# Proposed Rules

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

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 731, 732, and 736

**RIN 3206–AB92**

### Suitability, National Security Positions, and Personnel Investigations

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing changes to rules on personnel suitability, national security positions, and personnel investigations which OPM previously issued as an interim rule with a request for comments. OPM has received and considered public comments and is now publishing for comment proposed changes. The proposed rule incorporates many of the suggestions received, makes additional changes based on the recent abolishment of the Federal Personnel Manual (FPM), and continues the distinctions in the interim rule between national security investigations and investigations to determine suitability for non-sensitive positions. OPM will issue a final rule after review of the comments received on this proposed rule.

**DATES:** Comments must be submitted on or before February 20, 1996.

**ADDRESSES:** Send written comments to John J. Lafferty, Deputy Associate Director for Investigations, Office of Personnel Management, Post Office Box 886, Washington, DC, 20044–0886.

**FOR FURTHER INFORMATION CONTACT:** John J. Lafferty, (202) 376–3800.

**SUPPLEMENTARY INFORMATION:** OPM promulgated the current suitability and personnel security regulations as an interim rule with a request for comments in the Federal Register (56 FR 18650–18656, April 23, 1991). Comments were received from 16 sources, including individuals, Federal agencies, Federal employee unions, and public interest organizations. The following summarizes the principal comments, suggestions and proposed actions to be taken, as well as information added because of the abolishment of the FPM.

Part 731

*Section 731.102 Implementation*

Because of the abolishment of the FPM, a new section has been added to the regulations outlining OPM's and agencies' responsibilities under the Computer Security Act of 1987 and OMB Circular A–130.

*Section 731.103 Delegation to Agencies*

The interim regulations provided that OPM could, in its discretion, delegate to agencies authority for adjudicating suitability. In accordance with recommendations of the National Performance Review (NPR), the proposed regulations delegate to agencies all suitability adjudication authority, except in cases of material intentional false statement or deception or fraud in examination or appointment.

Several commenters on the interim regulations were concerned that the provision for delegation to agencies of suitability determination authority did not extend all of the same procedural protections that are applicable in OPM-adjudicated cases.

OPM has revised the regulations to make clear that all procedural rights applicable in OPM-adjudicated cases pertain to agency adjudications. This should alleviate concerns expressed regarding ''administrative due process'' for cases involving delegated suitability determination authority.

*Section 731.201 Standard*

Section 731.201 has been revised to clarify that removal is not the only option that may be pursued for an employee found unsuitable. The Director of OPM has authority under Civil Service Rule 5.3(a)(a) to instruct agencies ''to separate *or take other action*'' against an employee found unsuitable (emphasis supplied), and agencies will have the same authority under delegated suitability adjudication authority.

*Section 731.202 Criteria*

OPM received favorable comments on the substitution of a more clearly job-related criterion for ''alcohol abuse,'' in lieu of the prior standard of ''habitual use of intoxicating beverages to excess.'' However, a number of negative comments were received regarding certain other criteria. One commenter thought that ''refusal to furnish testimony as required by § 5.4 of this chapter'' was too broad and should be qualified by language making clear that the provision was not intended to require testimony protected by the U.S. Constitution or the Whistleblower Protection Act or the Inspector General Act. No change is proposed in response to this comment. OPM believes it is self-evident that none of OPM's regulations should or would be interpreted or applied in any manner that would violate the Constitution or specific statutory mandates.

Another commenter, while opining that ''knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force'' was ''more stringent'' than ''current criteria,'' nevertheless urged elimination of this criterion altogether on First Amendment grounds. OPM does not consider it necessary to adopt this suggestion because OPM does not believe that the criterion authorizes constitutionally forbidden questions concerning ''political associations'' or ''broad inquiries into loyalty.'' The phrase ''acts or activities designed to overthrow the U.S. Government by force'' properly focuses on illegal acts, and prevents inquiry into an applicant's or employee's political beliefs or associations. Mere advocacy of the use of violence as an avenue of political reform is not penalized under the standard.

Other comments were received concerning the proposed illegal drug use criterion. One commenter thought that ''substantial'' rehabilitation was too vague, and that ''complete'' rehabilitation should be required; one commenter thought that both ''use'' and ''substantial'' were too vague, calling for purely subjective judgments, and that the entire standard was defective because not job-related; another commenter asked how the illegal drug use criterion could be reconciled with the Drug Abuse Office and Treatment Act. OPM does not believe that the illegal drug use criterion would be interpreted or applied in a manner that would contravene the Drug Abuse Office and Treatment Act, and suggests

that ''substantial'' rehabilitation is a suitable standard, to be assessed in light of the evidence in a particular case.

OPM has proposed two additions to the ''specific factors'' in subsection (b): Misconduct or negligence in prior employment has been broadened to include current employment as well as prior employment, and the intentional false statement factor has been changed to read ''material intentional false statement.'' The latter change accords with longstanding OPM practice (as reflected in the former FPM) that a falsification must be ''material'' in order to justify debarment, removal, or other appropriate action.

*Section 731.203 Due Process*

OPM has set forth a new and separate provision governing ''due process'' protections applicable in suitability cases, as distinguished from due process provisions applicable in national security cases under § 732.301. Based on objections received from many commenters regarding the use of confidential information in suitability adjudications, and consistent with judicial precedent, OPM proposes to ensure that information furnished by confidential sources may not be used by agencies in adjudicating suitability.

