.

*Example 2:* An individual works for Agency A as a Program Analyst. The individual had a Tier 4 level background investigation for which Agency A made a favorable suitability determination. The individual has now been given a conditional offer for employment with Agency B in a Fiduciary Service Representative position. Agency B sees that the individual has a Tier 4 level background investigation, which is sufficient for the new position. Agency B also sees that Agency A made a favorable suitability determination; however, the background

investigation record in the government-wide repository reflects the individual had financial issues. Given the financial duties of the new position, Agency B determines that a core duty determination<sup>2</sup> is warranted. Agency B must reciprocally accept the existing Tier 4 background investigation but will request a copy of it for review to determine whether the individual is suitable for the position with their agency.

With respect to break-in-service requirements, OPM is removing the 24-month break-in-service provision that applied to reciprocity (see current §§ 731.104(a)(5) and 731.202(d)). This requirement is replaced with a new process, established in the Federal Personnel Vetting Investigative Standards issued by the Suitability, Credentialing, and Security Executive Agents, which expands this window of time up to sixty months using a tiered, risk-based approach of graduated levels of investigation. Upon reentry, individuals will be enrolled into continuous vetting consistent with new requirements in § 731.106(d).

Finally, OPM updates requirements for "seasonal" positions to require a background investigation as addressed in § 731.106(c)(1). Seasonal employees, in accordance with 5 CFR 340.401(a), 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 permanent characteristics of the positions, they implicate different risks than temporary appointments.

An individual commented on the option for agencies to make a core duty determination, rather than reciprocally accept a prior favorable suitability or equivalent fitness determination. The commenter believes this option will require agencies to review the prior investigative record each time an individual changes positions and suggested instead that OPM consider stipulating a time period after which agencies would no longer need to consider the impact of past conduct, as indicated in a prior investigation, against the core duties of the new position. OPM does not agree with the commenter's interpretation. Agencies are not required to make a core duty determination each time an individual changes positions. Core duty

<sup>2</sup> An agency must consider the nature of the position in evaluating suitability or fitness if pertinent to a specific case. 5 CFR 731.202(c). This assessment, which considers the core duties of the position and the relevance of information discovered during an investigation, is called a "core duty determination."

determinations are only required when there is information in the individual's investigative record as reflected in the government-wide repository that shows the individual has engaged in conduct that may be incompatible with the core duties of the position to which the person is applying or transferring into. That prior conduct may make that person unsuitable or unfit for the new position, though they were suitable or fit for the current position. It would be inconsistent with the manner in which suitability should be assessed if OPM were to establish deadlines after which an agency may not consider how conduct may impact suitability or fitness for a new position. Take for example an individual moving into a law enforcement position where conduct of a criminal nature, even if dated, may be incompatible. While OPM is not making a change as a result of this comment, we acknowledge that enhancements to information technology systems allowing agencies more clarity regarding the nature of conduct contained within the investigation record would streamline and reduce processing times for agencies. Additionally, future system enhancements could avoid the need for agencies to request copies of prior files as is often required currently to make a new determination.

A labor union expressed support for the change to remove the 24-month break in service provision citing that investigations can be onerous and time-consuming for employees. The organization agreed that the change is a reasonable step towards minimizing that burden.

A Federal agency recommended that, as written, the proposed regulatory text requiring agencies to enroll individuals into continuous vetting when reentering service may not align with implementation guidance. Implementation guidance has not yet been made available for the full scope of this rule. OPM is revising the regulatory text in § 731.104(a)(2) for clarity by adding that agencies must request such checks as may be specified in implementing guidance and must enroll individuals re-entering service after a break in service into continuous vetting, consistent with the requirements in § 731.106(d). Additionally, OPM will continue to issue updated implementation guidance as continuous vetting is expanded to more populations.

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

This section specifies OPM and agency authorities with respect to taking suitability actions. Changes from the current rule are for clarity and to address the additional circumstances under which OPM retains jurisdiction when the nature of the conduct would make an individual unsuitable to hold any covered position.

One commenter believed that, because the language in § 731.105(a)(1) was new (clarifying that suitability actions can be taken if an application is withdrawn, if an offer of employment is withdrawn, and if an appointed individual separates from employment), the authority to take suitability actions in these instances is also new. It is not. The authority to take suitability actions in these circumstances exists currently and updates to the regulation simply provide clarity and greater transparency on the situations when suitability actions can be taken. In regulatory changes made in 2008 (*see* 73 FR 20149), OPM revised the definition of "applicant" from "[a] person being considered for employment" to "a person who is being considered or has been considered for employment." In a notice explaining the regulatory changes, OPM stated "[s]uitability actions may be warranted for individuals who are not currently, but were previously, under consideration. For instance, if an individual provided fraudulent information in an attempt to obtain a Federal job, he or she might no longer be actively under consideration because the qualification requirements were not met. In such a case, it is in the best interests of the Government to refer the case to OPM for suitability adjudication." (*See* Federal Investigations Notice No. 09–06, available at <https://www.dcsa.mil/Portals/128/Documents/pv/GovHRSec/FINs/FY09/fin-09-06.pdf>.) The commenter also suggested that, by resigning from a position, the individual should be protected from a suitability action. However, if an individual who is undergoing a suitability review and whose suitability is in question has the job application or offer withdrawn or resigns or is terminated for reasons other than suitability, this will not prevent an agency or OPM from taking a suitability action, including the potential to impose a debarment so that the individual cannot serve in a position for a period of time. Imposing a debarment through the suitability action process not only stops an individual

from holding a covered position, it also offers a period of time for the individual to potentially rehabilitate from the concerning conduct that caused them to be deemed unsuitable, raising the possibility that they could be found suitable for a future position after the period of debarment has concluded. To improve clarity, OPM is adopting revised text at § 731.105(a)(1) to reflect the intent of the rule, which is to allow OPM or an agency to continue with an action that is in process. Specifically, we are revising "take" in the proposed rule to "complete" in this final rule.

At § 731.105(d), in addition to OPM having jurisdiction over material intentional falsification, OPM has added that only OPM is able to take a suitability action under part 731 against an *employee* in the competitive service or career Senior Executive Service based on the criteria of § 731.202(b)(3), (7), or (8). As addressed further in the pertinent section of this final rule, OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7), (8), (9), or (10) and is instead retaining the current factors at § 731.202(b)(7) and (8). An individual commented that the proposed change to also retain jurisdiction over the (previously proposed) four distinct additional factors is unjustified as it seems to exist for the exclusive purpose of targeting ideological enemies. The commenter's concerns with the factors are moot now that OPM has decided not to proceed with those factors; but, with respect to the commenter's objection to OPM retaining suitability jurisdiction, OPM does not agree with the commenter's contention. OPM is assigned the authority to adjudicate suitability on behalf of the executive branch. Where OPM has determined that individual agencies are better positioned to make the suitability determination, OPM has delegated the responsibility to the respective agency head. However, where there is evidence of conduct that would make an individual unsuitable for any covered position, OPM retains jurisdiction as only OPM can impose a government-wide debarment.