*Section 731.302 Designation of Public Trust Positions and Investigative Requirements [This Section Was Entitled ''Risk Designation and Investigative Requirements'' in the Interim Regulations]*

OPM received a number of comments questioning the lack of specificity in paragraphs (a) and (b) of § 731.302. Commenters were concerned about the lack of guidance to agencies, especially with respect to assessing ''risk levels'' of positions covered under § 731.302. OPM has deleted all references to ''risk levels'' in the proposed regulation, and has set forth specific criteria for determining public trust positions. In addition, the regulation makes clear that agency heads, not OPM, are responsible for the designation of public trust positions within their agencies.

A number of commenters opposed the reinvestigation requirement for public trust positions set forth in § 731.302(c), pointing out that there is no clear statutory foundation for imposing a reinvestigation requirement for current employees occupying positions not affecting national security; rather, the authorities empowering OPM to conduct suitability investigations speak solely in terms of ''applicants.'' Because of the lack of statutory or other authority for reinvestigating the character and fitness of current employees who do not occupy positions affecting national security, OPM proposes to delete from the final regulations the reinvestigation requirement for public trust positions. Agencies wishing to conduct reinvestigations may explore their enabling legislation to determine whether they have the authority to conduct reinvestigations on their own initiative.

*Section 731.303 Actions by OPM and Other Agencies*

OPM received a number of comments concerning § 731.303(c), which provides that suitability disqualification actions are not considered actions under part 752 or §§ 315.804–806 of part 315. The primary concern seemed to be that by withdrawing suitability-based removal actions from the statutory protections associated with other adverse actions, employees would be denied the protection of collective bargaining agreements and attendant grievance and arbitration procedures.

OPM does not consider it appropriate to amend the regulation in question along the lines suggested for two reasons. First, the questioned provision is not new (except to the extent that removals of probationary employees are included). Suitability-based removals have always been exempted from agency-initiated removal procedures; *see* 5 CFR § 731.302(c) (1991). Second, suitability actions are taken under authority delegated to OPM by the President. These actions are taken by OPM in the exercise of its government wide function of safeguarding the appointment process to positions in the competitive service. They are not chapter 75 adverse actions at all. Accordingly, chapter 75 of title 5 does not apply to suitability actions. Such actions also are not subject to the negotiated grievance procedure, which is limited to disputes between agencies in their capacity as employers and employees in recognized bargaining units.

*Section 731.304 Debarment*

One commenter thought that the provision giving OPM discretion to debar a person found unsuitable from reapplying for a competitive service position for up to 3 years was unclear in failing to clarify whether a new determination of suitability after expiration of a debarment period would trigger the same procedural protections as are afforded upon an initial suitability determination. Another commenter felt that debarment for 3 years was too long, and that debarment for up to 1 year would be a more reasonable standard.

OPM applies the same procedural protections upon subsequent redeterminations of suitability as it applies in initial determinations. In order to make this clear, a clarifying phrase to this effect has been added to § 731.304(b). OPM does not believe it is necessary to change the permissible debarment period, since OPM exercises discretion in each case, giving due weight to the ''additional factors'' set forth in § 731.202(c).

Subpart D—Suitability Actions

Two commenters recommended extending due process protections under part 731 to excepted service employees, since recent amendments to 5 U.S.C. § 7511 grant appeal rights in adverse action cases to most employees in the excepted service. This suggestion cannot be adopted since OPM does not have authority to extend part 731 requirements to the excepted service.

Commenters also suggested that § 731.403 be amended to limit an agency's discretion to set the time and place of an employee's oral answer, to require agencies to provide employees paid time to prepare an answer, and to require that agencies answering an OPM proposed action notice also provide it to the employee. OPM does not believe it is appropriate to limit the discretion to set the time and place of oral responses, in light of the NPR's recommendation that agencies by given more latitude in suitability determinations. Similarly, it should be up to each agency to determine whether it wishes to excuse an individual or class of individuals for brief periods of time for the purpose of preparing answers and appeals in suitability actions.

OPM has, however, assumed an additional obligation in § 731.402(b): Copies of notices of proposed actions must now be sent both to respondents' residences and to their duty stations, in order to ensure actual receipt of such notices by respondents.

*Section 731.501 Appeal to the Merit Systems Protection Board*

OPM published a final rule revoking the section establishing the OPM Review Panel, concluding, as several commenters predicted, that the OPM Review Panel did not serve a useful independent review function (60 FR 13613) March 14, 1995.

Under OPM's interim rule that established the Review Panel, appellants were retained in a pay status while their appeals were pending with the Panel, but if the Panel affirmed OPM's decisions, the appellants' agencies were directed to remove the appellants within 5 days of receipt of

the Panel's decision by the agency. With the elimination of the Panel, the appellants' employing agencies not have the option of retaining appellants in a pay status pending adjudication of their appeals to the MSPB.

Part 732

*Section 732.102 Definition and Applicability*

Several commenters suggested that the definition of national security positions be changed by broadening ''activities of the Government'' to include ''the conduct of foreign relations.'' It was also suggested that the degree of involvement in national security activities necessary to support a national security designation be spelled out, and that the meaning of ''regular'' access to classified information be clarified.

OPM proposes to broaden the definition of national security positions to include ''positions primarily concerned with sensitive diplomatic relations with other countries,'' believing that ''conduct of foreign relations'' is too broad a phrase and might, for example, invite national security position designations for positions beyond those involved in trade negotiations, such as those involving only trade promotion.