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

This section addresses requirements for agencies to designate position risk and sensitivity. OPM is adding a reference to 5 CFR part 1400, which is the complementary regulation, issued jointly by OPM and the Office of the Director of National Intelligence (ODNI), addressing position sensitivity designations. Additionally, OPM

clarifies the timing of initiating background investigations, which should occur prior to appointment. This is consistent with OPM's prior guidance for issuing personal identity verification credentials and with what is required for positions with a sensitivity designation, as specified in 5 CFR part 1400.

OPM is also moving the requirements regarding the timing of criminal and credit history collection from § 731.103 to this section by including the language that was published in the final rule to implement the Fair Chance to Compete for Jobs Act of 2019 (*see* 88 FR 60317). Finally, this section adds the requirement for continuous vetting for the low risk population and replaces periodic reinvestigations for the public trust population.

One commenter recommended that OPM should enhance training on position designation and provide additional guidance to agencies. The comment is outside the scope of the rule changes, but OPM will take the commenter's suggestion under consideration.

OPM received comments in support of and in opposition to continuous vetting. A labor union, in support of the change, acknowledged the importance of ensuring that the integrity and efficiency of the civil service is upheld but expressed concern with the current reinvestigation process, which they described as unnecessarily rigid and burdensome for employees.

The same labor union and another commenter urged OPM to consider the burden on employees, while two commenters opined that the nature and periodicity of the continuous vetting checks needs to be specified. One commenter expressed concern that the investigative service provider could determine the scope of the checks, causing the checks to be too intrusive. OPM acknowledges that, even with the shift to continuous vetting, individuals will be required to provide self-reported information and may be subject to interviews or inquiries as a result of information revealed via checks. OPM recognizes that the Privacy Act of 1974 requires collecting information, to the greatest extent practicable, from the individual and, accordingly, that there is a need to provide the individual with an opportunity to address issues an agency may determine to be adjudicatively relevant. OPM also agrees that the process should be designed in a way such that individuals undergoing vetting are not required to provide information or respond to requests unnecessarily. These individuals deserve transparency into the vetting

process in a way that will not jeopardize the nation's security. OPM and ODNI, in their respective roles as the Suitability and Security Executive Agents, establish the continuous vetting checks that are required, considering the positions' risk and sensitivity levels. The requirements specify the types of checks conducted along with the periodicity. Heads of agencies must follow policies and issuances by the Executive Agents, including investigative standards (*see* E.O. 13467, sec. 2.7, as amended) and all Federal personnel vetting conducted by the executive branch must comply with the standards established by the Executive Agents. Therefore, the mechanisms will be better understood and widely followed, resulting in consistent and standardized checks across the covered populations.

One commenter opined that, if periodic reinvestigations are replaced by continuous vetting, the initial check should only go back one year, while two commenters opined that individuals in positions designated as low risk should not be subject to continuous vetting or personnel vetting standards because they do not require security clearances, making it unfair for them to fall under the same scrutiny. Various commenters also expressed concern that the requirement is contrary to the Administration's position on second chance hiring, will result in less talent competing for Government positions, could cause difficulty keeping jobs, and is too invasive. An organization objected to the reduction in suitability and fitness review from an objective, five-year reassessment to a continuous review process on the basis that the current rule already permits this and that doing away with the five-year requirement could weaken agency security.

OPM agrees that the current rule permits checks for the public trust population at a higher periodicity if they take place at least once every five years but otherwise disagrees with these points. The requirement that individuals working for or on behalf of the Government be subject to some level of vetting dates back several decades. More recently, since 2008, under the Final Credentialing Standards for Issuing Personal Identity Verification Cards under Homeland Security Presidential Directive 12, a Tier 1 or equivalent investigation has been required to be granted a personal identity verification (PIV) credential. Investigative source and coverage requirements for full background investigations are established commensurate with the position risk and sensitivity designations and the

same will be true with continuous vetting requirements. The President, by Executive order, established the requirement for continuous vetting for covered individuals, and therefore, OPM is implementing that requirement via this rule. OPM has revised the regulatory text to state that checks must be conducted at regular intervals based on the type of check and with consideration of position risk and sensitivity. These provisions were in the proposed regulatory text but are reorganized to clarify the agency requirements. Similarly, OPM has made minor changes to the examples of public trust positions in the regulatory text to improve readability.

Another commenter raised questions about the authorities that agencies may consider when actionable information is returned as the result of continuous vetting checks. As has been the case with periodic reinvestigations, agencies will consider the substantive standards in § 731.202 when evaluating the results. A person's employment status, however, will determine the applicable agency authority and procedures to be followed in any action taken based upon the results. In many instances, based upon the time on the job and/or the conduct occurring post appointment, a suitability action under part 731 will not be applicable. Nonetheless, conduct that surfaces could be the basis for an adverse action under 5 CFR part 752. Whether to propose or take an adverse action based on results from continuous vetting checks is a matter within the discretion of the employing agency. How the results of continuous vetting may be addressed when a favorable determination cannot be made is not different from how agencies currently manage the results of periodic reinvestigations.

A commenter expressed concern with the language in the revised § 731.106(d)(1) specifying that individuals may only be subject to continuous vetting if they have signed an authorization for release of information permitting a disclosure for continuous vetting purposes. The commenter is concerned the continuous vetting requirement addressed in part 731 might be confused with other processes also referred to as continuous vetting where a release is not required. They asked that OPM replace the word "individual" to state more clearly to whom the continuous vetting requirements apply. Section 731.106(d)(1) addresses the continuous vetting requirements as being applicable to individuals occupying positions of *employment subject to investigation* and, under § 731.101, "employment



subject to investigation” generally 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 non-appropriated fund employee. Read as a whole, paragraph (d)(1) identifies the population to which continuous vetting and the corresponding requirements apply. In addition, the regulatory text explicitly states that continuous vetting may be conducted only after an individual has signed an authorization for release of information. Therefore, OPM is not making a change in response to this comment.

OPM is making a clarifying edit to § 731.106(g) with respect to the timing of credit history inquiries, consistent with OPM’s guidance since December 1, 2016 (81 FR 86555). For competitive service and career Senior Executive Service positions, agencies may not make specific inquiries concerning an applicant’s credit background unless the hiring agency has made a conditional offer of employment to the applicant or has been granted an exception by OPM. (See 5 CFR 330.1300.) The requirement with respect to timing of collection of credit history does not apply to other positions, though agencies may determine it to be a best practice.

#### *Section 731.201 Standard*

Section 731.201 has long provided the standard for protecting the integrity and promoting the efficiency of the service. This final rule extends the standard to fitness determinations.