OPM has not adopted the suggestion that the degree of involvement in national security activities necessary to support a national security position designation be spelled out, since OPM believes that agencies are in the best position to judge whether particular positions might have an adverse effect on national security within the meaning of E.O. 10450.

OPM proposes to retain the word ''regular'' in connection with access to classified national security information, so that it is clear that irregular, infrequent, or occasional access to such information does not justify a national security position designation.

*Section 732.201 Sensitivity Level Designations and Investigative Requirements*

This section incorporates definitions of sensitivity levels and related guidance from the abolished FPM.

*Section 732.202 Waivers and Exceptions to Investigative Requirements*

One commenter suggested that positions covered by § 732.202(b)(1) be identified as ''non-sensitive'' and that this section be moved to part 731. This suggestion misconstrues the meaning and purpose of § 732.202(b)(1). The positions described in that section are related to national security, and are thus ''sensitive'' positions; but, because of their temporary or seasonal nature, agencies are permitted under E.O. 10450 to request that OPM exempt them from the investigative requirements of that order. (Paragraph (b) of § 732.202 has been revised to clarify that the specified positions may be exempted from the investigative requirements of E.O. 10450 only upon request of the head of the agency concerned.)

OPM also proposes to remove § 732.202(b)(2) from the final regulations, since there is no authority in E.O. 10450 for this provision as it appeared in the interim regulations.

*Section 732.203 Periodic Reinvestigations*

One commenter suggested that periodic investigations in national security cases are unnecessary, on the ground that competent managers should make it their business to garner the same information through personal inquiries and observations. However, OPM proposes to retain the requirement for periodic reinvestigations in national security cases, since reinvestigations appear to be authorized under E.O. 10450, have been standard practice at least since 1965 pursuant to Presidential directive, and are contemplated by National Security Directive 63 (October 21, 1991) and E.O. 12968.

Subpart C—Due Process and Reporting

*Section 732.301 Due Process*

OPM received a number of comments suggesting that procedural protections be strengthened for persons seeking security clearances, as well as a suggestion that the standards for granting or continuing security clearances be made uniform for Federal Government employees and for Federal Government contractors. With respect to the recommendation that OPM establish uniform governmentwide procedures for the granting, denial or revocation of security clearances, general authority in this area does not belong to OPM but is vested in individual agencies under E.O. 10450 and E.O. 12958.

Part 736

Part 736 has been revised to make clear that its requirements apply only to suitability and national security investigations conducted under parts 731 and 732 and to national security investigations of individuals seeking or holding employment with Federal contractors. In addition, OPM proposes to make the following changes in personnel investigation requirements:

*Section 736.104 Timing of Investigations*

Except for Special-Sensitive national security position, OPM has added a requirement that investigations for all positions subject to investigation be initiated within 14 days of placement in the position. This section implements the NPR's recommendation that background investigations be conducted promptly.

*Section 736.201 Protecting the Identity of a Source*

Several commenters urged OPM to eliminate the use of confidential sources of information or, in the alternative, to impose tighter controls on the granting of pledges of confidentiality.

OPM does not believe it is appropriate to eliminate the use of confidential sources altogether, since Congress specifically provided for the granting of confidentiality in appropriate circumstances in the Privacy Act of 1974. However, in § 731.203, OPM has proposed that information furnished by confidential sources may not be used by agencies in adjudicating suitability in non-national security cases, and in § 736.201, OPM has added a new provision that pledges of confidentiality under either part 731 or part 732 may be granted ''only in the most compelling circumstances and only upon specific request by the source.'' The latter requirement conforms to OMB's Privacy Act guidelines (40 FR 28949, 28974 (1975)).

*Section 736.203 Use of the Polygraph*

Chapter 736 of the former FPM contained limitations upon using polygraphs in personnel investigations, based upon a July 29, 1966, interagency committee report approved by former President Lyndon B. Johnson. The restrictions previously contained in the FPM are carried over in their entirety in § 736.203.

Subpart C—Maintenance of Information

This section incorporates OPM requirements for the maintenance and handling of OPM investigative files formerly contained in the FPM.

E.O. 12866, Regulatory Review

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

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they relate to internal personnel matters within the Federal Government.

List of Subjects in 5 CFR Parts 731, 732, and 736

Administrative practice and procedure, Government employees, National defense, Freedom of information, Investigations, Privacy.

U.S. Office of Personnel Management.

James B. King,

*Director.*

Accordingly, OPM proposes to amend 5 CFR parts 731, 732, and 736 as follows:

1. Part 731 is revised to read as follows:

## PART 731—SUITABILITY

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731.501 Appeal to the Merit Systems Protection Board.

**Subpart F Savings Provision**

731.601 Savings provision.

Authority: 5 U.S.C. 1302, 3301, 3302, 7301, 7701; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; E.O. 12731, 3 CFR, 1990 Comp., p. 306.