OPM received comments from two individuals. One interpreted the change making the standard applicable to fitness determinations as suggesting that agencies may use part 752 procedures to take a removal action. The intent of the section, however, is to establish that, like suitability, fitness determinations must be based on the degree of impact an individual’s character or conduct may have on the integrity and efficiency of the service. As we explained in the response to comments regarding § 731.106 and also addressed in the regulation at § 731.105(e), an agency has discretion to take adverse actions against individuals under authorities other than part 731, as appropriate and applicable. For populations subject to assessment of fitness, rather than suitability, OPM does not establish in part 731 procedures by which the agency may take an action based upon an unfavorable fitness determination.

The other commenter suggested the standard is subject to interpretation by hiring officials and could lead to

prohibited personnel practices, discrimination, civil rights violations, and potential legal action. The commenter asked OPM to develop a specific definition for suitability and fitness that applies to all agencies. OPM agrees that one suitability and fitness standard that applies to all agencies, to the extent feasible, is desirable. To that end, the standard that a suitability action “will protect the integrity or promote the efficiency of the service” has been in place since 2000 when it was last updated to add the phrase “protect the integrity . . . of the service.” In addition to considering the risk to an agency’s accomplishment of its duties or responsibilities, or potential interference or prevention of effective service in the position, an important facet of the standard for suitability is the integrity of the merit system and fair and open competitions for positions. The standard, now applicable to fitness determinations, is consistent with the suitability standards to the extent practicable in accordance with E.O. 13467, as amended.

#### *Section 731.202 Criteria for Making Suitability and Fitness Determinations*

This section establishes the suitability and fitness factors and additional considerations that collectively, and in consideration of the standard set forth in § 731.201, are used by agencies to determine if an individual is suitable or fit.

OPM received comments on this section from one Federal agency, five organizations, one labor union, and numerous individuals. Comments were in support of and in opposition to the proposed changes. Some comments were general to the section while others related to specific factors. The general comments are summarized first. Comments on specific factors are discussed next.

One individual opposed the application of the minimum standards of fitness to contractor employees. The individual stated that, because contractors are owners, members, or non-federal employees conducting their personal matters inside private businesses, the invasion of privacy and other rights is especially damaging and an overreach in comparison to the factors that had existed in part 302. OPM disagrees but offers a clarification. First, Government contractors are not “conducting their personal matters inside private businesses.” The very reason that a contractor employee needs to be vetted is because they are working for or on behalf of the Federal Government. Second, the President directed that contractor employee

fitness be subject to the same vetting requirements (e.g., position designation requirements; investigative standards, policies, and procedures; reciprocity) as civil service employees as prescribed by OPM. (See E.O. 13488, as amended.) Further, OPM notes that this is not a new requirement—contractors have been covered by E.O. 13488 since it was issued in 2009. Under this Executive Order, agency heads were required to take OPM guidance into account when considering if adjudicative criteria were equivalent for the purposes of making a reciprocally acceptable determination. Contractor employees have also been subject to the same investigative requirements as Federal employees since 2012. This was the result of a decision by Security, Suitability, and Credentialing Performance Accountability Council, as authorized by E.O. 13467. Finally, OPM notes that the additional authority given to OPM by the President to establish the minimum standards of fitness relates to the excepted service. (See E.O. 13764, sec. 2(c), amending E.O. 13488, sec. 3(a).) As has been the case since 2009, agency heads retain the discretion to establish adjudicative criteria for determining fitness to perform work as a contractor employee but with due regard to the regulations and guidance prescribed by OPM for the civil service and directives of the Office of Management and Budget.

A commenter suggested adding a factor covering emotional, mental, and personality disorders. They suggested that an individual’s mental health may have the propensity to affect their conduct and should be a factor for suitability or fitness as is done with national security determinations. Further, they pointed to medical qualification assessments that may be available to agencies for civil service positions, but not for contractors, as a basis for adding mental health concerns as a factor in the fitness determination process. OPM disagrees. Suitability and fitness determinations are decisions on whether an individual’s past conduct and actions may introduce risk to an agency’s mission or are contrary to the integrity required of individuals working for or on behalf of the Government. Additionally, the medical qualification determination process is addressed in 5 CFR part 339 and, therefore, is outside the scope of this rulemaking.

Multiple individuals asked OPM to reconsider changes to the factors, stating they are inappropriate, vague, overly broad and open to personal interpretation which could lead to bias or discrimination. Several of these

commenters suggested the proposed changes are illegal and would violate constitutional rights. A few commenters suggested that individuals should be hired based upon their qualifications without consideration of the types of conduct which the criteria address. OPM generally disagrees that any of the proposed factors give OPM or agencies the ability or authority to consider information in a way that is unconstitutional; however, OPM is not moving forward with some of the proposed changes. These changes are discussed as part of the discussion of each factor in the following sections. Further, OPM agrees that the process for assessing qualifications of applicants is essential, though separate from the process of vetting individuals, such as for suitability or fitness. In 5 U.S.C. chapter 73, Congress authorizes the President to prescribe regulations for the conduct of employees in the executive branch and, in chapter 33, authorizes the President to prescribe regulations for admission into the civil service that will best promote the efficiency of the service and to ascertain the fitness of applicants for employment sought. As such, via the Civil Service Rules, the President has made OPM responsible for establishing qualification standards and, separately, standards of suitability and fitness.

Evaluating whether an individual is suitable or fit to work for the Federal Government (either directly or indirectly as a contractor employee) often occurs after a background investigation. Portions of that investigation are conducted by gathering information directly from the individual via personnel vetting forms and, in some cases, personal interviews. Additional information is gathered from other sources.

Once the background investigation is complete, an adjudicator evaluates the information obtained against the factors. Only conduct falling within a factor may be the basis for finding one unsuitable or unfit. The adjudicator, through application of pertinent additional consideration, will determine whether the individual's character or conduct may have an adverse impact on the integrity or efficiency of the service.

#### Factor 4—Dishonest Conduct

OPM proposed to split the existing factor regarding “criminal and dishonest conduct” into two separate factors to make it clear that dishonest conduct need not be criminal to be relevant to a determination of suitability or fitness. OPM is adopting “dishonest conduct” as Factor 4.

A Federal agency noted that financial concerns can be easily overlooked under the criteria for “dishonest conduct.” That Federal agency acknowledged that financial irresponsibility may be a suitability issue falling under the dishonest conduct factor but suggested adding a factor specifically to address intentional disregard for debt in finances. The agency expressed the view that adding a factor would provide better clarity as the agency recognized that, to be a basis for unsuitability, an agency must establish financial irresponsibility demonstrated by evidence of the individual deliberately accumulating debt of a significant nature and/or intentionally disregarding those debts. OPM agrees that an important aspect of establishing financial irresponsibility as a suitability or fitness concern is the requirement to have evidence of the dishonest actions by the individuals. However, OPM believes that the current factor of “dishonest conduct” sufficiently captures this intentional disregard. Therefore, the suggestion to add another factor, or to elaborate on the existing, is not adopted.

Factor 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

OPM proposed to change “alcohol abuse” to “excessive alcohol use” to capture the intent that the relevance to suitability and fitness is the need to account for an individual's problematic misuse of alcohol over a period of time. As OPM described in the proposed rule, excessive alcohol use may suggest 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. OPM also proposed to remove the requirement that rehabilitation be “substantial” to align the suitability and fitness factors.

A labor union agreed with the change to this factor as being more representative of the concern of accounting for an individual's problematic misuse of alcohol, over time. The labor union also agreed with not requiring evidence that rehabilitation be substantial. An individual, who also expressed support for the change, asked OPM to provide additional guidance or examples for identifying and distinguishing conduct that may fall within this factor as well

as what constitutes rehabilitation. The individual also asked that OPM emphasize the importance of following other laws which offer protections from discrimination based upon past alcohol use, such as the Americans with Disabilities Act.

OPM agrees and will continue to provide guidance on this factor via supplemental issuances to agencies. Though outside the scope of this rulemaking, OPM also agrees that agency personnel involved in the hiring process must be familiar with and abide by laws and requirements meant to protect the rights of job applicants.

Factor 6—Illegal Use of Narcotics, Drugs, or Other Controlled Substances, Without Evidence of Rehabilitation

OPM proposed to remove the requirement for evidence of “substantial” rehabilitation to provide consistency between Factors 5 and 6. A labor union and the individual commenting on Factor 5 in support of the change also commented on Factor 6. The labor union commended the changes to strike the requirement for evidence of rehabilitation to be substantial while the individual expressed support but asked OPM to provide additional guidance.

Another individual suggested striking Factor 6, amend it to not apply to marijuana, or modify Factor 5 to focus on excess use of marijuana because of shifts in state laws regarding marijuana usage. OPM is not adopting this change. Factor 6 may be used by agencies to assess an individual's illegal use of several substances, not only marijuana. Also, despite changes to state laws, marijuana continues to be classified as a controlled substance under the Controlled Substances Act (21 U.S.C. 802(16)). But as is the case with any of the suitability factors, agencies and OPM must apply additional considerations, as pertinent, to assess the potential for the individual, based upon their conduct, to negatively impact the integrity and efficiency of the service. Marijuana use, alone, is not a basis for automatically finding one unsuitable or unfit. Instead, the agency or OPM must demonstrate how, considering the nature of the position, the past usage will have negative impact. This is the case with any illegal use of drugs. Recognizing that past marijuana usage may factor into the suitability determination of job applicants who are well qualified, OPM has issued guidance<sup>3</sup> for agencies on

<sup>3</sup> Available at <https://www.chcoc.gov/content/assessing-suitability/fitness-applicants-or-appointees-basis-marijuana-use-maintaining-drug>.

how marijuana use may or may not adversely affect the integrity and efficiency of the service, thereby impacting an individual's suitability or fitness for a position. Adjudicators will consider the person holistically, evaluating any impact to the integrity and efficiency of the service on a case-by-case basis.

#### Comments Applicable to Proposed Factors 7, 8, 9, and 10

OPM proposed to replace the existing Factor 7 with four distinct factors. Most of the comments received regarding OPM's proposed changes to the suitability factors were on these proposed changes. Some commenters, including multiple organizations, expressed general opposition to the changes, asking OPM to leave the existing Factor 7 unchanged, while others expressed specific concerns. Several commenters suggested that, without a stricter delineation of allowable or disqualifying conduct, the factors may be misused and could lead to findings of unsuitability for actions such as membership in organizations or movements that peacefully seek changes to our Nation's current laws and policies. The commenters offered other examples of conduct that they posited could lead to findings of unsuitability under the revised factors such as protesting at school board meetings or counseling a pregnant woman on her options. Finally, the commenters suggested the rule does not include any prohibition about applying the factors in a way that circumscribes an individual's personal liberties and recommended that OPM include an assertion that the factors address conduct not protected by the First Amendment. OPM does not agree with the commenters' assessment of how the factors could be applied or with the examples offered. As OPM explained in the proposed rule, the four new factors were intended to address conduct that has a clear nexus to the integrity and efficiency of the civil service, that poses significant insider threat risks to Federal agencies and the public and also is not protected by the First Amendment. (88 FR 6192, 6199.) OPM acknowledges the commenters' concerns regarding clarity. OPM is not proceeding with the four distinct factors that would have comprised § 731.202(b)(7), (8), (9), or (10) and is instead retaining at § 731.202(b)(7) the current factor, Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force.

#### Proposed Factor 7—Knowing Engagement in an Act or Activity With the Purpose of Overthrowing Federal, State, Local, or Tribal Government

OPM is not moving forward with its proposed changes to Factor 7 and is retaining the existing provision at 5 CFR 731.202(b)(7). Two individuals and two organizations supported this factor as was proposed, but not Factors 8, 9, and 10 as were proposed. A Federal agency asked OPM to strike "knowing" to avoid agencies having to establish evidence of the individual's thoughts and intentions and eliminate the risk of not being able to establish conduct if the individual claims to have not acted knowingly. OPM acknowledges that direct evidence of knowledge may not be readily available thus requiring circumstantial evidence. But requiring evidence that the individual participated in an act or activity with the purpose of overthrowing the Government knowingly is critical if the conduct is to be considered as a basis for finding an individual unsuitable or unfit. Requiring this element to establish the Factor helps demonstrate that the individual understood that the conduct was wrongful and better avoids scenarios where an individual is found unsuitable or unfit solely because they were in the wrong place at the wrong time or were misled about the purpose or intent of an event.

Two organizations and an individual questioned the removal of the words "by force" from § 731.202(b)(7) and recommended re-inserting it for clarity. As discussed, OPM is not moving forward with its proposed changes and will retain the existing factor.

#### Proposed Factor (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

A Federal agency suggested revising the factor to include attempted acts, and two individuals requested that the factor be removed because it could be used to discriminate against people who hold different views than those in government. Another commenter, who suggested the existing provision at 5 CFR 731.202(b)(7) was sufficient, suggested the language in this factor is unclear, overreaches OPM's authority, and could infringe on individuals' rights. The commenter suggested that, with this factor, OPM or an agency could find someone unsuitable due to "praying outside of an abortion clinic or marching in a Black Lives Matter protest

march." An organization suggested the factor parrots the "Klan Act" which would already be covered by the criminal conduct factor.

OPM disagrees that the factor, as was proposed, could be used by an agency to find someone unsuitable for activity protected by the First Amendment. OPM agrees that conduct covered by the proposed factor includes conduct covered by another factor as applicable to the circumstances, such as criminal conduct (*see* 5 CFR 731.202(b)(2)). Therefore, OPM is not implementing this proposed factor in this final rule.