## Subpart A—Scope

### § 731.101 Purpose.

The purpose of this part is to establish criteria and procedures for making determinations of suitability for employment in positions in the competitive service and for career appointments in the Senior Executive Service (hereinafter in this part, ''competitive service'') pursuant to 5 U.S.C. 3301 and E.O. 10577 (3 CFR, 1954–1958 Comp., p. 218). Section 3301 of title 5, United States Code, directs consideration of ''age, health, character, knowledge, and ability for the employment sought.'' E.O. 10577 directs OPM to examine ''suitability'' for competitive Federal employment. This part concerns only determinations of ''suitability'' based on an individual's character or conduct that may impact the efficiency of the service by jeopardizing an agency's accomplishment of its duties or responsibilities, or by interfering with or preventing effective service in the position applied for or employed in, and determinations that there is a statutory or regulatory bar to employment. Determinations made under this part are distinct from determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR, 1949–1953 Comp., p. 936) or similar authorities.

### § 731.102 Implementation.

(a) An investigation conducted for the purpose of determining suitability 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.

(b) Under OMB Circular No. A–130 (effective January 22, 1992), the Director, OPM, is to maintain personnel security policies for Federal personnel associated with the design, programming, operation, maintenance, or use of Federal automated information systems. Agencies are instructed to establish and manage personnel security policies and procedures to assure an adequate level of security for Federal automated information systems. In accordance with OMB Circular A–130, agency policies and procedures for the security of Federal automated information systems must conform to OPM guidance. The Computer Security Act of 1987 (Public Law 100–235) provides additional requirements for Federal automated information systems.

(c) Policies, procedures, criteria, and guidance for the implementation of this part shall be set forth in issuances of the OPM. Agencies exercising authority under this part by delegation from OPM shall conform to such policies, procedures, criteria, and guidance.

### § 731.103 Delegation to agencies.

(a) OPM delegates to the heads of agencies authority for adjudicating suitability in all cases involving applicants for and appointees to competitive service positions in the agency, except that OPM retains jurisdiction in competitive service cases involving evidence of material, intentional false statement or deception or fraud in examination or appointment. Agencies must refer these cases to OPM for adjudication, or contact OPM for prior approval if an agency wants to take action under its own authority (5 CFR part 315 or 5 CFR part 752).

(b) Agencies exercising authority under this part by delegation from OPM must show by policies and records that reasonable methods are used to ensure adherence to regulations, standards, and quality control procedures established by OPM.

(c) Paragraphs (a) and (b) of this section notwithstanding, OPM may exercise its jurisdiction under this part in any case when deemed necessary.

(d) Any applicant or appointee who is found unsuitable by any agency having delegated authority from OPM under this part for any reason named in § 731.202 may appeal to the Merit Systems Protection Board under the Board's regulations.

## Subpart B—Suitability Determinations

### § 731.201 Standard.

Subject to subpart C of this part, an applicant, appointee, or employee may be denied Federal employment, removed from a position, or be subjected to other appropriate action, only when the action will promote the efficiency of the service.

### § 731.202 Criteria.

(a) *General.* In determining whether its action will promote the efficiency of the service, OPM or an agency to which OPM has delegated authority under § 731.103 of this chapter, shall make its determination on the basis of:

(1) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, efficient service in the position applied for or employed in; or

(2) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties or responsibilities; or

(3) Whether a statutory or regulatory bar prevents the lawful employment of the individual in the position in question. Each agency is responsible for determining whether a statutory or regulatory bar prevents employment with that agency.

(b) *Specific factors.* When making a determination under paragraph (a) of this section, any of the following reasons may be considered a basis for finding an individual unsuitable:

(1) Misconduct or negligence in current or prior employment which would have a bearing on efficient service in the position in question, or would interfere with or prevent effective accomplishment by the employing agency of its duties and responsibilities;

(2) Criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee, or to that person's service in the position or the service of other employees;

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

(4) Refusal to furnish testimony as required by § 5.4 of this chapter;

(5) Alcohol abuse of a nature and duration which suggests that 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 others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial 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 which prevents the lawful employment of the person involved in the position in question.

(c) *Additional factors.* In making a determination under paragraphs (a) and (b) of this section, OPM and agencies shall consider the following additional factors:

(1) The nature of the position for which the person is applying or in which the person 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 person involved at the time of the conduct,

(6) Contributing societal conditions,

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

**§ 731.203 Due process.**

When an agency makes an adjudicative decision under this part based on an OPM investigation or upon an investigation conducted pursuant to OPM-delegated authority, or when an agency, as a result of information in an OPM investigation or an investigation conducted pursuant to OPM-delegated authority, changes a tentative favorable placement decision to an unfavorable decision, the agency must:

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

(b) Insure that all applicable administrative due process requirements provided by law, the regulations in this part, and OPM policy guidance have been observed;

(c) Consider all available information in reaching its final decision, except information furnished by a confidential source; and

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

## Subpart C—Suitability Rating Actions

**§ 731.301 Jurisdiction.**

(a) *Appointments subject to investigation.* (1) In order to establish an appointee's suitability for employment in the competitive service, every appointment to a position in the competitive service is subject to investigation by OPM or an agency conducting investigations under delegated authority from OPM, except:

(i) Promotion;

(ii) Demotion;

(iii) Reassignment;

(iv) Conversion from career-conditional to career tenure;

(v) Appointment, or conversion to an appointment, made by an agency of an employee of that agency who has been serving continuously with that agency for at least 1 year in one or more positions under an appointment subject to investigation; and

(vi) Transfer, provided the 1 year, subject-to-investigation period applied to the previous appointment has expired.