#### Proposed Factor (9)—Attempting To Indoctrinate Another or To Incite Another to Action in Furtherance of an Illegal Act

One individual requested that OPM remove this proposed factor because of its potential breadth—positing it could result in finding an individual unsuitable who sought to teach or influence another person in any context whatsoever. The individual commented that the language is vague and indoctrination must be defined. The commenter also suggested that this factor may be used to find unsuitable anyone who has ever attempted to persuade another person to lobby legislators to change laws and asked if even home schooling or holding political rights training sessions would be considered indoctrination. Two organizations commented that the factor is ambiguous with one asking if it makes it permissible for an agency to ask about all attempts to indoctrinate which could include serving as a youth group leader or posting about the pandemic on social media and another questioning whether indoctrination, a prolonged process, could lead to conduct in furtherance of an illegal act. OPM does not agree that the language is vague nor that "indoctrinate" needs further definition. Indoctrinate when used as a verb is generally understood to mean teaching another the ideas, opinions, or beliefs of a particular group. Under this factor, the attempt to indoctrinate or incite another must be done in furtherance of an illegal act. It is this latter point regarding illegality that sufficiently narrows the factor to answer commenters' various questions and hypotheticals and would be the relevant inquiry to be addressed in determining an individual's suitability or fitness. As discussed, however, OPM is not implementing this proposed factor in this final rule.

**Proposed Factor (10)—Active Membership or Leadership in a Group With Knowledge of its Unlawful Aim, or Participation in Such a Group With Specific Intent To Further Its Unlawful Aim**

A Federal agency suggested removing the element that the individual have knowledge of a group's unlawful aim. Three individuals suggested that "unlawful aim" will be difficult to prove and therefore, difficult to enforce. Two organizations suggested that the wording of the factor make it open to interpretation.

Similar to OPM's response relating to suggestions about Factor 7, this element helps demonstrate that the individual understood that the aim was wrongful and should be included to better avoid scenarios where being misled about a group's aim causes an individual to be found unsuitable or unfit.

Further, suitability and fitness determinations are based upon evidence of an individual's character or conduct and when that evidence supports a conclusion that the character or conduct will have an adverse impact on the integrity and efficiency of the service, OPM or the agency must not make a favorable suitability or fitness determination. The point of this factor was not to target individuals for holding views that may be in conflict with those of officials making adjudicative decisions or to find individuals unsuitable or unfit because of affiliations they may have with groups of others who share their opinions, for example. As specified in the text of the proposed factor, the factor required an unlawful aim or participation specifically for the purpose of furthering the unlawful aim. It is the knowing affiliation or intent to further illegal activities that raise the potential suitability or fitness concern. OPM agrees, though, that the nature of character or conduct that this tailored factor addresses, could be better addressed under another factor as applicable to the circumstances, such as criminal conduct (*see* 5 CFR 731.202(b)(2)). Therefore, OPM is not implementing this proposed factor in this final rule.

**Factor (12)—Violent Conduct**

OPM also proposed to add a factor for violent behavior to account for 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. For the purposes of this regulation, the term "violent" means using or involving physical force

intended to hurt, damage, or kill someone or something. (88 FR 6192, 6200.)

For example, in certain jurisdictions, protection orders may be filed against individuals for sexual or physical violence regardless of whether the violent conduct constitutes a criminal act under the law of the relevant jurisdiction. The process for securing the protection order may be a civil matter. The addition of this factor gives agencies and OPM a way to consider, in such a scenario, if the individual's conduct is a basis for finding the individual to be unsuitable or unfit.

One individual expressed support for the factor but asked that the scope be limited to avoid application against, for example, those who participate in competitive boxing or recreational hunting as those activities could arguably fit with the definition of violent conduct, because they involve physical force intended to hurt, damage, or kill someone or something. Two commenters opposed to this factor expressed the same concern that the factor was vague and potentially covered those who use deadly force in self-defense, such as abused spouses or law enforcement officers. OPM appreciates these comments as another opportunity to elaborate on how suitability or fitness determinations are made.

When evaluating information to consider if it may warrant an assessment for suitability or fitness, OPM or the agency must first consider whether the information falls within one of the factors. If so, OPM or the agency will consider the impact on the integrity and efficiency of the service through application of the additional considerations. For example, while the act of hunting wild game could technically fall within the definition of conduct that is "violent" as it involves physical force intended to kill something, lawful hunting would not have an adverse impact on the integrity and the efficiency of the service. First, an individual would not be required to report legal hunting activities during the course of a background investigation. If it were reported, such as by a co-worker, it is unlikely to be identified as a potential issue in the background investigation. Even in the unlikely event an adjudicator were to make the initial consideration that legal hunting could cause the individual to be unsuitable or unfit, the subsequent process of relating the conduct to the factor, assessing the applicable additional considerations under 5 CFR 731.202(c) (such as the nature and seriousness of the conduct and the circumstances surrounding the

conduct), and ultimately assessing whether the conduct negatively impacts the integrity and efficiency of the service would yield a favorable determination. In sum, when evaluating the nature of the conduct or the circumstances surrounding it, OPM or the agency would conclude that it is not adjudicatively relevant.

As another example, while deadly force in self-defense could be considered violent conduct, in the scenarios offered by the commenter, the surrounding circumstances would also be considered under § 731.202(c)(3) to determine if the conduct was mitigated, thus not leading to a finding of unsuitability.

As discussed previously, OPM is retaining the existing Factor 7 without change. OPM is also retaining the existing Factor 8 without change. (Although OPM had proposed to renumber the factors, OPM did not propose any substantive changes to the existing Factor 8.) Accordingly, OPM is adopting this proposed Factor 12 as new Factor 9 at § 731.202(b)(9).

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

OPM proposed to revise § 731.203 to limit the applicability of suitability actions to only individuals in the competitive service, in the excepted service that can noncompetitively convert to the competitive service, or the career Senior Executive Service. The change was necessary due to the implementation of the minimum standards of fitness for the excepted service.

OPM did not receive any comments on this section. OPM is adopting its proposed changes with several modifications as discussed in more detail in the section regarding § 731.101. Specifically, OPM has moved the list of actions from the proposed § 731.203 into the definition of a suitability action in § 731.101. OPM also moved the limitation that a suitability action may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of the part from the proposed definition of a suitability action to § 731.203.

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

This section explains OPM's ability to impose debarment, including concurrent periods of debarment, when new conduct arises while an individual is under debarment. OPM also proposed to revise the text to explain that this

provision is limited to individuals in or seeking appointment to the competitive service or the career Senior Executive Service.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

*Section 731.205 Debarment by Agencies in Cases Involving the Competitive Service and Career Senior Executive Service*

OPM proposed to revise the text to explain that this provision is limited to individuals in or seeking appointment to the competitive service or the career Senior Executive Service.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

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

This section specifies reporting requirements for agencies into the government-wide central repository. OPM proposed to revise this section to include references to continuous vetting.

OPM received no comments on this section and sees no reason to amend the proposal. OPM is adopting its proposed changes.

*Sections 731.302 and 731.402 Notice of Proposed Action*

Sections 731.302 and 731.402 govern the issuance of a notice of proposed action in a suitability action by OPM or an agency, respectively. OPM proposed to amend these sections to also permit delivery of correspondence by secure email.

OPM received no comments on these sections and sees no reason to amend the proposal. OPM is adopting its proposed changes.

*Subpart Headings*

OPM proposed to revise the headings of several subparts of part 731 to indicate that those provisions only apply to individuals in or applying to the competitive service, the excepted service that may noncompetitively convert to the competitive service, or career Senior Executive Service. OPM received no comments on those amendments, sees no reason to amend the proposal, and is adopting its proposed changes.

*Subpart F—Savings Provision*

OPM proposed to eliminate this subpart as obsolete. OPM received no comments on this subpart, sees no

reason to amend the proposal, and is removing the subpart in this final rule.

**Expected Impact of This Final Rule**

*1. Statement of Need*

OPM is issuing this final rule to 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. It implements several changes required by E.O. 13764. First, per the change to the Civil Service Rules expanding OPM's responsibilities for fitness, it sets the minimum standards of fitness for the excepted service. This change results in the same adjudicative factors and additional considerations being applicable across much of the civil service. Consistent with amendments to E.O.s 13467 and 13488, the changes also align position designation requirements, investigative standards, and reciprocity rules between the civil service, contractor employees, and nonappropriated funds workforces. Now, agencies will use the same system for designating position risk and sensitivity, background investigations will be conducted using the same standards, and the same rules for determining whether reciprocal acceptance of prior background investigations and suitability or fitness determinations will be applied across the workforce.

As required by E.O. 13467, as amended, the rule also implements continuous vetting for the low risk and public trust populations.

*2. Regulatory Alternatives*

OPM must comply with Executive order directions, 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 Department of Defense (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.

In implementing this requirement, OPM considered the cost to agencies of establishing policies and procedures to conform to OPM's regulation. There will

be costs associated with implementing aspects of the policies required by the E.O.s; however, there are also efficiencies resulting from policy implementation. The expected impact of aligned investigative and adjudicative standards 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 in the section 4. of this preamble, 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 avoidance in the near term through phased implementation of continuous vetting for low risk populations. As such, implementation of the required continuous vetting checks for enrolled individuals is eased through a phased introduction of the required checks over time.

OPM considered not only the cost to agencies but the burden of preparing for enrollment of the low risk and public trust populations into continuous vetting. Recognizing that agencies must validate the need of their current workforce to be enrolled into continuous vetting in accordance with this new requirement, a process that could be time intensive in particular for the low risk population not previously subject to a reinvestigation requirement, we established a phased approach. Beginning with the public trust population, agencies, working with their investigative service providers, will gradually enroll their workforces into the new continuous vetting service. This iterative approach avoids agency vetting professionals from being faced with enrolling their covered workforce all at the same time and adjudicating any resulting hits from continuous vetting checks. This enables agencies to adopt the necessary policy and procedural infrastructure needed to execute requirements.

### 3. Impact

The rule promotes 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 adjudicative 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.

OPM is implementing these requirements in the least burdensome way possible while still effectuating what the President set forth in Executive orders. Individuals subject to continuous vetting are those populations already subject to Federal personnel vetting investigative standards, including contractor employees with long term access to Federal facilities and information systems. Even prior to recent Executive orders and policy requirements requiring personnel vetting investigations and determinations on contractors, the Federal Acquisition Regulation (FAR) Council published a final rule in November 2006, amending the FAR to require contracting officers to incorporate the requirement for contractors to comply with agency verification procedures—implementing 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 requiring long term access to Federal facilities and information systems to support agencies should already be familiar with personnel vetting requirements.

This final rule provides greater consistency in vetting processes and, where possible, saves costs by reducing redundancy and duplication and modernizes processes for collecting information. By establishing minimum standards of fitness for the excepted service that align with OPM's suitability standards, there is a greater likelihood that individuals will be assessed using

consistent standards, thus providing a stronger 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.

OPM anticipates this final rule will reduce the burden on 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 non-sensitive public trust populations. Enrollment of the non-sensitive public trust population will occur throughout fiscal year 2025. Enrollment of the low risk population is projected to begin in fiscal year 2027. Through a phased process, agencies are initiating their populations into continuous vetting and, eventually, individuals will be enrolled into continuous vetting at the onset of their initial background investigations. 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. Instead, agencies will 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 to breaks in service or changes in position risk and/or sensitivity.

One organization suggested OPM provide data demonstrating the number of Federal civil service employees who were delayed in transferring to another agency and the processing burden to agencies as a result. An individual suggested that more research into the benefit of the scope and frequency of vetting could be beneficial, especially in the case of suitability or fitness vetting, which the commenter opines is less studied and scrutinized than that of security vetting. The individual offered that there is little objective research to support that this degree of vetting is effective and that there is little discussion of the goals and objectives of conducting vetting to this extent. As is outlined at the onset of this rule, OPM is required by Executive order to

establish continuous vetting requirements for the non-sensitive public trust and low risk populations to standardize investigative activities across the civil service, contractor employee, and DoD nonappropriated funds populations. OPM is not adopting substantial changes to the applicability of reciprocity requirements that have been in place since 2009. Further, by way of this rule, OPM is not increasing the scope of vetting requirements, though the periodicity of post-appointment checks are changing for the non-sensitive public trust population. The Federal Personnel Vetting Core Doctrine,<sup>4</sup> which defines the personnel vetting mission, its guiding principles, key supporting processes, and policy priorities, provides more explanation in support of the new approaches.

### 4. Costs

An organization asked for a cost-benefit analysis of the change from periodic reinvestigations to continuous vetting. The organization recognized that the current regulation already authorizes a continuous reassessment so long as it occurs at least every five years. The organization suggested reassessments that decrease in periodicity may result in a cost savings but could weaken agency security. The commenter did not express questions or concerns with the cost analysis that was included in the notice of proposed rulemaking published in January 2023 or with the explanation of anticipated benefits with the changes. Therefore, OPM adopts the economic assessment provided in the proposed rule with only two sets of changes. First, OPM updated pricing of products by the Defense Counterintelligence and Security Agency (DCSA), which was an estimate at the time the proposed rule was issued. Second, OPM also updated the cost analysis to use the 2024 pay rates.

This rule will affect the operations of most Federal agencies in the executive branch—ranging from cabinet-level departments to small independent agencies. To comply with the regulatory changes, affected agencies will need to review the rule and update their policies and procedures. For this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2024 for GS–14, step 5, from the Washington, DC, locality pay table (\$157,982 annual locality rate and \$75.70 hourly locality rate). We assume that the total dollar

<sup>4</sup> 86 FR 2705 (January 13, 2021), available at <https://www.federalregister.gov/documents/2021/01/13/2021-00547/federal-personnel-vetting-core-doctrine>.

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 \$151.40 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 \$151.40. This effort would result in estimated costs in the first year of implementation of about \$37,850 per agency, and about \$3,028,000 in total government-wide. In subsequent years, the costs of regulatory compliance associated with this rule will be folded into agencies' routine costs.