(2) Appointments are subject to investigation to continue OPM's jurisdiction to investigate the suitability of an applicant after appointment and to authorize OPM or an agency acting under delegated authority to require removal or take other appropriate action when it finds the appointee is unsuitable for Federal employment. The subject-to-investigation condition may not be construed as requiring an employee to serve a new probationary or trial period or as extending the probationary or trial period of an employee.

(b) *Duration of condition.* The subject-to-investigation condition expires automatically at the end of 1 year after the effective date of appointment, except in a case involving material, intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony.

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

(a) *Definition of public trust positions.* Public trust positions include positions involving policymaking, major program responsibility, law enforcement duties, or other duties demanding the highest degree of public trust; and positions involving access to or operation or control of unclassified confidential or financial records, with a relatively high risk for causing grave damage or realizing a significant personal gain.

(b) *Designation of public trust positions.* Agency heads shall be responsible for designating public trust positions within the agency in accordance with the criteria set forth in paragraph (a) of this section.

(c) *Investigative requirements.* Persons receiving an appointment made subject to investigation shall undergo a background investigation, the minimum scope and coverage of which shall be determined by OPM.

**§ 731.303 Actions by OPM and other agencies.**

(a) For a period of 1 year after the effective date of an appointment subject to investigation under § 731.301, an appointee may be removed or other appropriate action may be taken when OPM or an agency exercising delegated authority under this part finds that the appointee is unsuitable for any of the reasons cited in § 731.202.

(b) Thereafter, OPM may require that an employee be removed or other appropriate action be taken on the basis of either material, intentional false statement or deception or fraud in examination or appointment; or refusal to furnish testimony; or statutory or regulatory bar.

(c) An action to remove an appointee or employee under this part is not an action under part 752, or §§ 315.804 through 315.806 of this chapter.

(d) When OPM instructs an agency to remove an appointee or employee under this part it shall notify the agency and the appointee or employee of its decision in writing.

(e) Before OPM, or any agency having delegated authority from OPM under this part, shall take a final suitability action against an applicant, eligible, appointee, or employee under this part, the person against whom the action is proposed shall be given notice of the proposed action (including the availability for review, upon request, of the materials relied upon), an opportunity to answer, notice of the final decision on the action, and notice of rights of appeals.

(f) Agencies are required to report to OPM all unfavorable adjudicative actions taken under this part, including all actions based on OPM reports of investigation.

**§ 731.304 Debarment.**

(a) When OPM finds a person unsuitable for any reason named in

§ 731.202, OPM, in its discretion, may deny that person examination for, and appointment to, a competitive service position for a period of not more than 3 years from the date of determination of unsuitability.

(b) On expiration of a period of debarment, a person who has been debarred may not be appointed to any position in the competitive service until OPM has redetermined that person's suitability for appointment, in accordance with the procedures of this part.

(c) Any authorities delegated to agencies by OPM under this part do not apply to or include OPM's debarment authority under paragraphs (a) and (b) of this section.

(d) Any adjudication by an agency acting under delegated authority from OPM which indicates that debarment may be an appropriate action may be referred to OPM for its consideration.

## Subpart D—Suitability Actions

### § 731.401 Scope.

(a) *Coverage.* This subpart sets forth the procedures to be followed when OPM or an agency having delegated authority from OPM, acting under authority of this part, proposes to take or to instruct an agency to take, a final suitability ineligibility action, including removal, against an applicant, appointee or employee in the competitive service.

(b) *Definition.* In this subpart, days means calendar days.

### § 731.402 Notice of proposed action.

(a) OPM or the agency having delegated authority from OPM under this part shall notify the applicant, appointee, or employee (hereinafter, the ''respondent'') in writing of the proposed action and of the charges against the respondent. The notice shall state the reasons, specifically and in detail, for the proposed action. The notice shall also state that the respondent has the right to answer this notice in writing. If the respondent is an employee the notice shall further state that the employee may also make an oral answer, as specified in § 731.403(a). The notice shall further inform the respondent of the time limits for answer as well as the address to which such answer should be made.

(b) OPM shall send a copy of this notice to the agency, if any, that is involved. The notice shall be served upon the respondent by being mailed to the respondent's last known residence, and duty station if an employee, no less than 30 days prior to the effective date of the proposed action. If the respondent is employed in the competitive service on the date the notice is served, the respondent shall be entitled to be retained in pay status during the notice period.

### § 731.403 Answer.

(a) *Respondent's answer.* A respondent may answer the charges in writing and furnish documentation and/or affidavits in support of the response. A respondent who is an employee may answer orally. The respondent may be represented by a representative of the respondent's choice, and such representative shall be designated in writing. To be timely, a written answer shall be made no more than 30 days after the date of the notice of proposed action. In the event that an employee requests to make an oral answer, OPM or the agency having delegated authority from OPM under this part shall determine the time and place thereof, and shall consider any answer that the respondent makes in reaching a decision.

(b) *Agency's answer.* In actions proposed by OPM under § 5.3 of this chapter, the agency may also answer the notice of proposed action. The time limit for filing an answer is 30 days from the date of the notice. OPM shall consider any answer that the agency makes in reaching a decision.

### § 731.404 Decision.

The decision shall be in writing, dated, and inform the respondent of the reasons for the decision. Removal of appointees or employees will be effective 30 days following the date of the decision. The respondent shall also be informed that an adverse decision can be appealed in accordance with subpart E of this part. OPM shall notify the respondent and the agency of the decision.

## Subpart E—Appeal to the Merit Systems Protection Board

### § 731.501 Appeal to the Merit Systems Protection Board.

(a) *Appeal to the Merit Systems Protection Board.* An individual who has been found unsuitable for employment may appeal the decision to the Merit Systems Protection Board (the Board). An employee or appointee who appeals a removal directed by OPM shall notify the employing of the appeal at the time it is filed.

(b) *Appeal procedures.* The procedures for filing an appeal with the Board are found at part 1201 of title 5, Code of Federal Regulations.

(c) *Pay status pending appeal.* When an employee or appointee who has been found unsuitable for employment by OPM files an appeal to the Board, the employing agency may, at its option, retain the employee or appointee in an active duty status for the period, in which event the agency shall so notify the employee or appointee. If the agency elects to proceed with a suspension or removal ordered by OPM, part 752 of this chapter shall not apply.

## Subpart F—Savings Provision

### § 731.601 Savings provision.

No provision of the regulations in this part shall be applied in such a way as to affect any administrative proceeding pending on [THE EFFECTIVE DATE OF THE FINAL RULE]. An administrative proceeding is deemed to be pending from the date of the ''notice of proposed action'' described in § 731.402.

2. Part 732 is revised to read as follows:

# PART 732—NATIONAL SECURITY POSITIONS

### Subpart A—Scope

Sec.
731.101 Purpose.
732.102 Definition and applicability.

### Subpart B—Designation and Investigative Requirements

732.201 Sensitivity level designations and investigative requirements.
732.202 Waivers and exceptions to investigative requirements.
732.203 Periodic reinvestigation requirements.

### Subpart C—Due Process and Reporting

732.301 Due process.
732.302 Reporting to OPM.

Authority: 5 U.S.C. 3301, 3302, 7312; E.O. 10450, 3 CFR, 1949–1953 Comp., p. 936.

## Subpart A—Scope

### § 732.101 Purpose.

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

### § 732.102 Definition and applicability.

(a) For purposes of this part, the term *national security position* includes:

(1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States;

(2) Positions that are primarily concerned with sensitive diplomatic relations with other countries; and

(3) Positions that require regular use of, or access to, classified national security information.

(b) The requirements of this part apply to competitive service positions and to Senior Executive Service positions filled by career appointment within the Executive Branch. Nothing in this part prohibits agencies from applying these provisions, in their discretion, to excepted service positions within the Executive Branch.

## Subpart B—Designation and Investigative Requirements

### § 732.201 Sensitivity level designations and investigative requirements.

(a) For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security, as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

(b) *Definitions of sensitivity levels.* For the purposes of this part: (1) A Special-Sensitive position is a position which the head of the agency determines to be in a level higher than Critical-Sensitive because of special requirements under authority other than E.O. 10450.

(2) A Critical-Sensitive position is any position with potential for exceptionally grave damage to the national security.

(3) A Noncritical-Sensitive position is any position with potential for some damage to serious damage to the national security.

(c) *National Security Directive 63.* Standards for single scope background investigations are established by National Security Directive (NSD) 63, ''Single Scope Background Investigations,'' dated October 21, 1991. These investigations are used as the minimum investigative standard by all executive branch departments and agencies for granting individuals access to Top Secret (TS) national security information and Sensitive Compartmented Information (SCI).

(d) *Director of Central Intelligence Directive 1/14.* The standards set for single scope background investigations established by NSD 63 are further defined for SCI access in DCID 1/14, ''Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI),'' effective January 22, 1992, and as subsequently amended.

(e) Investigative requirements for each sensitivity level are provided in OPM issuances.

### § 732.202 Waivers and exceptions to investigative requirements.

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

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

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

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

(ii) For positions designated Critical-Sensitive under this part, the records of the department or agency required by § 732.202(a)(1), shall show what decision was made on obtaining prewaiver checks, as follows:

(A) The nature of the emergency precluded obtaining prewaiver checks; or

(B) Checks were initiated but not all responses were received within 5 days. The records shall also include a listing of all checks made and favorably completed.

(iii) When waiver is authorized, the required investigation must be initiated within 14 days of placement of the individual in the position.

(b) *Exceptions to investigative requirements.* Pursuant to section 3(a) of E.O. 10450, the head of an agency may request that the following positions be exempted from the investigative requirements of E.O. 10450, providing that the employing agency conducts such checks as it deems appropriate to insure that the employment or retention of individuals in these positions is clearly consistent with the interests of the national security:

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

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

### § 732.203 Periodic reinvestigation requirements.

The incumbent of each position designated Special-Sensitive or Critical-Sensitive under this part shall be subject to periodic reinvestigation of a scope prescribed by OPM 5 years after placement, and at least once each succeeding 5 years. The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security.

## Subpart C—Due Process and Reporting

### § 732.301 Due process.

When an agency makes an adjudicative decision under this part based on an OPM investigation or upon an investigation conducted pursuant to OPM-delegated authority, or when an agency, as a result of information in an OPM investigation or an investigation conducted pursuant to OPM-delegated authority, changes a tentative favorable placement or clearance decision to an unfavorable decision, the agency must:

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

(b) Insure that all applicable administrative due process requirements provided by law, the regulations in this part, and OPM policy guidance have been observed;

(c) Consider all available information in reaching its final decision;

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

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

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

(2) An opportunity to respond; and

(3) Notice of appeal rights, if any.