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 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 non-sensitive 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. Consequently, the cost of continuous vetting for the low risk and public trust population will vary amongst the Federal agencies.<sup>5</sup>

<sup>5</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

To assist Federal agencies in budget development, DCSA released in August 2024 its 2025 and 2026 products and services billing rates<sup>6</sup> including pricing for the initial continuous vetting capability for non-sensitive public trust positions. For fiscal year 2025, agencies can expect to pay a \$3.25 monthly subscription fee for active enrollees in non-sensitive, public trust continuous vetting. By comparison, DCSA's price for a standard service, non-sensitive, high risk public trust reinvestigation (Tier 4) in fiscal year (FY) 2025 is \$2,505, which equates to \$41.75 monthly over five years. Agencies utilizing continuous vetting in FY 2025 for their non-sensitive, high risk, public trust populations would avoid \$2,310 in personnel vetting costs over five years for each such position. The difference 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 2025 cost of \$375 for each non-sensitive moderate risk public trust reinvestigation. While DCSA's pricing for FY 2025 and 2026 does not establish the cost of the continuous vetting product for the low risk population, it will not be more than \$39–\$40.20 per year which are the FY 2025 and FY 2026 costs for the continuous vetting products for the non-sensitive, public trust populations.<sup>7</sup> 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 extensive than those on the national security population.

An additional factor that agencies 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 for a department that is comprised mainly of non-sensitive positions, the Department of Veterans Affairs (VA), and a department that is comprised mainly of sensitive positions, DoD. The VA has vastly more contractor personnel as well as Federal appointees and employees.

<sup>6</sup> Available at [https://www.dcsa.mil/Portals/128/Documents/about/err/FIN\\_24-01\\_FY25\\_and\\_FY26\\_Billing-Rates.pdf](https://www.dcsa.mil/Portals/128/Documents/about/err/FIN_24-01_FY25_and_FY26_Billing-Rates.pdf).

<sup>7</sup> DCSA has established the FY 2025 cost for the interim continuous vetting product for the non-sensitive public trust population at \$39 per year versus the full Trusted Workforce 2.0 product which is priced at \$90.

non-sensitive positions (approximately 513,400) than sensitive positions (approximately 9,000). The VA's positions are largely non-sensitive, low risk, with approximately 455,000 Federal and contractor personnel in low risk positions; 41,200 in non-sensitive, moderate risk, public trust positions; and 17,200 in non-sensitive, high risk, public trust positions. Under the current requirement to request a reinvestigation for public trust positions every five years and considering FY 2025 DCSA pricing, the VA should anticipate paying \$58,536,000 for non-sensitive, public trust reinvestigations over five years. With continuous vetting, the annual cost of enrolling the public trust population for fiscal year 2025 is \$2,277,600, or \$11,338,000 over five years, equating to \$47,198,000 in cost avoidance for the non-sensitive, moderate and high risk positions over the five-year cycle. For continuous vetting of the low risk population, at a cost of \$39 per low risk position per year, VA would expect to pay DCSA \$17,745,000 annually or \$88,725,000 over five years. For any sensitive positions the VA has, they may also recognize the cost savings between the periodic reinvestigation 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 \$29,286,000 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 DoD, which has a much higher sensitive population than non-sensitive with approximately 3.5 million individuals in sensitive positions and approximately 283,000 in non-sensitive positions. With approximately 3,000 non-sensitive, moderate risk positions and 560 non-sensitive, high risk positions, the DoD could plan to spend \$3,465,440 on periodic reinvestigations over five years for their non-sensitive public trust positions whereas continuous vetting would result in a total cost of \$1,602,000 and therefore result in \$1,863,440 in cost avoidance over that same period. The cost of enrolling DoD's 280,000 federal and contractor low risk positions at \$39 per year subject to the requirement would equate to an annual

cost of \$11,037,000 or \$55,185,000 over five years; however, this cost would be offset not only by the cost avoidance of \$1,863,440 for the non-sensitive, 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.

#### 5. Benefits

The standardization in vetting resulting from the changes in this rule will increase efficiency across the executive branch while allowing for faster identification of issues that may adversely affect trust determinations of individuals. Mobility of individuals is enhanced by reciprocal acceptance of investigations and adjudications thus allowing individuals to move more quickly between and within Federal agencies and Government contractors. Additionally, the revised rule enables a more efficient re-entry to Federal service.

With respect to continuous vetting, agencies may recognize a cost savings by using continuous vetting rather than the traditional reinvestigation product that is currently required for public trust positions at a minimum 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 Trusted Workforce 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 non-sensitive, public trust or national security positions, we do not believe that this 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.

#### Severability

If any of the provisions of this final rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be severable from its respective section(s) and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances, unless such holding is that the provision is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof. This final rule revises vetting requirements by broadening their applicability, establishing continuous vetting, and standardizing the way in which suitability and fitness determinations are made. As discussed elsewhere in this rule, there are various authorities for these provisions. The provisions of this final rule apply to different populations such as the competitive service, the excepted service, and contractor employees. Should provisions related to one of these populations be held to be invalid we believe that most of the provisions should be severable and would not be impacted. Similarly, many of the operational requirements have no bearing on other provisions and are severable. For example, a holding that a suitability or fitness factor is invalid should not impact other provisions related to how these decisions are made. In enforcing the provisions of this rule, OPM will comply with all applicable legal requirements.

#### Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866, 13563, and 14094, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with effects of \$200 million or more in any one year. This rulemaking does not reach that threshold but has otherwise been designated as a

“significant regulatory action” under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

#### Regulatory Flexibility Act

The Acting Director of the OPM certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### Federalism

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

#### Civil Justice Reform

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

#### Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule that would impose spending costs on State, local, or tribal governments in the aggregate, or on the private sector, in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately \$183 million. This regulation will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, in excess of the threshold. Thus, no written assessment of unfunded mandates is required.

#### Congressional Review Act

The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule does not satisfy the criteria listed in 5 U.S.C. 804(2).

#### 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 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 systems of record notice Personnel Vetting Records System, DUSDI 02–DOD (83 FR 52420).

In a parallel effort to this rule, and as part of its work with the PAC, OPM proposed a new information collection and renewal cycle, Personnel Vetting Questionnaire (PVQ), to streamline the existing information collections commensurate with on-going efforts to improve personnel vetting processes and the experience of individuals undergoing personnel vetting. OMB approved the PVQ information collection under control number 3206–0279 on November 15, 2023. See [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202302-3206-005](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-3206-005). Once the new collection is implemented, OPM plans to discontinue the current information collections.

Some individuals or populations may be required to complete an updated questionnaire in order for continuous vetting to be conducted. In the notice of proposed rulemaking published in January 2023, OPM sought public comment on the cost and burden implications for this potential new population. However, no comments were received other than what has been addressed elsewhere within this rule.

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

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

Office of Personnel Management.

**Kayyonne Marston,**

*Federal Register Liaison.*

Accordingly, for the reasons stated in the preamble, OPM amends 5 CFR parts 302 and 731 as follows:

#### PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

- 1. The authority citation for part 302 is revised to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151. E.O. 10577, 19 FR 7521, 3 CFR 1954–1958 Comp., p. 218. Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95–454, 92 Stat. 1111. Sec. 302.501 also issued under 5 U.S.C. ch. 77. Sec. 302.107 also issued under 5 U.S.C. 9201–9206; sec. 1122(b)(1), Pub. L. 116–92, 133 Stat. 1607. Secs. 302.108 and 302.203 also issued under E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243.