### § 732.302 Reporting to OPM.

(a) In accordance with section 9(a) of E.O. 10450, each agency conducting an investigation under E.O. 10450 is required to notify OPM when the investigation is initiated.

(b) In accordance with section 14(c) of E.O. 10450, agencies shall report to OPM the action taken with respect to individuals investigated pursuant to E.O. 10450 as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

3. Part 736 is revised to read as follows:

## PART 736—PERSONNEL INVESTIGATIONS

**Subpart A—General Provisions**

Sec.
736.101 Purpose.
736.102 Scope.
736.103 Responsibilities of OPM and other Federal agencies.
736.104 Timing of investigations.

**Subpart B—Collection of Information**

736.201 Protecting the identity of a source.
736.202 Notice to investigative sources.
736.208 Use of the polygraph.

**Subpart C—Maintenance of Information**

736.301 Maintenance of investigative files.
736.302 Handling of OPM investigative files.

Authority: Pub. L. 93–579; (5 U.S.C. 552a).

### Subpart A—General Provisions

#### § 736.101 Purpose.

The purpose of this part is to specify certain requirements for personnel investigations conducted by OPM, for investigations conducted under delegated authority from OPM, and for use of OPM investigative records.

#### § 736.102 Scope.

(a) The requirements of this part apply to suitability and national security investigations conducted under parts 731 and 732 of this chapter and to national security investigations of individuals seeking or holding employment with Federal Contractors.

(b) For purposes of this part, *Agency* means any authority of the Government of the United States, whether or not it is within or subject to review by another agency, and includes any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government, or any independent regulatory agency.

#### § 736.103 Responsibilities of OPM and other Federal agencies.

(a) Unless provided otherwise by law, the investigation of persons entering or employed in the competitive service, or by career appointment in the Senior Executive Service, is the responsibility of OPM.

(b) *Requests for delegated investigating authority.* Agencies may request delegated authority from OPM to conduct or contract out investigations of persons entering or employed in the competitive service or by career appointment in the Senior Executive Service. Such requests shall be made in writing by agency heads, or designees, and must specify the reason(s) and justification for the request and must include a complete cost analysis of all factors spelled out in OPM guidance. Background investigations for these positions may not be conducted or contracted out unless expressly authorized by OPM special agreement.

(c) *OPM Security Program Appraisals.* Under E.O. 10450 (3 CFR, 1949–1953 Comp., p. 936), OPM is required to conduct a continuing study of each agency's personnel security program. The purpose of the appraisal is to identify any deficiencies in security programs established under E.O. 10450 which are inconsistent with the interests of, or directly or indirectly weaken, the national security, and to identify tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment or rights under the Constitution and laws of the United States.

(d) *OPM Suitability Program Appraisals.* Under its statutory authority to delegate personnel management functions to agencies (5 U.S.C. 1104), OPM conducts a continuing appraisal of agency compliance with personnel suitability program requirements under 5 CFR part 731. In addition, OPM conducts a continuing appraisal of the Computer/ADP requirements set forth in OMB Circular A–130.

#### § 736.104 Timing of investigations.

Investigations required for all positions subject to investigation must be initiated within 14 days of placement in the position except for positions designated Special-Sensitive under part 732 of this chapter, for which the preappointment investigative requirement may not be waived.

### Subpart B—Collection of Information

#### § 736.201 Protecting the identity of a source.

(a) The interviewing agent may grant a pledge to keep confidential the identity of an information source only in the most compelling circumstances and only upon specific request by the source. Although the interviewing agent may not ordinarily suggest that the source request confidentiality, the agent may offer a pledge of confidentiality where the agent believes that the source would not otherwise be willing to provide needed information.

(b) A pledge of confidentiality may not be assumed by the source.

(c) A pledge of confidentiality, if granted, extends only to the identity of the source and to any information furnished by the source that would reveal the identity of the source.

(d) When a source is granted a promise that the source's identity will be kept confidential, the investigating agency and all other agencies that receive information obtained under the promise are required to take all reasonable precautions to protect the source's identity. Each agency will prepare implementing instructions consistent with this part.

#### § 736.202 Notice to investigative sources.

(a) The investigating agent must notify sources:

(1) Of the purpose of the request for information,

(2) Of the uses that may be made of the information, and

(3) That all information provided, including the record source's identity, may be disclosed to the subject of the investigation upon the subject's request.

(b) Where information is requested by written inquiry, the form, instructions, or correspondence used by an agency must include, in addition to the requirements listed in paragraph (a) of this section:

(1) Space for the source to request a pledge that the source's identity will not be disclosed to the subject of the investigation, and

(2) An offer to make special arrangements to obtain significant information which the source feels unable to furnish without a promise that the source's identity will be kept confidential.

#### § 736.203 Use of the polygraph.

(a) An executive branch agency which has a highly sensitive intelligence or counterintelligence mission directly affecting the national security (e.g., a mission approaching the sensitivity of that of the Central Intelligence Agency) may use the polygraph for employment screening and personnel investigations of applicants and appointees only after complying with the requirements in paragraphs (c) and (d) of this section.

(b) All other executive branch departments and agencies are prohibited from initiating a polygraph examination for employment screening purposes for applicants or appointees to the competitive service.