- 2. Amend § 302.107 by revising the section heading to read as follows:

#### § 302.107 Suitability and fitness inquiries regarding criminal history.

- 3. 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 service 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 must furnish a copy of those reasons to an applicant upon their request.

- 4. 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

- 5. The authority citation for part 731 is revised to read as follows:

**Authority:** 5 U.S.C. 1302, 3301, 7301. E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218, as amended. E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 198, as amended. E.O. 13488, 74 FR 4111, 3 CFR, 2010 Comp., p.

189, as amended. E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243. Presidential Memorandum of January 31, 2014, 3 CFR, 2014 Comp., p. 340. 5 CFR parts 1, 2, 5, and 6.

- 6. Revise the heading for part 731 to read as set forth above.
- 7. 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) The following definitions apply for the purposes of 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, the individual's status as an appointee will extend through the end of the initial probationary/trial period, if longer than one year.

*Competitive service or career Senior Executive Service*, for the purposes of this part, 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, 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 employee includes employees of a grantee of any agency or any other category of person who performs work for or on behalf of an agency but does not include a Federal employee.

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

*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 competitive service or career Senior Executive 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 the 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 of the executive branch either excepted from the competitive service or which is not in the Senior Executive Service.

(1) For the purposes of this part, excepted service does not include:

(i) Any position in an element of the intelligence community as defined in the National Security Act of 1947, as amended, to the extent that the individual is not otherwise subject to OPM appointing authorities;

(ii) Any position where OPM is statutorily precluded from prescribing such standards; and

(iii) Any position when filled by political appointment.

(2) Senior Executive Service noncareer, limited term, and limited emergency appointments are not subject to suitability actions under this part.

(3) 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 nonappropriated 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 5 U.S.C. 2105.

*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 and 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 one or more of the following outcomes:

(1) Cancellation of eligibility;

(2) Removal;

(3) Cancellation of reinstatement eligibility; and

(4) Debarment.

*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 suitability 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 13488, are also subject to the position designation requirements, investigative standards, and reciprocity-requirements in this part.

(2) To establish the criteria for making determinations of suitability for the competitive service or career Senior Executive Service and to establish 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.

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

(d) 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 that there has been knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force. 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 part 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 (see definitions § 731.101(a)) 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) An agency must reciprocally accept a prior background investigation in the event of promotion, demotion, reassignment, or transfer from employment subject to investigation to other employment subject to investigation without a break in service, unless the new employment is at a higher risk level.

(2) An agency must reciprocally accept a prior background investigation 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, 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 must request such checks as may be specified in implementing guidance and must 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) 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.

(c) 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 (c)(2) of this section.

(1) In the case of a prior investigation that is reciprocally accepted, if the record in the Central Verification

System or its successor system does not reflect a prior favorable suitability or fitness determination, the agency must review the prior investigation for the purpose of making a suitability or fitness determination.

(2) In the case of a prior investigation that is reciprocally accepted, if the prior investigation was favorably adjudicated for suitability or fitness, the agency must accept the prior determination except that the agency must make a new determination where:

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

(ii) The agency has prescribed additional factors as permitted under § 731.202(b) that were not addressed in the prior favorable adjudication, in which case the agency must conduct an adjudication using only those additional factors.

(d) 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 complete 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), or (8).

(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 5 CFR part 752 or terminating a probationary employee under the procedures of 5 CFR part 315 or 359 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.* For every position in the competitive service; in the excepted service; to be filled with a career appointment in the Senior Executive Service; or in which the occupant performs a service as a contractor employee or as a nonappropriated fund employee, an agency head must designate the position at high, moderate, or low risk level (in accordance with the risk designation system issued jointly by the Executive Agents; see § 731.102(b)), as determined by the position's potential for adverse impact to the efficiency or integrity of the service.

(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 such as positions involving access to or control of financial records or 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 Non-sensitive,

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 title 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 5 CFR part 1400.

(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. Checks must be conducted at regular intervals, based on the type of check and with consideration of position risk and sensitivity. The nature of a continuous vetting check, and any additional requirements and parameters, are specified in supplemental issuances as described in § 731.102(b). An individual may be subjected 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 this paragraph (d).

(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 5 CFR part 1400.

(f) *Completed investigations.* An investigation or continuous vetting check under paragraphs (c) through (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 5 CFR part 315, 359, or 752. 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) *Criminal or credit history inquiries.* A hiring agency may not make specific inquiries concerning an applicant's criminal background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. For criminal inquiries prior to a conditional offer, this prohibition does not apply to applicants for positions excepted under 5 CFR 920.201(b). For competitive service or career Senior Executive Service, a hiring agency may not make specific inquiries concerning an applicant's credit background in oral or written form (including through the OF-306 or other forms used to conduct vetting for Federal employment, USAJOBS, or any other electronic means) unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provisions in 5 CFR part 330, subpart M. Agencies may make an inquiry into an applicant's Selective Service registration, military service, citizenship status, where applicable, or previous work history, prior to making a conditional offer of employment to an applicant.

(h) *Recordkeeping and use of information.* 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).

■ 8. 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) 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.* Only OPM may take a suitability action considering the factors in paragraph (b)(3) or (7) of this section. Agencies may use the factor in paragraph (b)(8) of this section in applicant and appointee suitability cases but not employee cases; however, OPM may use this factor in employee cases. When making a suitability determination, OPM or an agency will consider only the following factors to determine if one is suitable. 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 and willful engagement in acts or activities designed to overthrow the U.S. Government by force;

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

(9) 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) A suitability action may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.

(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 and willful engagement in acts or activities designed to overthrow the U.S. Government by illegal or unconstitutional means; and/or

(3) 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 5

CFR part 315, 359, or 752. Where conduct covered by this part may also form the basis for an action under 5 CFR part 315, 359, or 752, an agency may take the action under 5 CFR part 315, 359, or 752, 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 it takes 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 3 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.

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

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

■ 10. 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.

\* \* \* \* \*

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

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

■ 12. 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.

\* \* \* \* \*

■ 13. Revise the 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**

**Subpart F—[Removed]**

■ 14. Remove subpart F, consisting of § 731.601.

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**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 950**

**Combined Federal Campaign: Authorization of Short-Term Regulatory Variation**

**AGENCY:** Office of Personnel Management.

**ACTION:** Notification.

**SUMMARY:** The Office of Personnel Management (OPM) is providing notice that the Acting Director is authorizing a variation from the regulatory public accountability standards to relieve practical difficulties and unnecessary hardships in complying with the strict letter of the regulation. The Acting Director has found that such a variation is within the spirit of the regulations and will ensure the achievement of campaign objectives. Specifically, for an 18-month period, OPM is modifying certain revenue thresholds for the various public accountability standards