(c) If an agency desires to determine whether the agency mission meets the criteria to be allowed to use the polygraph, the agency must submit to the Director, OPM a statement of the nature of its mission and a copy of its current or proposed regulations and directives governing use of the polygraph (or a citation to them if there has been no change since they were previously submitted and approved). The Director shall then determine whether the agency has an intelligence or counter-intelligence mission directly

affecting the national security and whether the regulations and directives meet current approval requirements.

(d) The agency shall prepare regulations and directives governing use of the polygraph in employment screening and personnel investigations which must be reviewed and approved by the Director, OPM. These shall contain at a minimum:

(1) Specific purposes for which the polygraph may be used, and details concerning the types of positions or organizational entities in which it will be used, and the officials authorized to approve these examinations;

(2) A provision that a person to be examined must be informed as far in advance as possible of the intent to use the polygraph, and of

(i) Other devices or aids to the examination which may be used simultaneously with the polygraph, such as voice recordings,

(ii) The effect of the polygraph examination, or his/her refusal to take this examination, on eligibility for employment, and that refusal to consent to a polygraph examination will not be made a part of the personnel file, and

(iii) The characteristics and nature of the polygraph machine and examination, including an explanation of the physical operation of the machine, the procedures to be followed during the examination, and the disposition of information developed;

(3) A provision that no polygraph examination will be given unless the person to be examined has voluntarily consented in writing to be examined after having been informed of the provisions in paragraph (d)(2) of this section;

(4) A provision that questions to be asked during a polygraph examination must have relevance to the subject of the particular inquiry;

(5) Adequate standards for the selection and training of examiners, keeping in mind the Government's objective of insuring protection for the subject of an examination and the accuracy of polygraph results;

(6) A provision for adequate monitoring of polygraph operations to prevent abuses or unwarranted invasions of privacy; and

(7) A provision for adequate safeguarding of files, charts, and other relevant data developed through polygraph examinations to avoid unwarranted invasions of privacy.

(e) Approval to use the polygraph for employment selection screening for positions in the competitive service will be granted only for a 12-month period, and is conditioned upon prior approval of the agency's regulations and directives as provided in paragraph (d) of this section. An agency given approval to use the polygraph for competitive service positions will be required to recertify annually to the Director, OPM, that the conditions which led to the original certification still exist in the agency. Nothing contained in this section shall be applicable to polygraph examinations for purposes other than employment selection screening.

(f) The basic requirements of National Security Decision Directive Number 84 (NSDD–84), subject to and as affected by any restrictions in force, approved by former President Ronald W. Reagan on March 11, 1983, include the use of the polygraph in certain instances. Agencies that originate or handle classified national security information should review the current requirements of NSDD–84.

## Subpart C—Maintenance of Information

### § 736.301 Maintenance of Investigative Files.

(a) Investigative files are records subject to the Privacy Act and the Freedom of Information Act and are maintained in accordance with the provisions of those Acts.

(b) Investigative information, including investigative reports and other materials, is highly personal and is properly restricted to agency officials who have an official need for it in performance of their duties. All investigative information shall be maintained in confidence. Notices of systems of records published to fulfill Privacy Act requirements must show full consideration for the highly personal nature of this information.

(c) When not in use, personnel investigations must be stored in a combination-locked cabinet or safe, or in an equally secure area. Access to case files should be limited only to the Security Officer and approved staff, who shall not have access to their own files.

### § 736.302 Handling of OPM Investigative Files.

(a) The agency security office must maintain a record of each disclosure of OPM investigative material within the agency, including at a minimum:

(1) The name and title of the person to whom disclosure was made;

(2) The type of background investigation conducted on the person to whom the material was disclosed;

(3) The date(s) of disclosure; and

(4) The reason(s) for the disclosure.

(b) An agency may disseminate OPM investigative files, in whole or in part, outside the agency only when the agency obtains prior OPM approval. Agency security officers are responsible for controlling files within their agencies.

(c) Privacy Act and Freedom of Information Act requests for OPM investigative records are to be submitted to the Office of Personnel Management, Federal Investigations Processing Center, FOI/P, P.O. Box 618, Boyers, Pennsylvania 16018–0618.

[FR Doc. 96–116 Filed 1–4–96; 8:45 am]

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## DEPARTMENT OF THE TREASURY

## Fiscal Service

## 31 CFR Part 356

**[Department of the Treasury Circular, Public Debt Series No. 1–93]**

## Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds

**AGENCY:** Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Treasury (''Department'') is proposing, for comment, an amendment to 31 CFR Part 356 (Uniform Offering Circular for the Sale and Issue of Marketable Book-Entry Treasury Bills, Notes, and Bonds). The proposed amendment defines the term ''investment adviser'' and contains a new section on bidding through investment advisers. The amendment also makes certain clarifying changes.

**DATES:** Comments must be submitted on or before March 5, 1996. The Department is particularly interested in receiving comments regarding alternative methods for obtaining, in the least burdensome manner possible, the information needed to ensure that no person or entity receive a disproportionate share of the auction.

**ADDRESSES:** Comments should be sent to: Government Securities Regulations Staff, Bureau of the Public Debt, Room 515, E Street Building, Washington, D.C. 20239–0001. Comments received will be available for public inspection and copying at the Treasury Department Library, FOIA Collection, Room 5030, Main Treasury Building, 1500 Pennsylvania Avenue, N.W., Washington, D.C. 20220. Persons wishing to visit the library should call (202) 622–0990 for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Michael W. Sunner, Deputy Assistant Commissioner, Office of Financing,